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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 Ph.D. students, chaired by *Ibolya Stefán*, PhD student at the Department of Civil Law, University of Miskolc.

The first lecturer was *Amanda Petra Shakibapoor*, Ph.D. 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 Ph.D. 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*, Ph.D. 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, Ph.D. 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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VOLUNTARY ERRORS AS CAUSES OF CHALLENGE IN THE EMPLOYMENT RELATIONSHIP

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Abstract: The study covers two main topics. The first part of the study deals with the avoidance of the statement on commitment relating to relating to employment. Thus, the Hungarian Labour Code, in contrast to the provisions of the Hungarian Civil Code, assures a quite short period for the avoidance of the statement, in case of coercion, threat, mistake or mislead. In the opinion of the author, this special, shorter period is not justified. In the second part of the study, the author proposes to handle employment-related legal acts similarly to consumer contracts, since labour contracts are mostly concluded by using contract form. Moreover, the author suggests extending the application of collective action *(actio popularis)* to these labour contracts.

Keywords: *labour law and civil law statement, divergent regulation, avoidance, subjective and objective time limit, consumer, consumer contract, contract form, collective action*

Labour law is a fundamental representative of the vast field of civil law, a branch of law in its own right, which regulates at its very core one of the fundamental systems of human relations, both economically and socially decisive: the employment relationship.

A fundamental feature of the civil law system is that two subsystems, similar in many respects but with significant differences, are, so to speak, separate, coexist, and operate side by side: the area of non-contractual relations and the area of contractual relations.

A fundamental feature of labour law is that it does not consider contractual and non-contractual sharing. Logically, the division between contractual and non-contractual is not the governing principle of labour law, since labour law itself is a specialised branch of law where everything starts with a contract. The employment relationship is inherently contractual and the whole system of employment law can therefore only think in terms of contractual relationships.

The fundamental characteristic of contractual relations is their adversarial and synallagmatic nature. With rare exceptions, contractual relations are created by the mutual will of the parties, their content and changes to their content are created or changed by the mutual will of the parties and in most cases, contracts are terminated upon performance following the mutual will of the parties. In most cases, where a party has the unilateral power to modify the content of a contract, this is not inherent in the contract, but is a right given to the party concerned by the common will of the parties.

However, the specific approach to labour law stems from the claudicatory conception of law that pervades labour law as a whole. The employment law obligation is synallagmatic, but its essential characteristic – which in itself also implies the need for special regulation – is that it is a relationship between parties who are not in equal positions. Accordingly, employment law is a regulation that constantly seeks to eliminate this inequality of opportunity.

In the wave of codification that followed the change of government in 2010, a new labour code was drafted. The current Labour Code, i.e. *Act I of 2012* (hereinafter Labour Code or LC) entered into force on 1st July 2012. The Labour Code has brought about a paradigm shift in the regulation of several legal institutions compared to the old, 1992 adopted Labour Code. (Trenyisán, 2017)

The LC in force is the first Hungarian labour law code that was truly born in civilian conditions. It is incomparably closer to real conditions and legal solutions to real problems than any of its predecessors, and it provides greater legal certainty than any other labour law code, for both employees and employers. *'The employment relationship is also a contractual, private legal relationship, created by two parties of equal legal status by mutual consent. However, legally equal parties are rarely in the same bargaining position. The employment relationship is characterised by the superior position of the employer, who dominates the legal relationship at the time of the conclusion of the contract and throughout its duration.'* (Kártyás, 2014)

It is a necessary and constitutional aspiration of labour law to 'push back' this natural and unavoidable positional difference towards natural equality by its unilaterally (claudication) cogent regulation, including the asymmetric regulation of the liability regime described above. In this endeavour, labour law seeks to ensure real equality of opportunity for the employee within the framework of a legal relationship that is only formally equal.

The existence of this specificity makes the specificity of labour law examined in the present study explicitly uninterpretable, according to which in many respects it provides the parties, and both parties, with a much more limited and narrow legal remedy than civil law, and thus the rules concerned put already disadvantaged, lay, even vulnerable workers in a position where they cannot effectively exercise their rights and assert their interests sufficiently.

A specific feature of contracts is that in many cases the parties may later disagree on the content of the contract and how it is implemented.

It is a well-accepted legal institution that a party who recognises that 'this is not the horse I wanted' can challenge the contract and thus enforce his rights.

The possibility of challenging contracts is therefore a necessary, even indispensable, element of civil law contract law, but it obviously cannot give rise to legal uncertainty.

The two basic means of avoiding legal uncertainty are, on the one hand, the time limit for challenging contracts, which substantially reduces the possibility of abusive law enforcement between the parties and reduces the number and seriousness of the legal situations that may arise, and, on the other hand, the exhaustive definition of the grounds for challenge, which precludes the possibility of challenging agreements based on unfounded or untrue grounds, which would be likely to succeed on the merits.

Taking into account the fact that labour law is a branch of law based entirely on the existence of a contractual legal relationship, it is reasonable to expect that the possibility of challenging contracts should also be given adequate scope in the LC.

Of course, the legal regulation has been done, and Article 28 of the LC contains the necessary regulation, but, as *Tamás Prugberger* states in his research, the provisions on nullity and challengeability in the current Labour Code are identical to the relevant provisions of *Act V of 2013 on Civil Code* (hereinafter Civil Code or CC), except for the shorter time limits for the challenge. (Prugberger, 2002)

Behind the author's conclusion is the fact that while Article 6:89 of the CC sets a one-year-long time limit for the contestation, which is sufficiently long but at the same time, for legal security aspects it is satisfactory as well, Article 28(7) of the LC sets a subjective time limit of only thirty days, commencing upon recognition of the error or upon cessation of duress, and which is also limited by a quasi-objective time limit of six months.

Tamás Prugberger draws an eloquent analogy between the two major areas of civil law. It is a fact that in the case of labour law, one party, the employee, is typically in a more vulnerable position than his contractual partner, the employer. However, in the field of civil law, there are also contracts, namely consumer contracts, that are actually concluded by parties in different positions. (Prugberger, 2021)

Moreover, Tamás Prugberger effectively demonstrates, by simple means, that while civil law provides explicit protection for the vulnerable consumer side in challenging contracts, labour law does not provide any preferential treatment in this respect.

It is indisputable that labour law gives a healthy advantage to employees in terms of liability for damages in substantive law, but this advantage is not at all noticeable in procedural law.

The employer's liability is governed by Articles 166–167 of the LC. The employer's liability for damages has objective nature and is extremely strict, even the consent of the aggrieved party is only a saving circumstance if it was 'unavoidable conduct'. Nevertheless, the employer even has to protect the employee on his/her own in the course of his/her working activity.

The level of compensation is also very strict, but employers have more excuses here.

It can be concluded that the liability regime for employers under labour law is significantly closer to the regime of civil law liability for damages caused by the breach of contract than to the rules of non-contractual liability, although, in the case

of issues regulated in labour law, provisions of the CC (Art. 6:518–534 CC) are not applicable.

This proximity is already evident from the fact that civil law also gives priority to the rules on damages caused by the breach of contract over the rules on compensation for non-contractual damages, and we have already established that liability for damages in labour law itself is essentially a system of rules specialised for a legal situation arising from a contractual relationship.

It can also be seen that the liability of employers for damages is much stricter than the rules of civil law for damages caused by the breach of contract, with the only exception that labour law allows the exemption from the liability 'in exceptional circumstances' [cf. Art. 166(2) LC], which is rarely possible.

It is generally accepted that two (or more) contracting parties to a contract are always subject to the same liability rules, but the liability of employees is completely different from that of employers.

The general rules on the liability of the employee are set out in Article 179 of the LC. In the cited Article, there is no reference to objective liability, and the regulation clearly approaches the rules of compensation for non-contractual damages in civil law by applying the doctrines of general liability and the possibility of excuse.

Employee liability is, therefore, a special type of liability where it is equally difficult to get into the position of a tortfeasor, but the possibility of an excuse is the widest possible, within the framework of the rule of law. It can be seen that in quite unusual way, all the burden of proof rests on the employer. The scope of the possibilities for exculpation is much wider than the possibilities for exculpation from liability in case of a breach of contract and, uniquely in contractual relations, since there is no possibility of reducing damages 'based on exceptional circumstances'. The four-month absence allowance as a limit is also very interesting because it is not a kind of 'employer's contribution', since the limit has nothing to do with the extent of the damage, but is an objective limit, completely independent of the damage.

This provision also leads to the quite unusual situation that the amount of liability is based on the income of the tortfeasor, so that in the case of two identical but unrelated damages and two identical tortfeasors, one tortfeasor will almost certainly pay a higher amount of compensation than the other.

An interesting example might be the following: two employees, a pharmaceutical researcher, and a mechanic are asked to close the window in their office before they leave. They both independently close the window carelessly, causing the two rooms to get wet during the night in a significant but not force majeure rainfall. Both premises contain a substantial stock of IT equipment which is destroyed as a result of the negligent but not grossly negligent conduct of the employees, the damage being estimated at 3,000,000 HUF per office. The monthly absence allowance for the technician is 120,000 HUF and 400,000 HUF for the medical researcher. In this case, the mechanic, who obviously knows more about windows than the medical researcher, pays 480,000 HUF, while the medical researcher, who is not a practice-oriented person but obviously should be able to close a window, pays 1,600,000 HUF. The burden of 3,920,000 HUF remains on the completely blameless employer.

Of course, these specific rules have their social, economic, and legal background, but at the same time, as far as procedural rules and time limits are concerned, workers do not benefit from any preferential treatment and are subject to the same very strict subjective and objective time limits as employers.

There is no doubt that the subjective and objective time limits, which are much stricter than those applied in civil law, go far beyond the requirements of legal certainty, and, at the same, restrict the possibilities of enforcement of rights in an unjustified manner, and even without justification in the reasoning of the law, make the situation of the employees' side more difficult in the first place and put the more vulnerable party in an even more difficult, sometimes hopeless situation.

In any case, we believe that the following cornerstones should be taken into account for enforcement and redress:

- the employee is basically in a vulnerable position, unable to set the internal rules of the game,
- the employee's ability to prove the contract is extremely difficult, especially in proving the parties' contractual intent,
- all these disadvantages should be offset by legislative means,
- there is such an economic inequality between the worker and the employer that the application of unnecessarily strict redress rules could ruin the worker's life.

At the same time, Tamás Prugberger proposes a simple but effective solution, when he notes that 'the specific provisions on this issue could be completely removed from the Labour Code, if only because there is no justification for the time limit for challenging a labour law case to be shorter (6 months) than in civil law (1 year)'. (Prugberger, 2021)

In support of the above position, but also slightly supplementing it, it should be added that a further difference is that, unlike in the CC, the gross disproportion in value does not appear as a ground for the challenge in labour law.

In our opinion, this discrepancy is also not negligible and in any case weakens the employee's side, since it is the employee who is not aware of the circumstances of the contract or at least is significantly less aware of them than the employer.

The legal harmonisation proposal of Prugberger could also be a suitable way to eliminate the regrettable lack of value proportionality, which would, so to speak, solve the Gordian knot in one fell swoop.

A further problem is that the possibility to enforce the remedy itself is available in different ways in the two major areas of civil law.

According to the quoted provision of CC, *'[t]he right of avoidance may be exercised within one year of the conclusion of the contract by a declaration addressed to the other party or by direct action before a court'*. (Art. 6:89 CC)

This solution obviously provides a more favourable option for the party asserting the claim, not only about the time limit, than the relevant provision of the LC, which provides that *'[t]he other party shall be notified in writing regarding the execution of a legal statement for contestation within the time limit specified in Subsection (7)'*. [Art. 28(8) LC]

There is no doubt that the workers' side will suffer any undue hardship, be it in terms of deadlines or procedures.

Obviously, it would be easier for a worker to walk into the court's complaints office promptly and tell the court about his or her problem than to address it directly, at short notice, to the employer on whom his or her livelihood is most likely to depend at that moment.

These rules are not a problem for an employer, who is in a dominant position to communicate with his/her employee, is usually experienced in dealing with such situations, and even has a professional HR specialist or labour lawyer at his/her disposal to help him/her deal with such situations.

It is undeniable that, in many cases, rigid rules explicitly prevent workers, who are often inexperienced and almost always vulnerable, from asserting their interests.

It can be concluded that *'the employment relationship is also a contractual, private legal relationship, created by two parties of equal legal status, by mutual consent. However, legally equal parties are rarely in the same bargaining position. The employment relationship is characterised by the superior position of the employer, who dominates the legal relationship both at the time of the conclusion of the contract and throughout its duration.'* (Kártyás, 2014)

This dominance is particularly true in disputes where the employer necessarily has a substantive communicative advantage (e.g. he invites the employee in because he wants to talk to him or, in the case of a reverse initiative, he is the one who receives the other party).

The dominance of employers should be reduced at the legislative level, as the claudication of labour law does in many areas, but it is jurisprudence and a sufficiently mature application of the law that can provide meaningful help to the legislature.

Unfortunately, domestic court practice does not necessarily provide the necessary and justified assistance to the employee side.

Unfortunately, the case law in many cases ignores the help that workers, who are vulnerable in many respects, should expect.

The legitimate allocation of the burden of proof must be enforced seriously and consistently, by the law. However, in our view, the fact that the employee's means of proof are very limited does not require any particular explanation, since

- in the vast majority of cases, their private relationships may not be affected by workplace circumstances,
- often cannot even report them because of confidentiality obligations,
- their colleagues, concerning the exception, in many cases do not dare to tell the truth, and even if they do not necessarily lie, they shamelessly conceal facts and circumstances that are really disadvantageous for the employer,
- in contrast, many on the employer's side are eager to testify,
- the documents are fully available to the employer, while the employee usually does not have them,

- in most cases, it is not a problem for the employer to use a private consultant, whose own experts can provide occasional assistance,
- while in most cases the employee is not only financially unable to hire a private expert, but the employer often does not even provide the opportunity for the possible expert to be examined.

The courts would be able to accept these difficulties within the framework of the law and provide legal assistance to the workers' side, but unfortunately in many cases, they tend to interpret even the law more weakly, to the disadvantage of the workers.

To summarise the above thoughts, it can be said that the rules on legal remedies and enforcement of interests, in contrast to the substantive labour law rules, do not sufficiently facilitate the exercise of rights by employees, not only falling short of the general legal concept of labour law, but also falling short of the rules protecting the weaker party in similar areas of civil law.

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DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN ACTIO PAULIANA DISPUTES

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Abstract: An attempt was made to compare the decision of the EU Court in the case/dispute with Actio Pauliana, methods of property protection to ensure the asset of obligations of the European Union member states to the loan contract, and its legal environment.

Keywords*: European law, civil law, loan contract, Actio Pauliana, fraudulent conveyance, fraudulent transfer*

1. INTRODUCTION

The Court of Justice of the European Union (hereinafter referred to as the CJEU) interprets whether EU law applies equally to all EU countries and resolves the legal disputes between national governments and EU organizations.

Besides, in certain circumstances, individuals, companies, and organizations may apply to the CJEU if they believe that the EU has violated their rights in any way.

There were around ten court decisions related to Actio Pauliana claims in the database of the Court of Justice of the European Union. Most of the court decisions refused to accept the claim and decided that the claim does not fall under international jurisdiction.

In European law, there is no direct regulation on fraudulent transfers or Actio Pauliana related disputes and is mainly used only to establish jurisdiction.

The European law does not directly codify the legal actions to be taken in the event of a false or fraudulent transfer of property to others by a debtor for the purpose of causing damage to a creditor but it is settled by the court precedent in view of the laws of the member states. I think that the court decisions for this civil case or dispute, which protects the interest of the creditor, remain a controversial topic among European lawyers.

2. STUDYING THE SETTLEMENTS BY THE COURT OF EUROPEAN UNION OVER ACTIO PAULIANA RELATED DISPUTES

The Court of Justice of the European Union (hereinafter referred to as the CJEU)[1] interprets whether EU law applies equally to all EU Member States and resolves the legal disputes between national governments and EU organizations.

Besides, in certain circumstances, individuals, companies, and organizations may apply to the CJEU if they believe that the EU has violated their rights in any way. Pauliana claim related disputes settled by the CJEU were compared below with examples.

3. DISPUTE 1. THE REICHERT I CASE (C-115/88)

The Reicherts, who live in Germany, are the owners of a real estate in the commune of Antibes in the French city of Alto-Maritimes and donated the real estate by naming their son, Mario Reichert and others as the legal owners. The Dresdner Bank, a creditor of the Reicherts, has filed a claim against the donation.

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[1] The Court of Justice is composed of 27 Judges and 11 Advocates General. The Judges and Advocates General are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned. They are appointed for a term of office of six years, which is renewable. They are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence.
The Judges of the Court of Justice elect from amongst themselves a President and a Vice-President for a renewable term of three years. The President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber. The Vice-President assists the President in the exercise of his duties and takes his place when necessary.
The Advocates General assist the Court. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them.
The Registrar is the institution's secretary general and manages its departments under the authority of the President of the Court.
The Court may sit as a full court, in a Grand Chamber of 15 Judges or in Chambers of three or five Judges.
The Court sits as a full court in the particular cases prescribed by the Statute of the Court (including proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfil his or her obligations) and where the Court considers that a case is of exceptional importance.
It sits in a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.
Other cases are heard by Chambers of three or five Judges. The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year. (Source: CJEU's website)

The parents demised their property to their son and the dispute was settled by the Court of Justice of the European Communities (hereinafter Court) in 1990 when the 1968 Brussels Convention (hereinafter Brussels 1968) has not been amended yet.

Jurisdiction was denied by Reicherts, however, the Court held that it had jurisdiction on the grounds that the objective of the case is the transfer of an immovable property that is situated on the territory of Contracting States. Therefore, the Court has exclusive jurisdiction, regardless of the nationality of the parties. Court held that Article 16 of Brussels 1968 should not be interpreted widely. Therefore, jurisdiction is best determined by the location of the property *(locus rei sitae)*. However, Article 16(1) Brussels 1968 means that Contracting State where the property is situated has the jurisdiction but only in measures that come under Brussels 1968 and regarding actions that seek to determine the extent, content, ownership or possession of named property and the rights and obligations of the right holders. Consequently, such an action, brought by a creditor against a contract of sale of immovable property entered into, or a donation thereof made, by his debtor, does not come within the scope of Article 16(1) Brussels 1968. Creditors request regarding Actio Pauliana does not come under the scope of Article 16(1) Brussels 1968.

4. DISPUTE 2. CASE C-339/07 SEAGON V DEKO MARTY BELGIUM

The Frick Teppichboden Supermärkte GmbH (hereinafter Frick), a German-registered company, transferred 50,000 euros to Deko Marty Belgium NV (hereinafter Deko), a Belgian-based company. Two and a half months later, an insolvency proceeding was opened in Germany at the request of Frick. Since the case of the avoidance of obligations was settled under the Insolvency Law of Germany, the bailiff filed a claim at the German court seeking a refund for the payment to Deko from Frick.

Only the bailiffs were authorized to take this action and it was the only action that could be taken. The German court ruled that the claim was stateless and dismissed the case. Eventually, the case was transferred to the Court by the Federal Court of Justice of Germany *(Bundesgerichtschof)*. The Federal Court of Justice of Germany transferred the case to the Court to get settled the following issues:

1. Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation No 1346/2000[2] (hereinafter European Insolvency Regulation) in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30. 6. 2000, pp. 1–18.

2. If the first question is to be answered in the negative, does the action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation No 44/2001?[3]

The CJEU got the case settled by the Federal Court of Justice of Germany, which filed the bankruptcy case and postponed the transfer. In other words, the CJEU confirmed that Article 3(1) of the European Insolvency Regulation must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State. This means that a third party has to accept the fact that the courts of the centre of the main interest of the debtor Member State are competent to hear and determine recovery actions. (Linna, 2014, p. 78).

5. DISPUTE 3. CASE C-337/17 FENIKS

Feniks, a Polish investor, had signed a construction contract with the Coliseum Company (hereinafter Coliseum), established also in Poland. However, due to the insolvency of the Coliseum, Feniks was obliged to pay the debt of the Coliseum to subcontractors under the applicable Polish laws. As a result, the Coliseum was indebted to Feniks for the amount paid to subcontractors. During this process, the Coliseum sold its real estate located in Szczecin (Poland) to Azteca, a company established in Spain. Actio Pauliana claim was filed at a Polish court against the Spanish company to repeal the sale of the real estate by opposing this transfer as it adversely affected Feniks's chance to take back the payment.

The court of Poland transferred the case to the CJEU to clarify whether it falls under international jurisdiction.

The CJEU reviewed the dispute and accepted the claim of Feniks claim, stating that '[t]he case applies to the Regulation 1215/2012 (EU)[4] adopted on December 12, 2012, on the court decision on jurisdiction, civil, and commercial issues. Therefore, the international jurisdiction set forth in Article 7 (1) (a) of this regulation, jurisdiction and court decisions may be enforced and approved.'[5]

The decision of the CJEU contradicts the opinion of the Advocates General (hereinafter AG)[6] of the Court and divided the lawyers. For example, researcher

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[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16. 1. 2001, pp. 1–23.

[4] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20. 12. 2012, pp. 1–32.

[5] It should be emphasized that the Brussels Convention has not yet been amended when the case of Case C-115/88 or the case of the Richards which is similar to this case.

[6] The Advocates General assists the Court. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them.

Tobias Lutsi criticised that the CJEU settled the case of Feniks as '[f]orcing a square peg into a round hole'. (Lutzi, 2018). The decision was made against the proposal of the AG. This decision was different from similar cases that have been settled before, so it has been criticized.

Researcher *Michiel Poesen* concluded the court decision "The notion of 'matters relating to a contract' within the meaning of Article 7(1) of the Brussels I Regulation Recast underwent an evolution in the recent case law of the ECJ the decision in Feniks confirming and advancing its broadening. It is worth noting that the ramifications of this evolution are not isolated to the topic of jurisdiction under the Brussels I Regulation Recast. (…) As for now, it appears that there are good arguments to assume that third parties who are even remotely involved in the contractual dealings of others are at risk of being sued in the contract." (Poesen, 2019)

6. DISPUTE 4. CASE C-722/17 REITBAUER

Mr. Casamassima and Ms. Isabel C., citizens of Rome, lived together until the spring of 2014. In 2010, they bought a house in Villach, Austria. Although Mr. Casamassima paid for the house, Ms. Isabel C. was registered as the sole owner at the registration office. With the help of Mr. Casamassima, Ms. Isabel C. signed a contract with Reitbauer and others (hereinafter referred to as Reitbauer) and started renovating the house. Payment to the Reitbauer was suspended because the cost of the renovation far exceeded the budget. Since 2013, the Reitbauer has sued Ms. Isabel C. at the Austrian court. In 2014, the decision of the primary court settled the case in Reitbauer's favor. But Ms. Isabel C. appealed against the decision.

Meanwhile, Mr. Casamassima sued Ms. Isabel C. on May 7, 2014 at the court of Rome to enforce payment of the house which he bought in Villach. Ms. Isabel C. accepted the claim and agreed to apply for a mortgage on his house in Villach for ensuring the payment for the claim. Accordingly, the debt and collateral certificates were notarized and the settlement was confirmed on June 13, 2014, in Vienna. On June 18, 2014 a mortgage was signed for the house in Villach.

From that day on, the court decision for the Reitbauer could not be enforced. The Reitbauer pledged Isabel C.'s house under the law enforcement decision but now it was ranked behind Mr. Casamassima's mortgage agreement.

In February 2016, Mr. Casamassima filed a lawsuit in the district court of Villach, Austria, demanding that the house in Villach be put up for auction and getting an ordinance issued related to Ms. Isabel C. Then the house was sold at an auction in the autumn of 2016. According to the order in which the land was registered, the revenue from the sale of the collateral was decided to be transferred in full to Mr. Casamassima.

In order to prevent this, the Reitbauer filed a complaint against Mr. Casamassima and Ms. Isabel C. in June 2016 at the court in Klagenfurt, Austria. However, Mr. Casamassima and Ms. Isabel C. were not residents of Austria, therefore the complaint was rejected. The Reitbauer believed that Ms. Isabel C. and Mr.

Casamassima had forged the house documents and it was a form of Actio Pauliana. The Reitbauer, therefore, requested the CJEU to review whether the court decision is acceptable and shall be followed in connection with the regulations No (EX) 24 (1) and (5) issued by the European Parliament and Council on December 12, 2012. The CJEU reviewed the dispute and ascribed that the actions of Mr. Casamassima and Ms. Isabel C. were not related to the evasion of payment and that the claim was inadmissible and does not apply to the court of the Member State where the real estate is located.

7. DISPUTE 5. CASEC-394/18 I.G.I V CICENIA

The Costruzioni Ing. G. Iandolo Srl, a construction company in Italy, was reorganized, and a new company, I.G.I, was incorporated from it and a part of the assets was transferred to it. However, some creditors objected, claiming that they were 'losing a significant portion of their assets' and filed a claim to the district court of Avellino, Italy, to delay the transfer of assets of the two companies. The district court accepted the creditor's claim and made a decision to delay the division of the assets. The two reorganized companies objected and appealed to the Naples City Court of Appeals. They said that '[u]nder the Italian and EU laws, creditors could have exercised their right to get a court decision issued before reorganizing and registering the split company'. They also protested that 'separation' cannot be considered 'invalid' after the official requirements have been met, and that 'measures to delay the transfer of assets will not be accepted'. The court of appeals upheld the decision and addressed it to the CJEU.

The Court of Appeals of Naples stayed the proceedings and referred two questions to the Court of Justice for a preliminary ruling with regards to Articles 12 and 19 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies ('the Sixth Directive').

CJEU revised the case and considered it possible for creditors to file an Actio Pauliana claim against the split company. In other words, it was settled that the Actio Pauliana claim can be lodged with the purpose of not letting the activities of the two companies that resulted from the reorganization of the company can not cause harm to creditors and taking coercive and protective measures related to the assets transferred to the newly established company and Actio Pauliana would not affect the reorganization of the company but would eliminate the solvency to the creditors and that the creditors are able to claim to delay the transfer of assets even after the company is reorganized.

8. CONCLUSION

There were around ten court decisions related to Actio Pauliana claims such as C-115/88, C-339/07, C-337/17, C-722/17, C-394/18, C-213/10, C-157/13, C-256/00, C-274/16, and C-133/78 in the database of the CJEU. Most of the court decisions refused to accept the claim and decided that the claim does not fall under

international jurisdiction. Therefore, I have selected and compared five specific disputes with the court decisions that accepted the claims, establishing international jurisdiction, and refusing to accept the claim, as well as attracted the attention of lawyers and researchers.

Two of the disputes involved family members and people who had family relations. The other three cases were related to the claims lodged by the people against the transfer of real estate and payments from one company to another (bankruptcy, reorganization, etc.). In other words, these are the disputes with Actio Pauliana claims against cross-border actions between citizens and legal entities of the EU member states.

Lawyers and researchers Tuula Linna, Michiel Poesen, Tobias Lutsi, and Nicola De Luca have variously interpreted the court decisions as examples.

But for me, I do not consider court decisions to be right or wrong because I have made my study to seek answers to the questions: Is there Actio Pauliana regulation in the laws of Europe? What regulation was used by the Court of Justice of the European Union to settle the disputes related to Actio Pauliana and how were the cases settled?

When I studied the disputes, the courts of the Member States addressed the CJEU to clarify 'whether the Actio Pauliana falls under the jurisdiction of an international regulation (hereinafter referred to as the EU law) in accordance with the Brussels Convention, whether a claim in regard to the fraudulent transfer could be settled by the court of a member state, the court decision of a member state can be enforced in another member state, and how to understand the provisions of the EU law'. For example, the following articles and provisions of the EU law were explained whether those are related to Actio Pauliana and how to understand:

1. In the dispute C-115/88, Article 16(1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, September 27, 1968;
2. In the dispute C-339/07, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article (2)(b) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
3. In the dispute C-337/17, Article 7(1)(a) of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
4. In the dispute C-722/17, Article 24(1) and (5) of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
5. In the dispute C-394/18, Articles 12 and 19 of the Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives based.

Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies.

The court decisions acknowledged and interpreted the Actio Pauliana related insolvency claims in the legal regulation pertaining to the insolvency and reorganization of the companies. However, the Actio Pauliana claims between the family members were rejected and the cases were dismissed.

In European law, there is no direct regulation on fraudulent transfers or Actio Pauliana-related disputes and is mainly used only to establish jurisdiction. In other words, it is not legalized. Only in the case of C-394/18, 2020, it was explained whether Actio Pauliana could be used after the reorganization or division of the company for EU law and the laws of Italy.

Maybe there was no other way because the EU member states have different regulations for Actio Pauliana or fraudulent transfers in their civil laws. Besides, some researchers of the European Union intend to codify the EU's Civil Code but have not yet reached any result. This is due to the fact that researchers and lawyers of the member states have different views on this issue.

Moreover, I conclude that the Court of Justice of the European Union should make flexible and balanced decisions based on the interests of the parties, weigh the real interests of the parties, and have a neutral position.

Finally, I would like to note that decisions of the EU courts show that the EU regulations have been modified and amended constantly and gradually and that positive steps have been taken to interpret Actio Pauliana-related disputes and to determine its jurisdiction. In other words, the EU law Union has been updated year by year in connection with the integration of the European Union.

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

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

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

1. INTRODUCTION

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

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

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

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

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

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

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

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

It is worth taking the BGB rule on usurious contracts as the next example, since at the beginning of the 20th century, during the attempts for the codification of the Hungarian civil code and among the numerous spontaneous adoptions of German civil law concepts and legal solutions into the Hungarian customary law, the Hungarian legal development of usurious contracts was significantly influenced by the German Civil Code, the BGB. Article 138 of BGB states that a legal transaction contrary to public policy (usury) is void, in particular, when a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance (usury).[1] The usurious contract is null and void, the remedy is similar to the Hungarian rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. CLOSING REMARKS

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

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

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

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

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

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

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INVALIDITY, INEFFECTIVENESS, AND NON-EXISTENT LEGAL RANSACTIONS IN LABOUR LAW

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Abstract: Validity and invalidity are not synonymous concepts; they cover different legal content and result in different legal consequences as well. In the case of non-existent contracts, there is no consent between the parties on the essential elements of the contract. In such cases, contracts either have no legal effect at all or we can speak about some special legal effect.

Though the invalidity system of labour law is based on civil law, specific characteristics of labour law as an independent field of law are also taken into account. It is a fundamental difference that, unlike civil invalidity, the restitution of the original situation is not possible because of the long-term nature of the legal relationship. Instead, labour law imposes a remedy on the parties and if it is not possible, termination of employment is mandatory. Incidentally, invalidity under labour law also means incapacity to produce the intended legal effect and we distinguish between two different types of invalidity: nullity and voidability.
In the event of termination of a contract, an agreement between the parties shall be concluded and shall remain in force, however, for some reason, it can not produce legal effects between the parties. Therefore, the existence and validity of the contract is a precondition for invalidity.

Keywords: *labour law, invalidity, ineffectiveness, termination*

1. INTRODUCTION

In the process of concluding an employment contract, similarly to civil law, three concepts have relevance: non-existent, invalid, and ineffective contracts.

The invalidity system of labour law is based on civil law, but it also takes the features of labour law as an individual branch of law into consideration (Berke and Kiss, 2014, p. 121). In general, invalidity means unenforceability before the court, when the state does not provide the right to pursue a claim before its authorities. Nevertheless, invalidity can also be regarded as a special sanction, since invalid agreements or unilateral acts do not give rise to any obligation.

In civil law, the legal system aims at *in integrum restitutio*, while labour law, due to its special features, strives for the obligation to remedy, instead of restitution.

Under Article 31 of the Hungarian Labour Code in force (*Act I of 2012*, the fourth Labour Code, hereinafter referred to as *HLC*), legal statements of labour law are required to be governed by the exhaustively listed provisions of the Hungarian Civil Code (Act V of 2013, hereinafter referred to as HCC), unless otherwise provided for in the HLC. This legal technical solution was criticised by the commentary literature of labour law, stating that structurally it does not conform with the provisions of the HLC, and regarding the content, other provisions of the HCC (e.g. penalty) may also be applicable instead of the exhaustively listed provisions (Pál et al., 2012, p. 79; Berke and Kiss, 2014, p. 135).

2. PROVISIONS OF THE HUNGARIAN LABOUR CODE IN FORCE

Chapter IV of the HLC regulates the details of invalidity.

One type of invalidity is nullity, which is regulated by Art. 27 HLC. Under the provisions of the HLC, not only the terms and conditions violating the law are regarded as null and void, but also those which violate collective agreements, work agreements, or the binding decisions of the conciliation committee. Agreements entered into by way of circumvention of any of the abovementioned sources of employment law, or are contrary to accepted principles of good morals, shall be regarded as null and void. However, reference to nullity is no longer optional to anybody, just for the concerned part, but for them, alleging the nullity of an agreement is possible without a time limit. Courts have to observe the nullity of the agreement of its own motion *(ex officio)*. The legal consequence of nullity is that the contract does not and may not give rise to any positive legal effect intended by the contracting party, i.e. it is invalid. According to Art. 27(3) of the HLC, *'[a]n agreement if annulled shall be considered void unless the relevant employment regulation stipulates another legal consequence'*. However, we are also going to mention other consequences as well. The HLC also regulates sham contracts, which are invalid, except if sham contracts disguise other agreements, these need to be judged upon the disguised agreements, for example, if parties conclude a sham agency contract to circumvent the mandatory rules on employment contracts.

Contestability (or avoidance) means conditional or relative invalidity, compared to nullity, which latter is the unconditional or absolute type of invalidity. Agreements can only be avoided based on specified reasons (mistake, misrepresentation, unlawful threats), and solely by the person who 'suffered' from them. The other party needs to be notified within thirty days that the agreement is contested, and in case of a negative answer or a lack of answer, the party is free to bring an action before the court. The time limit for contesting is of absolute type, and it terminates after six months.

Rights and obligations deriving from or in connection with a legal relationship based on an invalid agreement are required to be regarded as if they originated from a valid agreement, i.e. employees are entitled to receive the remuneration for their work. If the reason for invalidity can be remedied, the court declares the contract to be valid (Berke and Kiss, 2014, p. 132), otherwise, the employer has to terminate the legal relationship with immediate effect without any delay. In case of partial

invalidity, the employment regulation needs to be applied, but only in case, if the parties would have concluded the contract without the invalid part. Damages resulted in by the invalidity of the contract shall be judged according to the provisions of the HLC on compensation, instead of taking into account the provisions on disguised contracts (Rácz, 2021, p. 167).

3. QUESTIONS OF EFFECTIVENESS IN LABOUR LAW

In this article, we are not going to present the questions of invalidity in labour law, because our opinion on this issue was already published in another article as we have indicated previously. (Rácz, 2021)

The legal literature has already dealt with the issue of ineffectiveness in labour law relating to a labour law institution, the instruction of the employer (Kiss, 2000, pp. 112–117; Román, 1977, pp. 72–76). The author thinks that the instruction, in general, comes into effect upon delivery, specifically when the employee becomes aware of it. It means that a valid instruction can be 'perceived' by delivery, so it is effective upon this date.

Regarding the effectiveness of the employment relationship, *György Kiss* studied the issues of the formation and starting date of the employment relationship, the further conditions of the effectiveness of the employment relationship, and finally the determination of the duration of the relationship or the term of the contract (Kiss, 2000, pp. 112–117). We need to highlight that these issues fall within the scope of the effectiveness of the employment relationship, not of the effectiveness of the employment contract. In labour law, compared to civil law, the processes of entering into an employment contract and entering into an employment relationship are closely connected.

According to the current literature in connection with ineffectiveness, only valid legal statements can be ineffective or effective. An ineffective legal statement can cause the intended legal effect, but rights and obligations not yet or no longer derive from it (e.g. because of suspensory or resolutory condition). An effective legal statement is not only potentially, but actually able to cause the intended legal effect. (Kun et al, 2018, p. 15; Nádas, 2017, p. 404).

Under the provisions of the HLC, a unilateral statement takes effect upon its delivery to the recipient and can be amended or revoked only upon the consent of the recipient [We will return to this point below, with the conditions of the wording of the provision in Art. 15(4) HLC].

Under the provisions of the HLC, the parties may render the conclusion, amendment, and termination of an agreement contingent upon certain future, uncertain events (conditions). It is obvious that relating to the regulation of condition precedent, the HLC used the solution of the HCC. (Cf. Art. 6:116 HCC) In addition, as it is provided for in the HLC, any condition that is contradictory, impossible, or unintelligible shall be considered invalid, and the agreement shall be treated as if it does not contain the condition in question [Art. 19(1)(2) HLC].

4. NON-EXISTENT EMPLOYMENT CONTRACTS

Not only in theory but also in practice it is often confusing what constitutes an invalid and a non-existent employment contract. As an example for it, we present a current decision of a court of first instance.

Under Act XXXIII of 1992 on the legal status of public servants and Act LXXXIV of 2003 on some questions related to medical activities, the defendant, i.e. the employer appointed the plaintiff to a fixed-term, full-time, 40-hour per week job as specialised nurse, for replacement of a civil servant, who was absent due to incapacity for work, from 11 January 2021 until 10 April 2021, with the probationary period from 11 January 2021 until 10 April 2021.

At the beginning of February 2021, the defendant's director general convened the employees and explained to them the circumstances and process of the transformation of their relationship into a health service legal relationship, including the draft of the employment contract. The plaintiff received the draft of the health service employment contract, which he had to return signed to the defendant by 5 February. By signing on 2 February 2021, the plaintiff acknowledged that the defendant had offered him further employment, had read the information on the terms and conditions of the employment, and had read and understood the draft of the employment contract. In possession of this, the plaintiff stated that he agreed to be further employed by the defendant.

The plaintiff returned the Draft signed by him to the defendant. In February 2021, the plaintiff signed a document called a 'statement on the conflict of interest', according to which there is no conflict of interest regarding him under Article 4 of Act C of 2020 on Healthcare Service Relationship (hereinafter referred to as HSRA). He returned the document to the defendant on 24 February 2021.

On 24 February 2021, the plaintiff received his health service employment contract, which he had to return signed to the defendant by 26 February 2021 (hereinafter referred to as 'Contract').

The plaintiff indicated by handwriting on the Contract that it had a different content from the Draft. The plaintiff returned the Contract signed to the defendant on 26 February 2021 (on Friday).

The plaintiff appeared before the defendant for work on 1 March 2021 (on Monday). The defendant terminated the relationship with the plaintiff with immediate effect on 1 March 2021, during the probationary period.

In its non-final judgment, the court of first instance found that it was necessary to examine whether a health service legal relationship had been established between the parties and whether the contract on which it was based had been validly concluded by the parties. As a result of the examination, the court of first instance concluded that the parties' statements did not result in a health service employment contract between them due to the lack of clear, mutual, and consistent will on both sides to establish a health service legal relationship. The date of the transformation of the legal relationship was 1 March 2021, therefore, in the absence of a contract

concluded on that date, the plaintiff was not in a health service legal relationship, so it could not have been terminated during the probationary period.

In our view, the court of first instance did not take sufficient account of the legal statements reflecting the plaintiff's contractual will in determining whether or not the parties had a health service employment contract. The plaintiff stated that he gave his consent to his further employment with the defendant. The plaintiff also signed the statement, in which he declared that there was no conflict of interest specified in HSRA. Moreover, the plaintiff signed the draft of his employment contract. Finally, the plaintiff signed his health service employment contract. In our opinion, these documents reflect the employee's contractual will. The fact is that the plaintiff wrote comments on the health service employment contract, but he signed the contract itself. The differences were only contractual terms laid down by law, which became part of the contract even if the parties had not expressly agreed to do so. The HLC does not regulate the conditions of the non-existent contract, therefore Article 6:63(1–3) of the HCC applies to it pursuant to Article 31 of the HLC. Under Art. 6:63(3) of the HCC, parties do not have to agree on matters which are settled by law. Under Article 45(1) of the HLC, parties must agree in the employment contract on the employee's basic salary and job, which are mandatory elements of the employment contract. If the parties agree by their mutual and concurrent will to these terms and conditions, the contract exists.

5. SUMMARY

In the process of entering into a contract, civil law examines the expression of the mutual and concurrent will of the parties. To enter into a contract, the parties must agree on the relevant issues or on issues declared to be relevant by one of the parties. Otherwise, the contract will not exist. If the contract is entered into, but due to reasons of form or substance the legal statement is not suitable for causing its intended legal effect, it constitutes invalidity. The essence of the ineffectiveness of a contract is that parties entered into an agreement, which is valid, but it is not suitable for causing its intended legal effect between the parties.

In labour law, we can also make a difference between non-existent, invalid, and ineffective employment contracts. Labour law defines invalidity on the grounds of civil law, however, regards it as a specific category of this branch of law, while compared to civil law, labour law has a different concept for effectiveness. The most obvious example is the issue of the revocation of termination by notice.

Studies on non-existent employment contracts have only begun recently (Herdon, 2020, p. 14); labour law literature has not given it a great relevance, and judicial practice seems to be unsteady in decision-making on it.

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THE SYSTEM OF GROUNDS FOR INVALIDITY IN HUNGARIAN PRIVATE LAW

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Abstract: The study analyses the system of grounds for invalidity that has developed in Hungarian private law. One of the starting points is the distinction between nullity and contestability, which distinguishes, depending on the gravity of the error in the contract, between *ipso iure* invalidity (nullity) and invalidity, depending on the juridical act of the aggrieved party or person with legal interest. The other systematisation aspect was based on the dogmatic triad of conditions of validity, so it was grouped according to the error of contractual intention, the error in the contractual juridical act, and the error in the intended legal effect. Errors of contractual intention include mistake, mispresentation, and unlawful threats, while errors of the contractual juridical act include formal errors in the contract. Most of the legal facts were included among the errors of the intended legal effect, e.g. a prohibited contract, a contract contrary to good morals, a usurious contract, obvious disproportionality, nullity of transferring title as security, contract terms impairing consumer rights, etc.

Keywords: *invalidity, nullity, grounds for invalidity, system of invalidity, prohibited contracts, Civil Code*

1. INTRODUCTION

The study aims to present the system of grounds for invalidity in Hungarian private law. In doing so, of course, I take the legal provisions in force into account along with the categories developed by jurisprudence, but all in a subjective approach, also pointing out problems of legal interpretation. My goal is to trigger a debate on these issues.

Since the Hungarian Civil Code (hereinafter HCC) has no general part, it is possible to set up a framework for the invalidity of legal transactions by applying the concept developed for the invalidity of contracts. The starting point here is the rules under Title VI of the Sixth Book of the HCC, which systematises the grounds for invalidity in two respects. One of the starting points is the distinction between nullity and voidability which, depending on the gravity of the error in the contract, distinguishes between *ipso iure* invalidity (nullity) and invalidity depending on the juridical act of the aggrieved party or person with legal interest. The other systematisation aspect was based on the dogmatic triad of conditions of validity, so

it was grouped according to the error of contractual intention, the error in the contractual juridical act, and the error in the intended legal effect.

However, the framework outlined above only provides full guidance on the invalidity of contracts. On the one hand, this is because the grounds for invalidity contained in the other pieces of private law have not been specifically included in this dogmatic framework by the legislator. On the other hand, with regard to unilateral juridical acts, we also apply the rules for contracts. With these in mind, we need to analyse each of the invalidity rules one by one to determine which dogmatic category they fall into. The HCC for example attaches the legal consequences of nullity to nearly two hundred specific rules, not to mention the other pieces of private law legislation.

2. DELIMITATION OF INVALIDITY BASED ON STAGES OF LEGAL TRANSACTIONS

With regard to legal transactions, three main stages of existence can be distinguished, namely: establishment, validity, and effect. This clear and transparent systematisation is not only relevant from a dogmatic point of view, but also in practice. Whether we are talking about a legal transaction that has not been concluded or is invalid or ineffective, in all three cases we can conclude that the legal transactions are not suitable for producing the intended legal effect, and they may have different consequences. (Siklósi, 2005)

The legal effect of an invalid contract appears to be treated in the same way as that of a non-existent contract, but there is still a significant difference between the two. In the case of a non-existent contract, there is no consistency between the parties' legal declarations for the conclusion of the contract, i.e. the consensus, is replaced by dissent, or no agreement is reached on the essential content of the contract (e.g. the purchase price is completely missing in a sale agreement, etc.), the absence of which precludes the conclusion of the contract. A non-existent contract must be distinguished from an invalid contract in that the non-existent contract has no legal effect at all, so it does not have a negative legal effect either *(in integrum restitutio)*. In case law, the problem of distinguishing between a non-existent and an invalid contract also arises in many cases. Thus in the case, for example, where the person acting on behalf of a legal entity concluding a contract was not the representative of the legal person, i.e., there was a case of pseudo-representation, the Supreme Court of Hungary declared the contract signed by the pseudo-representative null and void.[1] This typically happens when the question arises as to whether the contract is between the entity and the other party, or whether, as a result of the pseudo-representation, we are faced with a non-contract. Before the entry into force of the new HCC, case law was unanimous that where the conclusion of a contract requires the approval of a third party, the contract will not come into existence in the

[1] Supreme Court order No. Fpk: VI. 31.393/2001/2. It should be noted that under the rules of the new Civil Code, this would no longer be the applicable legal consequence in a similar case.

absence of such approval.[2] Under the rules of the new HCC, a contract subject to consent or approval shall be deemed valid, only the effect of the contract shall be subject to approval. (Art. 188 HCC)

A typical case of the distinction between the validity and effectiveness of a contract aimed at concealing assets comes where the HCC attaches the legal consequence of relative ineffectiveness to such a contract, while in similar circumstances, the Bankruptcy Act uses the legal consequence of contestability and invalidity. Within the HCC, we also find a different view in the case of testaments, where it prescribes the application of the legal consequence of ineffectiveness in the event of its revocation. (Bessenyő, 2001, p. 3; Földi, 1998)

3. SYSTEM OF GROUNDS FOR INVALIDITY IN DETAIL

A contract can be considered valid if the parties make a declaration in accordance with their will (i.e. their will and declaration are in conformity with each other), their declaration is in the form and bears the content required by law, and the declarations made by the parties are capable of reaching the intended legal effect. A valid contract must therefore meet three conjunctive conditions: the will, the declaration, and the desired legal effect shall be sound and intact. If any of the three elements listed above does not exist, the contract may be declared invalid.

3.1. Errors in contractual intention

3.1.1. Lack of capacity to act

Civil law requires the person making the declaration to be able to act at the time of making the declaration and to have at least limited legal capacity in the cases specified by law. Lack of legal capacity – as a general rule – results in the invalidity of the legal declaration.

Legal capacity is the ability of a natural person to acquire rights and assume obligations through a declaration of intention they made directly. At the same time, legal capacity presupposes a person's ability to assess the civil law consequences of their statements and to have the freedom of will to give direction to their statement. As regards the grounds for invalidity related to legal capacity, it can be said that they essentially result in the invalidity of the legal declaration due to the lack of intention to transact, but the Civil Code does not discuss grounds for invalidity related to legal capacity or the related rules together with the other errors in intention. On the other hand, the lack of capacity is partly treated differently. Emilia Weiss emphasised that the starting point for the regulation of invalidity due to lack of legal capacity is that the regulation is intended to protect the incapacitated. (Weiss, 1969, p. 333) Consequently, a lack of capacity to act is grounds for nullity but can only be invoked in the interests of the incapacitated party.

[2] Metropolitan Court of Appeal judgments, No. 16. Gf. 40.249/2006/9, and No. Gf. 14. 40.092/2006/3.

We come across a slightly different approach in literature as well. For a legal declaration to have legal effect, the legal capacity of the person is required. This criterion is partly objective and partly subjective. In the absence of legal capacity, it is not possible to speak either of an intention or a statement in a legal sense, i.e. the subjective side of a legal declaration made by an incapacitated person is incorrect for objective reasons. In that approach, therefore, the lack of capacity to act is in fact invalid because of the error in the intended legal effect. In my opinion, this theoretical issue merits further professional discussion. (Földi et al., 2020, pp. 487–488)

3.1.2. Mistake

A mistake must be distinguished from the non-existence of the legal transaction. If there is a complete lack of intention, the legal transaction will not take place. For example, in the case when a bill of exchange is completed for illustrative purposes only. A mistake can be distinguished from misrepresentation in that, in the case of misrepresentation, the other party caused the mistake of the contracting party. The mistake can also be distinguished from the warranty rights of the supplies, as the warranty rights can be enforced even in the case of a minor defect in the service, but the contractual intent is not open to challenge based on the mistake. It should also be noted concerning family law relations that grounds for contesting upon a mistake, misrepresentation, or unlawful threat of the Civil Code do not apply, they only provide a background regulation with regard to the relationship between the parties. We can distinguish between two cases of mistake: one-sided, and the common case. Anyone who was at fault for a material circumstance upon concluding the contract may challenge their contract declaration if the fault was caused or recognised by the other party. A mistake applies to a material circumstance if, with knowledge of it, the party would not have entered into the contract with or without other content. If the parties made the same erroneous assumption on a material issue at the time of concluding the contract, either party may challenge the contract.[3] The contract may not be challenged by anyone who may have discovered the mistake or assumed the risk of the mistake. It should be mentioned, however, that the new Civil Code does not regulate the case of a mistake of law as a separate rule; in this case, the general rules of mistakes apply.

The grouping of Gyula Eörsi can be considered relevant in terms of typifying mistakes, so the mistake can relate to the subject, object, and content of the contract, any legal issue related to the contract, and the reason for the contract. (Eörsi, 1992, p. 102) For a mistake to trigger invalidity, the error must satisfy the conditions already known in Roman law as essential and tolerable *(essentialis et tolerabilis)*, (Földi et al., 2020, pp. 482–483) that is to say, it is material and cannot be attributed to the erroneous party with due diligence. If there is a joint mistake of the parties, we can talk about practically hidden dissent, which may also result in the non-existence of the contract. In such a case, the question of whether a contract has not been

[3] Supreme Court order No. Gfv. IV. 31.168/1999/6.

concluded or is open to challenge raises a serious demarcation issue, which can only be determined based on all the circumstances of the case.[4]

3.1.3. Misrepresentation

The rules concerning misrepresentation are based on the mistake, since anyone who intentionally misleads the other party, or keeps them believing their mistake, may challenge their contractual declaration as a result of the deception. If the deception is from a third party, the possibility of exercising the right to contest extends to it. Compared to a mistake, it is not enough for someone to have recognised the other party's mistake, deliberate and purposeful conduct is also required. In such a case, the other party's mistake is deliberately caused by the party through deception, which may be active conduct *(dolus malus)* or even the omission of some essential circumstances *(reticentia)*. Failure to provide the other party with information on the material circumstances related to the subject matter of the contract – concealment of important information – is likely to mislead the other party. In such a case, challenging the contract on the grounds of misrepresentation may be effective. Hiding the fact that a car covered by insurance was previously totally damaged before concluding the insurance contract is typically likely to mislead the insurance company, as this is an essential circumstance meaning the insurer would either not conclude the contract or would only accept an offer for the insurance contract under significantly different conditions.[5] In a specific case, the Supreme Court pointed out that when the seller did not inform the buyer that the apartment, which is the indirect object of the contract of sale, was damp, it thereby concealed material information that was suitable for misleading the other party.[6] This case is a good example of the fact that the party has access to several different legal aids for the same situation, including warranty, guarantee, misrepresentation, and mistake, not to mention the obvious disproportionality of value and invalidity competing with other possible legal instruments.

3.1.4. Unlawful threat

If someone has been unlawfully threatened by the other party to enter into a contract, he may challenge the validity of the contract. This rule applies even if the threat was made by a third party and the other party knew or should have known about it. The threat must be capable of provoking serious fear in the person threatened. (Menyhárd, 2000, pp. 48–52) The threat should refer to the prospect of an illegal consequence, e.g. there is no illegality in applying lawful legal consequences, the prospect of the exercise of rights. About the three facts, two important demarcation issues arise. (Lallesovits et al., 1913, p. 381) On the one hand, concerning the magnitude and significance of a mistake, there is a possibility that no contract was

4 Supreme Court order No. Gf. VII. 30.955/2000/7.
5 Supreme Court order No. BH 2004.361.
6 Supreme Court order No. BH 1996.254.

concluded between the parties. On the other hand, a mistake is more general than the facts of the deception and an unlawful threat, it covers these cases.

3.1.5. Sham contract

At first glance, the Civil Code may unnecessarily, but clearly, provide that the validity of a contract shall not be affected by the secret or disguised reason of the contractor. A sham contract is void, and if it disguises another contract, the rights and obligations of the parties must be judged on the basis of the disguised contract.[7] In the case of a sham contract, there is a difference between the actual intention and the statement of the parties, i.e. the parties make a statement to the outside world about a contract or a contract with different content than their actual agreement. If only the will of one of the parties deviates from the statement expressed, it is not a sham contract, just a unilateral secret reservation that does not affect the validity of the contract. (Gellén, 2008, pp. 30–35; Szalma, 1998, pp. 14–16). Attila Menyhárd aptly compares sham contracts to the joint secrecy of the parties and draws parallels with it. (Menyhárd, 2000, p. 13). A sham is a deliberate, two-sided act, in which the common intention of the parties is to refrain from concluding a contract based on their legal declarations or to enter into a contract with different content and other legal effects instead. The fictitious nature of a contract, and consequently its nullity, cannot be established if even one of several contracting parties is willing to conclude the contract in question. Unilateral pretence is therefore indifferent to the invalidity of a contract.

If the court declares the contract to be fictitious and invalid, it is also necessary to examine whether the veiled legal transaction is valid in itself and capable of producing legal effects. If the parties misrepresent or impersonate the title, the veiled transaction may still be valid.[8] If the veiled legal transaction has the necessary content enabling the realisation of the parties' intentions, the legal effects thereof shall be enforced accordingly.

The occurrence of a sham contract is usually linked to either a legal prohibition or an adverse legal consequence, e.g., it is created to avoid public burdens or to circumvent the enforceability of the rights of a third party. (Nizsalovszky, 1933, p. 159; Haitsch, 2005, pp. 25–26). From this, there is a close link between the invalidity of sham contracts and the possible application of grounds for invalidity in the case of transactions with an error in the intended legal effect.

Regarding the errors of intention, it should be mentioned that the Civil Code provides special rules for gratuitous contracts. In the case of a free contract, the contract may be challenged in the event of a mistake, misrepresentation, unlawful threat, or deception on the part of a third party, even if those circumstances could not have been recognised by the other party. In contractual legal relations, the Civil Code invariably considers retaliation to be primary, and in comparison, unpaid

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[7] Supreme Court order No. BH 1997.593.

[8] Decision of Regional Court of Appeal of Debrecen No. BDT 2006.1431. Supreme Court orders No. BH 1997.436., BH 2006.118., and BH 2006.17.

performance as an exception. It follows that it creates a more favourable position for the party performing free of charge for the legislature and allows the right to challenge the contract even if the other party could not have recognised the error of will. (Art. 6:93 HCC).

3.2. Breach of formality

The Civil Code contains general provisions regarding the formality of legal transactions and their violation, while their non-existence and violation are sanctioned with invalidity for certain specific rules. Examples of such cases are the conclusion of certain contracts (e.g. sale or gift of real estate, fiduciary asset management contract, etc.); formalities of testaments, last wills; property contracts of spouses, contracts governing the use of the joint home, contracts of sale, exchange, gift and loan concluded with each other during cohabitation, the sharing of the spouses' joint property by contract, authorisation to exercise parental supervision; general authorisation; property and housing contract of the life partners, etc.

Due to a breach of formality, a contract void upon acceptance of the performance shall be valid for the duration of the performed part, except in some special cases. There is a different approach to inheritance law. For a document to qualify as a will, it must contain an arrangement for property upon the death of the testator and seem to originate from the testator. Wills may be made either as a public will or a private written will, and oral wills may be made in the cases provided by the Civil Code. On the other hand, the invalidity and ineffectiveness of the will may only be established based on a statement of challenge, in contrast to contracts.

3.3. Errors in the intended legal effect

3.3.1. Contracts violating the law

Among the grounds for invalidity, the regulation of the Civil Code is the richest in terms of errors in connection with intended legal effect. The starting point for the regulation is an illegal (prohibited) contract, supplemented by a contract aimed at circumventing the law and obviously contrary to good morals. Compared to these general categories, there is a specific rule for a usury contract, a contract with an obvious disproportionate countervalue, the nullity of fiduciary credit guarantees, a contract with impossible performance, an incomprehensible clause, the nullity of conflicting clauses, and a contract that infringes consumer rights, a consumer waiver, an unfair term in a consumer contract, and an unfair general contract term. However, the scope of errors related to intended legal effect is limited to facts that, for the most part, can occur in virtually any type of contract, irrespective of the type of contract in question. In addition to the provisions in Chapter XVIII of the Civil Code, the Code contains several mandatory provisions in several places, in particular, the general part of contract law and individual contracts, which expressly (expressis verbis) contain the legal consequences of nullity for violation.

3.3.2. Contracts violating the law

A contract violating the law can be classified as a general category, in fact, it can be considered in a broader and narrower sense. In a broader sense, all grounds for invalidity can be included here, as the legal norm prohibits the act in question. In a narrower sense, this also includes cases in which the law imposes legal consequences for invalidity. This is usually defined in the Civil Code with the prospect of 'void' or 'invalid' legal consequences, or in another approach, it prescribes how a given legal transaction can be validly created. In the alternative to unlawful treaties, there are cases that – although not expressis verbis infringing a rule of law – are intended to circumvent the intention of the legislator *(in fraudem legis)* or are contrary to general social judgment *(contra bonos mores)*. The latter can be judged individually and the power of the legislature is vested in the judge.

On the other hand, the prohibition of infringing the law by a contract arises if the legislator intends to impose a legal consequence of nullity on the prohibition expressed in the given norm within the violation of a mandatory rule concerning the content of the contract, but the nullity is not specifically mentioned in connection with the prohibition. We can find such mandatory rules, and without direct reference to nullity, a breach of these rules causes invalidity. In this context, we can refer to several provisions, e.g., at one time, a natural person may only be a member of one company with unlimited liability; a minor may not be a member of an unlimited liability company; a general partnership, a limited partnership and, a sole proprietorship may not be members of a company with unlimited liability.

The prohibition of conflict with the law is, of course, not only a violation of the mandatory rules of the Civil Code, but it applies to transactions that violate the provisions of other laws. (Darázs, 2008, p. 23) According to the prevailing perception, due to a violation of the Fundamental Law (Constitution), it is not possible to establish the nullity of the legal transaction as a violation of the law, as no rights and obligations of the parties arise directly from it. A directive, resolution, regulation, etc. cannot be considered legislation, even if it is issued by an authority. Lénárd Darázs points out that, if necessary, the nullity of a contract in conflict with foreign law can also be established if the contract is governed by foreign law due to the application of collision rules. (Darázs, 2008, p. 24) It should be mentioned that in the case of a contract that conflicts with the law, other legal consequences may arise instead of invalidity, if the contract is concluded with the content specified in the law, contrary to the different stipulations. (Vékás, 2008, p. 781; Wellmann, 2013, p. 135).

From the point of view of assessing a prohibited contract, the criminal rules contained in the Criminal Code are given a special assessment. It can generally be said that any contract is contrary to the law in which a service provided by one of the parties is a criminal offence in itself.[9]

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[9] Decision of Regional Court of Appeal of Szeged No. BDT 2006.1450; Supreme Court order No. BH 2009.46.

3.3.3. Contracts contrary to good morals

A systematic evaluation of contracts that are contrary to good morals would even deserve a separate study, so I just want to address two interpretation issues. (For monographic processing of the legal institution see Menyhárd, 2004.) Violation of the law also includes a violation of good morals. However, it does not follow, in my view, that in the event of a breach of law which does not have the effect of invalidity (there are other legal consequences, or based on an individual interpretation of the infringed law, the legislature does not intend to nullify the juridical act), a conflict with good morals can be established. Some grounds for nullity are special rules named in relation to the violation of good morals, therefore in the absence of additional facts, the prohibition of violation of good morals does not apply to these legal norms. Parallel enforcement in the case of a mistake, misrepresentation, and a transaction with obvious disproportionality of value is also excluded. Parallel enforceability would undermine these legal norms on the one hand, and prevent the legal and dogmatic aspects of concluding contracts that are open to challenge on the other hand.

The demarcation is more problematic in relation to the grounds for challenges in Act XLIX of 1991 on Bankruptcy Procedure and Liquidation Procedure (hereinafter Bankruptcy Act). The special feature of the rules set out in the Bankruptcy Act is that, in most cases, they only constitute grounds for a challenge if, and to the extent that, the party to the contract becomes insolvent and liquidation proceedings are subsequently instituted against him. [Art. 40(1) Bankruptcy Act] Failing this, these transactions are not invalid themselves and do not conflict with good morals in the absence of additional facts. It is not an ethical requirement but a road safety requirement that a company should satisfy its creditors and provide free benefits to others in a way that does not jeopardise its viability. In the event of an action to the contrary, both the debtor and the contracting party must take into account that the amount provided or the service provided will be part of the creditor's assets in the event of the debtor's insolvency. Since they are essentially rules on damages, it follows that these statutory facts do not constitute a *lex specialis* in comparison with contracts that are manifestly contrary to good morals. The situation is more complicated when judging a so-called fraudulent transaction regulated by Article 40(1) of the Bankruptcy Act. A fraudulent transaction is, in itself, manifestly contrary to good morals, since it expressly presupposes bad faith on the part of the contracting parties. In this sense, the transaction does not require additional facts to be considered that are manifestly contrary to good morals. According to case-law, it follows that if the time-limit for challenging the contract has expired, the interested party may, if the facts materialise, seek a declaration that the contract is contrary to good morals, without the need to prove additional facts.[10] The fact that a fraudulent transaction can be regarded as a *lex specialis* in comparison with a transaction contrary to good morals only in the sense that the legal fact 'takes effect' when the

[10] Supreme Court order No. Gfv.IX.30.038/2011/4.

winding-up proceedings are opened – but there is no legislative intent behind it – or after the commencement of the liquidation, this precludes a finding that the transaction was contrary to good morals.

3.3.4. Usurious contract and contract with obvious disproportionality of value

Usurious contracts, contracts with obvious disproportionality of value, and unfair contract terms can, in my view, actually be considered cases of contracts that are contrary to good morals. In the case of a usury contract, the contracting party enters into a remarkably disproportionate advantage by capitalising on the other party's position when concluding the contract, i.e., within the framework of freedom of contract, but still in an immoral way in the opinion of society. A usury contract, therefore, restricts the general possibility of freedom of contract to protect persons in a socially and economically weaker position, that is to say, on social and moral grounds. Case law basically distinguishes between objective and subjective elements, thus considering the vulnerable economic situation and the difference in value to be objective, while the targeted use of the vulnerable position of one contracting party by the other party is subjective.[11] The facts of a usury contract are very similar to a contract concluded with a strikingly large disproportionate value. The main difference in the latter case is the absence of a vulnerable position of the other party, and in the case of a usury contract, the stipulation of a disproportionate advantage. This practice is criticised by Menyhárd (Menyhárd, 1999, p. 234). The assessment of the concept of disproportionate advantage is fundamentally related to the consideration of the traffic habits and commercial practice for the given service for the contract to be classified as equally bilateral. Established case law generally identifies a disproportionate advantage as an obvious disproportion between the value of the service and the consideration, but the two concepts do not necessarily overlap.

I note that the principle of the application of contracts resulting in a synallagmatic obligation as a general rule is supplemented by a rule providing for the possibility of an action similar to that already known in Roman law and based on significant legal history. The rule, which has received significant criticism, is open to challenge because of the 'conflict between fairness and legal certainty'. Professor Lajos Vékás points out in a similar spirit that in a developed market economy the requirements of commercial turnover are also applicable to private law contracts, so the creation of certain protection situations is justified only in the field of consumer protection. (Vékás, 1998, p. 322. In a similar spirit see Kecskés 1999, p. 138; Kemenes, 2002, p. 23.) The raison d'être of the obvious disproportionality is questionable, and I agree with Professor Vékás that it could at most have a *raison d'être* in the case of consumer contracts; it is definitely necessary to regulate this. From a taxonomic point of view, obvious disproportionality is actually a kind of subsidiary adjunct to a mistake, which could in fact be placed in the category of contracts that, at most, are contrary to good morals.

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[11] Csongrád County Court judgment No. 1.Gf. 40.212/1998.

3.3.5. Unfair standard contract terms

Unfair general contractual clauses are also actually contracts that are against good faith, as they are contracts with content incompatible with the principles of good morals and fair dealing. According to Attila Menyhárd, there are, in principle, two possible solutions for determining the relationship between an unfair standard contract term and a contract that violates good morals. One is to consider the invalidity of unfair standard contract terms as a special factual situation compared to contracts that are contrary to good morals, but he does not consider this solution acceptable. He believes the correct solution is that if a condition considered unfair is of such gravity, it may at the same time be contrary to good morals, and thus nullity must be established ex officio. If the unfair standard contract term does not otherwise make the contract manifestly contrary to good morals, the term can only be challenged. (Menyhárd, 2004, p. 261) I would add that even if the unfairness of a standard contractual term cannot be established, in the absence of other additional facts it is conceptually ruled out that it would be contrary to good morals.

3.3.6. Invalidity in consumer contracts

The next large group of grounds for invalidity due to lack of legal effect can be linked to consumer contracts. In these cases, the aim is to increase the protection of vulnerable consumers against business enterprises. This also includes the nullity of fiduciary credit collateral, if the consumer undertakes to transfer ownership or another right or claim or to establish a call option. Domestic legislation also took into account the need to somehow divert the previously controversial practice into a clear regulatory framework.

3.3.7. The impossible service

The rule of *'impossibilium nulla obligatio est'* already appeared in Roman law as a result of the Celsus regulation in relation to the obligation to transfer a thing that no longer exists. Old Hungarian law also considered a contract for the supply of a non-existent thing to be a base case. Nevertheless, a distinction between material and subjective impossibility was already made earlier. The former meant that the performance of the service was impossible for anyone, while a subjective impossibility would occur if the performance of the service was impossible only for the debtor in question.

In addition to impossibility in kind, the (economic) impossibility of interest – when the service could only be provided by disproportionately unreasonable victims – and legal impossibility were also acknowledged. The latter included the supply of a non-marketable thing or the assumption of an obligation contrary to a legal prohibition (e.g. the transport abroad of goods subject to an export ban). It can also be seen from the examples of the time that there is no clear demarcation line between legal impossibility and violating the law, the classification varies depending on the judicial practice.

3.3.8. Incomprehensible, contradictory stipulation

A contract aimed at an impossible performance shall be null and void. The performance of a service shall not be impossible due to the obligor not having the subject of the service upon the conclusion of the contract.

Whether specific contractual clauses are indeed incomprehensible or contradictory can only be determined by interpreting the contract. Each contract term must be interpreted in accordance with the contract as a whole. In the case of terms included in a general contract term or other terms not individually negotiated, a more favourable interpretation shall be adopted for the party applying the term; and in the case of a contract between a consumer and a business, the contradiction or doubt must be resolved by adopting an interpretation that is more favourable to the consumer than any provision of the contract. A stipulation can therefore only be declared null and void if the content of the provision cannot be revealed by interpretation, or the contradiction between the clauses cannot be resolved.

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LEGAL THEORY AND THE JUDICIAL PRACTICE OF THE INVALIDITY OF LICENCE AGREEMENTS*

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Abstract: The purpose of the paper is to provide an overview of the invalidity rules and case law of licence agreements in the field of copyright law. The rules governing copyright relations are not exclusively governed by the rules of copyright law but are complemented by the rules of civil law as well. The specific grounds for invalidity issues of licence agreements show that these contracts are specific among private law contracts and that the rules applicable to them cannot be brought solely under the Civil Code. This special situation and legal environment are justified by the typically weaker position of the author in the contracting process, consequently, we can find some author-sensitive rules here. The copyright law rules on the invalidity of licence agreements can be found in a mosaic-way, rather than in a concentrated way, as in the Civil Code. The reason for this is also to be found in the regulatory environment, since the Copyright Act only lays down the 'copyright-focused' invalidity rules, which can supplement the grounds for invalidity in the Civil Code in cases where the subject matter of the legal relationship is the use of a copyright work. The paper primarily focuses on some 'general civil law' issues of invalidity, such as the requirement of written form, the gross disparity in value, or the problems of standard contractual terms and conditions in line with licence agreements. In this sense, I intend to focus on not just the legal theory but show the relevant judicial practice as well.

Keywords: *licence agreement, copyright contracts, invalidity, unfair general terms and conditions, gross disparity in values*

1. INTRODUCTORY THOUGHTS

The purpose of the paper is to provide an overview of the invalidity rules and case law of licence agreements in the field of copyright law. The rules governing copyright relations are not exclusively governed by the rules of copyright law but are complemented by the rules of civil law as well.

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We can find specific invalidity rules and causes for copyright licence agreements, which show that these kinds of contracts are specific among private law contracts. Consequently, it also means that the applicable rules cannot be brought solely under the *Act V of 2013 on the Civil Code* (henceforward abbreviated as Civil Code or CC) Civil Code, since *'the author's position in the contracting process is typically weaker'.* (Faludi, 2022, p. 82), but the rules of the *Act LXXVI of 1996 on Copyright Law* (henceforward abbreviated as CA or Copyright Act) shall also be applied.

The emphasis of the specific features and the special autonomy of licence contracts are also reflected in one of *Gábor Faludi's* works, which highlights the special nature of these contracts according to the rules of the so-called oeuvre contract (Art. 44 CA), which shall be regarded null and void as a special invalidity type.

The framework for the lawful usage of copyright works is laid down in Art. 16(1) of the Copyright Act. According to this strict rule, *'[o]n the basis of copyright protection, authors have the exclusive right to utilize works in whole or any identifiable part, whether financially or non-financially, and to authorize each and every use'.* In light of this rule, the legal literature highlights that *'it covers the full range of social uses of the work'.* (Gyertyánfy, 2000, p. 96) The second sentence of the given Article adds that *'[u]nless otherwise stipulated in this Act, use permits can be obtained with use contracts'.* Therefore, the CA explicitly creates and requires a contractual relationship between the user and the copyright holder. Thus, unlike the previous Copyright Act,[1] it does not allow a unilateral form of copyright consent, but only allows the lawful usage by contract.

According to Art. 42 of the Copyright Act we can define licence agreements as the following: *'[a]uthors grant licenses for the use of their works based on use contracts, and the users are obliged to pay remuneration in return'.* Regarding the conceptual elements, it is worth mentioning that the user is not obliged to use or exploit the work; it is only a right, a possibility for him/her. Therefore, the only obligation is the payment of the fee, regardless of whether (s)he has started using the work or not. The importance and necessity of payment are also emphasized by the judicial practice. In a concrete case (8. Pf. 20.136/2008/5.) the Budapest Court of Appeal emphasized that the negotiation about the payment is one of the necessary, essential elements of the licence agreements.[2] Consequently, if the parties do not agree on this essential element, the contract will not be concluded between them [Art. 6:63(2) CC], so this issue affects the existence of a licence contract and not its validity. The legal literature also stresses the following essential elements: the parties

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1 Act III of 1969 on Copyright Law, Article 13 (1).

2 *'An essential feature of a licence contract is that the author gives permission to use the work for a fee. In the case of a contract for a future work, if the user accepts the completed work and pays the fee, he also acquires the right to use the work to the extent specified in the contract. Therefore, unless otherwise agreed by the parties, the stipulated fee also covers the consideration for the right acquired under the license and the activity performed.'* (BDT 2008. 1862.)

and the work (which is not necessarily an already existing work).[3] According to the official justification of the CA *'[i]t is clear what the relevant issues are in the case of licence contracts: these include the identification of the work, the indication of the method of use, and the consideration for the license to use it. It would not be appropriate, and it would be strange to our civil law if the law were specifying such mandatory elements, which absences result in the invalidity of the contract.'*[4]

Thus, if the parties do not agree on the essential elements of the contract, it will not be concluded between them, so its invalidity cannot be examined even if it can later be established that there was a reason for invalidity in the contract. (Budapest Court of Appeal 8. Pf. 20.812/2009/6.)

2. THE INVALIDITY RULES OF THE COPYRIGHT ACT

However, the primary aim of the article is the analysis of the invalidity of licence agreements in line with the rules of the Civil Code, it is important to say a few words about the relevant copyright law regulations as well.

Contrary to the concentrated invalidity reasons of the Civil Code, which are in a separate chapter, the invalidity rules concerning licence agreements can be found in the Copyright Act like a 'mosaic'. The reason for this structure is the regulatory environment because the CA prescribes only the 'copyright-focused' invalidity reasons, which are outside the Civil Code. In fact, these rules supplement the basis of invalidity rules, when the subject of the legal relationship is the use of a copyrighted work.

The Copyright Act prescribes – as it was also mentioned – the nullity of an oeuvre contract so that a licence contract in which an author grants a license for the use of an indefinite number of future works is null and void. Furthermore, the Act adds that a license cannot be validly granted for a means of use that is unknown at the time a contract is concluded (Art. 44 CA).

Furthermore, the Copyright Act fixes that a licence agreement is valid only in a written form, with some exceptions (Art. 45 CA), but this issue will be analysed later in the publication in connection with the rules of the Civil Code.

In addition to the two sections, Article 16(4) should be mentioned as an additional ground for invalidity, which, due to the rule of the same formality and the protection of the author's right to the fee, requires that the waiver of remuneration shall be recorded in a written form. Furthermore, according to Article 41(1e) of the Copyright Act, the contractual provisions that would exclude certain cases [Art. 41(1)–(1d) CA] of free use for the benefit of the blind and visually impaired are void. The 'mosaic-like' mentioned above is reinforced by Article 62(4) and Article 84/B(5), which prescribe the grounds for nullity to protect the person lawfully using the database. To protect performers, the Act rules that where a performer is entitled to recurring

[3] Licence agreement can be concluded for a future work as well. (Art. 49 and 52 CA), which is not the same as oeuvre contracts, which is null and void. (Art. 44 CA)

[4] Official Justification of the Copyright Act (for Art. 42–57).

payments under contract on the fixation of performances with a phonogram producer corresponding to the income from the use of their performances, the performer shall receive remuneration following the fiftieth year calculated from the first day of the year after the year when the phonogram was lawfully published or, failing such publication, the fiftieth year after it was lawfully communicated to the public. Any provision for the deduction of advance payments or any contractually defined deductions shall be null and void [Art. 74/A(3) CA].

3. THE POSSIBLE GROUNDS FOR INVALIDITY UNDER THE CIVIL CODE

According to the relationship between the Civil Code and the Copyright Act, the two Acts shall be applied simultaneously in certain matters. Such an issue is the invalidity of licence agreements, where, although the Copyright Act lays down specific rules, the relevant part of the Civil Code shall also be applied. However, it is also worth noting that not all the invalidity causes of the CC (Art. 6:90–6:107) can be interpreted unambiguously in the context of licence agreements, which situation also reflects the independent nature of licence agreements among civil law contracts.

If we focus on the invalidity reasons of the Civil Code, it may be of particular interest to examine, for example, mistake (Art. 6:90 CC), misrepresentation (Art. 6:91 CC), unfair general terms and conditions (Art. 6:102–103 CC), immoral contracts (Art. 6:96 CC), the gross disparity in value (Art. 6:98 CC) or formal discrepancies (Art. 6:94 CC).

3.1. Gross disparity in values

The gross disparity in values is well known in civil law and it is not completely strange in copyright relations, since it can mostly occur in the field of the usage of works, consequently in licence agreements. According to the civil law rules, in the case of a gross disparity in values between the service and the consideration, the injured party shall be allowed to avoid the contract [Art. 6:98(1) CC]. However, this can occur in copyright relations as well, the real application of it among licence agreements is unusual.

Both the judicial practice and the legal theory emphasize that the real possibility to apply gross disparity in values in line with the rules of the Civil Code cannot be successful in copyright law disputes.

The Budapest Court of Appeal emphasized in a case (Pf. 21.239/2014/7.), that gross disparity between the services can emerge in copyright law relations, but as an invalidity reason, it was not applicable in the concrete case. The court had to adjudicate the issue in a contract for the production and distribution of the figures of a cartoon for plush toys. Therefore, the essence of the contract was the exclusive right to authorize the commercial exploitation of a characteristic and original form contained in a copyright work (in this case a series of cartoons), that is the right to merchandising. (About the merchandising see in detail Tattay, 2009, p. 337; Görög, 2011, p. 20). According to the contract, the plaintiff was entitled to reproduce and distribute the characters for 36 months from the start of production and to sell the

finished products for a further 6 months after the expiry date. The amount of the licence fee was HUF 100,000 + VAT, for a period of 3 years, but the contract was not signed by one of the rightsholders. The plush figures were seized by the tax authority in that year and then returned to the plaintiff on the condition that they could be marketed only if they obtained the necessary authorization from both rightsholders. In the legal dispute, the plaintiff based the claim on the gross disparity in values, because (s)he referred that had to enter into a new licence contract with the rightsholders for the sale of the seized plush figures, in which (s)he undertook to pay a bigger amount, HUF 1,000,000 + VAT. The plaintiff was finally able to sell 2,500 of the plush toys, most of them at a lower price, and had to destroy some of them. As a result, the sales generated only HUF 2,500,000 so it would have been realistic to stipulate a license fee of HUF 250,000 + VAT, taking into account the standard 10% royalty, which actually exceeded the paid amount by HUF 750,000 + VAT. Consequently, (s)he argued that this resulted in a gross disparity in values between the services, so the contract would be invalid and the overpayment of HUF 750,000 + VAT would be refunded to him. The court highlighted that the circumstances alleged by the plaintiff occurred after the conclusion of the contract. Additionally, the applicant, who knows the specialties of the relevant market, did not calculate with the mentioned circumstances, so they fall within the applicant's business risk as a market player.

As a summary, we can ascertain, that the element of the business risk in the gross disparity shall also be interpreted differently in licence contracts, since the position of the author and the user in the licence contracts is fundamentally different and, in most cases, they are in a different negotiating position (Nahmias, 2020, p. 157). It follows that the occurrence of risk cannot be interpreted in the case of licence contracts as defined in the Civil Code concerning gross disparity. The Civil Code sets out, as an exception, the case where the party to the contract may have recognized the disproportion or assumed the risk thereof. When interpreting the concept of risk in copyright, it should be emphasized that in the context of the usage of work, the risk of the author should not extend beyond finding a user for his work. This is what the legal literature calls the risk of creation (Gyertyánfy, 2020, p. 155), and it points out that, on the other hand, an investor risk appears on the side of the user, which begins where he can successfully convey the given work to the public. If an author would base his claim on the Art. 6:98 of the Civil Code, the element of risk-taking could eliminate his rights and it would not be in line with the logic and dogmatic of copyright law.

Consequently, it can be ascertained that the author, and in many cases the user as well, will be in a better position if the claim is grounded on the special copyright law institution, the bestseller clause, which can help better their litigation than the gross disparity in values.

3.2. Formal requirements

According to Article 6:4(2), a legal statement can be made orally, in writing or implicitly, which rule is also fundamental in the field of contract law. However, this does not mean that legal provisions, whether the Civil Code or other laws, cannot require the validity of the contract to a written form. A good example of this situation is the licence contract, since the Copyright Act provides that *'[u]nless otherwise provided by this Act, use contracts shall be put in writing'*. [Art. 45(1) CA] The written form is of guarantee-nature (Pogácsás, 2017, p. 43), which is justified on the one hand by the weaker position of the author and on the other hand the possibility of a long duration of copyright protection. As the legal literature mentions an example, e.g. *'if the author enters into a contract for the publication of his novel at the age of thirty and the term of protection is stipulated as the term of the license, the term of the contract may be longer than one hundred years. Due to its long duration, it would be almost impossible to prove the content of an oral contract.'* (Fejesné et al., 2020, p. 30).

Besides the general requirement of the written form, the CA allows some exceptions. It shall be mentioned that previously only one exception was prescribed in this Article, i.e. when the licence agreement was concluded for publication in a press product, daily newspaper, or periodical. But since the newest amendment of the CA[5] a use contract need not be made in writing if it is concluded for publication in a press product, daily newspaper, or periodical; or for licensing non-exclusive, free use rights defined in the special case by the CA[6]; or for licensing non-exclusive use rights for software and database recognized as a collection of works; or by accepting the author's offer for licensing non-exclusive, free use rights for non-specific or for an indefinite number of persons.

So, before the latest amendment of the CA, there was only one exception. Therefore, we can find only such judicial decisions yet, which deals, dealt with this issue. In connection with this exceptional case, a decision of the Budapest Court of Appeal emphasized that *'[i]f the licence agreement relates to publication in a daily newspaper or magazine, its written form is not a mandatory requirement'*. (BDT 2006.1467.)

Besides the legal consequence of nullity, the legal literature emphasizes that *'[t]he obligation of the written form (…) shall be interpreted broadly. This means that all statements regarding the licence agreement are valid only in writing.'* (Gyertyánfy, 202, p. 306) This interpretation is grounded on the 'requirement of the

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5 Act XXXVII of 2021 on the modification of the Act LXXVI of 1999 on Copyright Law and of the XCIII Act of 2016 on the Collective Rights Management.

6 This right extends, in particular, to the case in which works are made accessible to the public by cable or by any other means or in any other manner in a way in which the members of the public can determine individually the time and place of access. [CA. Art 26 (8) second sentence]

same form' which is well-known in civil law,[7] and it is in line with the protection of the interests of authors. [Art. 6:6(2) CC] Even though the CA contains a mandatory provision on the formality of licence agreements, this rule has not been fully leaked into the contract practice. (See for example Supreme Court Pfv.IV.22.317/2011/6., Budapest Court of Appeal 8. Pf.21.422/2010/3., Budapest Court of Appeal 8. Pf.20.394/2016/3., Szombathely Tribunal 17. P.20.663/2014/36/I., Szombathely Tribunal G.40.003/2016/7., Debrecen Court of Appeal Pf.I.20.634/2016/6., Budapest Court of Appeal Pf.21.817/2009/6., BDT 2019.3989.)

In line with the formal requirement the CA regulates the issue of concluding the contracts by electronic means, but only in the field of collective rights management. According to the Art. 45(3) of the CA, a licence agreement between a collective management organisation and a user may be concluded electronically if the collective management organisation is subject to a legal statement made in advance by the collective management organisation and the user prescribing the use of electronic means, and the licence contract is entered into by way of electronic means as instructed by said legal statement. The contract so executed shall be construed to have been made in writing.

According to the rules of the Civil Code, if a contract is null because of any breach of formal requirements, it shall become valid by acceptance of performance, up to the extent performed [Art. 6:94(1) CC], which regulation shall also be applied in the case of licence agreements as well.

3.3. Unfair general terms and conditions

According to the Civil Code, a contract can be concluded by general terms and conditions as one of the special ways of entering into a contract (Art. 6:77–6:81 CC). The application of general terms and conditions is an essential part of economic life, as individual bargaining would make it impossible to provide products and services on a large scale. However, it is acknowledged, that there are some dangers in using them, since the guarantees of the classical contracting mechanism and the bargaining process are delayed, consequently, the contractual balance is breaking. (Török, 2010, p. 81) In other words, it can be said, that *'the classification of a system of contract terms as general terms and conditions is a central issue with neuralgic elements in the legal sense of the contract'*. (Leszkoven, 2014, p. 3)

The role of the general terms and conditions is also important in the mechanism for concluding the licence contract, as they are also used in copyright cases in many cases. Nowadays, the use of software or access to other computer programs takes place almost without exception electronically and on general terms and conditions,

[7] According to the Art. 6:6 of the CC, if a legal statement has to be made in a specific form determined by law or by agreement of the parties, the legal statement shall be considered valid only if made in that form. If a legal statement is considered valid only if made in a specific form, it shall be amended, confirmed, withdrawn and challenged, and the amendment and termination of any legal relationship entered into under such legal statement shall be made in that form as well.

which can be regarded as an automated form of concluding contracts. (Németh, 2018, p. 12) In such cases, the authorization may be for commercial and for non-commercial purposes as well. The legal literature emphasizes that – taking into account the provisions of the Civil Code (Art. 6:82–6:85 CC), such cases should also be considered as a written contract, so writing is not required in a strictly classical sense. (Fejesné et al., 2020, p. 33)

Both the judicial practice and the legal literature highlight that in the case of general terms and conditions, the other party has no real possibility to participate in the establishment of the content of the contract, because of the lack of the classical bargaining process. (Leszkoven, 2014, p. 6)

If we overview the invalidity rules in line with the general terms and conditions, they can be divided into two groups based on the mode of invalidity. (Barzó, 2015, p. 187) In the case of unfair general terms and conditions, if it is a part of a non-consumer contract, the injured party can contest it [Art. 6:102(5) CC]. If the unfair contract term has been incorporated into a consumer contract, i.e. when a consumer and a business party conclude the contract with each other, then it shall be null and void. In this case, nullity may be invoked in favour of the consumer [Art. 6:102(5) CC]. In this context, it is necessary to determine whether a licence contract constitutes a contract between a consumer and a business. If so, the unfair terms and conditions shall be regarded as null, due to the consumer contract nature. If the answer is no, they can be contested by the injured party, typically the author. The question is interesting and significant. In the legal literature, we can find numerous works which deal with and analyse the common points of consumer protection and intellectual property law. Other works pay attention to the relationship between consumer protection and digitalization (Barta, 2020), which can also affect IP law. The literature emphasizes that indirect consumer protection regulations may arise in intellectual property law in several ways and some direct consumer protection regulations can be found primarily in the field of industrial property law (Szilágyi, 2021). It is also highlighted that the link between consumer protection and copyright law can also be established, even if it is not as organic and direct as we can see in industrial property law, especially in trademark law. (Csécsy, 2015, p. 107). *György Csécsy* mentions in his work, that *'[a]ccording to the legal environment of copyright law, the conclusion can be drawn, that we cannot find any direct consumer protection rules, only some indirect provisions'*. (Csécsy, 2015, p. 108) We largely agree with this thought and it also shall be stressed, that, in our view, authors can not be regarded as consumers.

While it is true that in many cases, authors are in a vulnerable position vis-à-vis the user (e.g., if the young, beginner author concludes a contract with a large book publisher), if we look at the legal concepts, the notion of the author cannot be met with the definition of the consumer without any concerns. According to the Civil Code, 'consumer' shall mean any natural person acting for purposes that are outside his trade, business, or profession. [Point 3, Art. 8:1(1) CC] Neither the concept of consumer fixed in the Act on Consumer Protection is met with the notion of the author. According to the Consumer Protection Act (Act CLV of 1997 on Consumer

Protection, hereinafter CPA), the consumer shall mean any natural person who is acting for purposes of purchasing, ordering, receiving, and using goods or services which are outside his trade, business or profession, or who is the target of any representation or commercial communication directly connected with a product. (Point a) Art. 2 CPA) If we analyse the definitions, it can be stated, that the author is not a person, who is acting for purposes that are *outside his trade, business, or profession.*

Consequently, if we turn back to the original question: according to our point of view, authors cannot be regarded as consumers, so licence agreements cannot be qualified as consumer contracts. Thus, if the licence agreement contains any unfair general terms and conditions, it will not be null *ipso iure*, but the author, as the injured party, can contest it.

4. THE LEGAL CONSEQUENCES OF AN INVALID LICENCE AGREEMENT

The legal consequences of the invalidity of contracts prescribed by the Civil Code (Art. 6:108–6:114) shall also be applied in the case of the invalidity of licence agreements. However, their practical application in a concrete copyright dispute is already a more interesting question. From the point of view of copyright law, the essential consequence of an invalid licence contract is that in this case the user is not entitled to use the given work and it (s)he does not have permission, the use is not considered lawful, and it will result in a copyright infringement. On the one hand, it is in line with the rules of the Civil Code, since according to the Art. 6:108(1), no right may be established, and performance may not be demanded on the basis of an invalid contract. Consequently, rights incorporated in the contracts are not displayed on the user and are not entitled to use the work.

On the other hand, it is grounded on Art. 16(6) of the Copyright Act, which prescribes that use is construed as illegitimate especially if the law or the entitled person does not grant authorization for it in a contract or if the user makes use of the work beyond the limits of its entitlement. In this case, the legal consequences are fixed in the Art. 94 of the CA shall be applied.

The further legal consequences listed in the Civil Code are the declaring a contract valid by court ruling with retroactive effect, the validity of a contract by actions of the parties, *in integrum restitution*, and the payment for monetary value for unjust enrichment.

According to the Civil Code, in connection with an invalid contract, each party has the right to reclaim the service (s)he has provided from the other party in kind if that party also returns the service he has received in kind. The obligation to return what was received applies to the party requesting restitution irrespective of whether the time of prescription or the duration of adverse possession has lapsed. In the process of restitution, the original value-service ratio must be maintained. (Art. 6:112 CC) However, the legal literature emphasizes that it is necessary to examine whether there was a license from the rightsholder for the usage of the work. It is a vital issue, whether there was a licence contract, because if it was, the court shall take into

account it when applying the legal consequences, whether the user has started using the work. It means in the practice, that legal consequence of *in integrum restitutio* can only be applied until the user does not start the usage of the work. (Gyertyánfy, 2020, p. 320) This feature shows again the special nature of copyright law contracts and points out the irreversible nature of licence agreements. The situation is a little bit different if the user started the usage of the work. The former judicial practice was on the standpoint, that in such cases the contract shall be declared effective, and the parties shall settle the values. (BH 2017.341.)

However, according to the current Civil Code, the court may declare an invalid contract valid with retroactive effect to the date of conclusion of the contract if the harm resulting from invalidity can be eliminated by the amendment of the contract to that effect; or the reason for invalidity no longer applies. (Art. 6:110 CC)

In copyright disputes, the elimination of a harm of interest can appear in various ways. We shall take into consideration the role of moral rights in such situations as well, because the personal relationship between the author and his work can be a centre point in the harm of interests.

Just as in every contract, an invalid licence agreement can also become valid by the actions of the parties. [Art. 6:111(1) CC] In practice, this can happen in several cases, since, for example, if the parties put in writing their previously oral licence agreement, this will remedy the error. One of the main reasons for disputes over the use of copyrighted works is that the parties do not cover the legal relationship to a precise contractual framework or that the oral agreement is often not fixed in writing, as it is often considered an unnecessary formality or distrust. It would be worthwhile to be aware in practice that the conclusion of contracts and the precise fixation of their content are not a sign of mistrust, or legal inconvenience but the interests of both parties.

5. CLOSING REMARKS

In this publication, we summarized the most significant regulations of the Copyright Act in line with the invalidity of licence agreements. Besides this summary, we analysed those invalidity reasons prescribed by the Civil Code, which can be relevant in copyright licence relationships as well.

According to our point of view, the unfair general terms and conditions are especially significant in copyright law relations as well, since nowadays most licence agreements are concluded in this way. It is also worth mentioning that general terms and conditions are applied mostly by the users in their agreements, but it is not excluded either, that authors use standard contract terms to grant the licence. For example, well-known and respected authors also use this method of concluding contracts. It is also worth emphasizing, that even if the user applies standardized contracts, which contain unfair contract terms, in our point of view, the author cannot be regarded as a consumer, therefore it results in only avoidance, not nullity.

We also have seen that gross disparity can also emerge in copyright economic relations, however gross disparity in value is not the best way to protect the interest

of authors or other rightsholders, because of the element of business risk, which shall be interpreted in a special way in copyright law legal relationships.

Finally, it is also self-evident, that most of the invalidity-related copyright legal disputes arise from the problem of the lack of written form, which is highlighted not only by the Civil Code, but by the Copyright Act as well. This is also the reason why this ground for invalidity is the most easily interpreted in the case of licence contracts.

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DIE BEDINGUNG UND DIE WIRKUNG DES RECHTSGESCHÄFTS NACH UNGARISCHEM UND EUROPÄISCHEM RECHT

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Abstrakt: In dieser Arbeit analysiert der Autor die auflösenden und aufschiebenden Bedingungen und Befristungen als Nebenbestimmungen des Vertrags (Rechtsgeschäfts), welche den Eintritt, die Aufhebung oder die Modifikation der Rechtswirkung des Vertrags oder des Rechtsgeschäfts von einem ungewissen, zukünftigen, nicht von den Parteien verursachten Umstand abhängig machen. Unter der Wirkung des Geschäfts versteht man die Rechte und Pflichten der Parteien, welche regelmäßig eine Willenseinigung erzielen. Die Bedingungen der Parteien können die Wirkung aufheben, aufschieben oder modifizieren, aber sie selbst berührt nicht die Gültigkeit des Rechtsgeschäfts. Im Gegenteil – die absolut nichtigen Verträge bleiben ohne Wirkung ab der Entstehung, aufgrund des Gesetzes. Die bedingten Verträge bleiben von Anfang an gültig, obwohl die Wirkung des Willens der Parteien begrenzt wird. Die (verbotenen oder unmöglichen) Bedingungen können auch nichtig sein, und dann führen sie prinzipiell zu keinen Wirkungsbegrenzungen. Bei der relativen Nichtigkeit (Anfechtbarkeit), welche wegen Willensmangel (z. B. Irrtum) entsteht, verliert das Rechtsgeschäft seine Wirkung nach der erfolgreichen Anfechtung seitens des Interessierten, ex nunc. Ohne Anfechtung innerhalb der Anfechtungsfrist kann es gültig gemacht werden. Bei Bedingungen, z. B. auflösenden Bedingungen, ist eine solche „Konvalidation" der Wirkung nicht möglich, das Rechtsgeschäft ist auch weiterhin gültig, aber es verliert seine Wirkung. Die Analyse erfolgte aus rechtvergleichender Sicht, unter Berücksichtigung des ungarischen, deutschen, österreichischen, französischen und schweizerischen Rechts.

Schlüsselwörter: *Bedingung und zeitliche Bestimmung, Nichtigkeit, Anfechtbarkeit, Vertragsgültigkeit und -ungültigkeit, Wirkung des Vertrags*

Abstract: In this work, the author analyses the resolutory and suspensive conditions and time limits, as ancillary provisions of the contract (legal transaction), which make the entry, cancellation, or modification of the legal effect of the contract or the legal transaction depend on an uncertain, future circumstance not caused by the parties. The effect of the legal transaction is understood to mean the rights and obligations of the parties who regularly reach an agreement of intent. The terms and conditions of the parties may suspend, postpone or modify the effect, but they do not affect the validity of the legal transaction. On the contrary, absolutely void contracts have no effect from the time they come into being, due to the law. The conditional contracts remain in effect from the beginning, although the effect of the will of the parties is limited. The (forbidden or impossible) conditions can also be void, and then

in principle, they have no effect restrictions. In the case of relative nullity (contestability or voidability), which arises due to the lack of will (e.g. mistake or deception), the legal transaction loses its effect after the successful contestation on the part of the interested party, ex nunc. They can be validated without contestation within the contestation period. For conditions, e.g. resolutory conditions, such a 'convalidation' of the effect is not possible, the legal transaction is still valid, but it loses its effect. The analysis was carried out from a comparative law perspective, focusing on Hungarian, German, Austrian, French and Swiss law.

Keywords: *condition and timing, nullity, contestability, contract validity and invalidity*

1. ÜBER DIE AUSWIRKUNGEN DER BEDINGUNGEN UND DER ZEITBESTIMMUNGEN AUF DIE WIRKUNG DES VERTRAGS UND ÜBER IHRE DIFFERENZIERUNG VON DER UNWIRKSAMKEIT (ABSOLUTE UND RELATIVE NICHTIGKEIT) DES VERTRAGS – NACH EUROPÄISCHEM UND UNGARISCHEM RECHT

Die Wirksamkeit und Unwirksamkeit des Vertrags und die Wirkung des Vertrags sind unterschiedliche Rechtsbegriffe. Unwirksame Verträge haben keine Wirkung, aber die wirksamen Verträge können ihre Wirkung aufgrund einer Nebenbestimmung der Vertragsparteien über die Bedingung oder Zeitbestimmung verlieren oder modifizieren (§ 6:119 UBGB).[1] In der neueren ungarischen Literatur, welche die Regelung des ungarischen BGB, Gesetz V von 2013 (in folgenden UBGB) kommentiert, wird bemerkt, dass der ungültige Vertrag die von den Parteien zum Zeitpunkt der Vertragsschließung gewollte Wirkung bezweckt, diese Wirkung kann jedoch weiter nicht erwartet werden, infolge gesetzlich vorgeschriebener Ursachen, welche zum Zeitpunkt der Vertragsschließung bestanden haben. Die Rechtsfolge der Ungültigkeit regeln die §§ 6:108–6:115. des UBGB. Die Ursachen für die Ungültigkeit können im Willen, in der Willenserklärung oder in den bezweckten Rechtswirkungen bestehen (Vékás, 2021, S. 110, Rnr 246, 248; Kiss and Sándor, 2014, S. 15–63).

Hinsichtlich der Voraussetzungen für die Entstehung der wirksamen, gültigen Verträge *(validité du contrat)* ist auch in den anderen europäischen Kodifikationen vorgeschrieben, dass die Parteien die gesetzlichen Voraussetzungen für die Gültigkeit des Vertrags erfüllen sollen.[2] Unter der Wirkung des Rechtsgeschäfts

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[1] Paragraph 6:119 des ungarischen BGB (UBGB) spricht über die Rechtswirkungen der unwirksamen Verträge: „(1) Falls der Wirkung des Vertrags noch nicht eingetreten ist, oder wenn der Vertrag seine Wirkung verliert, insbesondere in dem Fall, wenn das Einverständnis eines Dritten oder die Genehmigung von einer Behörde verfehlt oder abgewiesen wird – die Erfüllung des Vertrags kann man nicht verlangen. (2) Bei erfüllten Leistungen, die aufgrund von unwirksamen Verträgen erfolgten, gelten entsprechend die Rechtsfolgen über ungültige Verträge."

[2] Die alte, vor der Schuldrechtsreform geltende (weiter: alte) Regelung des französischen Code civil *(Des conditions essentielles pour la validité des conventions)* bestimmt in Art. 1108 für die Entstehung des gültigen Vertrags die nötigen Voraussetzungen, wie Willenseinheit, Geschäftsfähigkeit, Gegenstand des Vertrags, Form des Vertrags, und

(éffets des contrats) versteht man die nach der freien Vertrags-/Willenseinigung erzielten und entstandenen Rechte und Pflichten zwischen den Parteien,[3] ihre Fälligkeit und die beiderseitige Realisierungsmöglichkeit. Die Wirkung des Vertrags entsteht in der Regel zum Zeitpunkt der Schließung eines gültigen Vertrags. Durch Bedingungen, welche als Nebenverpflichtungen von den Parteien in den Vertrag eingeschlossen werden, kann die Wirkung des Vertrags begrenzt, modifiziert oder aufgehoben werden, und somit wird die Wirkung durch ein ungewisses zukünftiges Ereignis aufgeschoben, oder die erst nach Vertragsschließung entstehende Wirkung kann aufgehoben oder modifiziert werden. Als Folge der Nichtigkeit wird die Wirkung des Vertrags aufgrund des Gesetzes *(ex lege)* und von Anfang an *(ab initio)*, aufgehoben, aber bei Bedingungen und Zeitbestimmungen hängt die Wirkung des Vertrags im Einklang mit dem Parteiwillen von vorhergesehenen zukünftigen ungewissen Ereignissen ab, also vom Geschäftswillen der Parteien. Nach der Bestimmung des geltenden ungarischen Rechts [§ 6:108(1) UBGB] entstehen aufgrund ungültiger Verträge für niemanden irgendwelche Rechte und die Erfüllung des Vertrags kann nicht gefordert werden. Die Regelung des ABGB (Österreichisches Allgemeines Bürgerliches Gesetzbuch) setzt für die Entstehung und Wirkung des Vertrags bestimmte Erfordernisse voraus, wie die Fähigkeit der Personen (§§ 865–868 ABGB), und nach §§ 869–877 die wahre Einwilligung,

neben diesen auch die Causa (Rechtszweck). (Falls eine von diesen verfehlt oder rechtswidrig ist, kann der Vertrag nicht entstehen, er ist ungültig, hat keine Wirkung.) Nach der Schulrechtsreform des französischen Code civils (2016/2020) ist die Causa nicht mehr eine Voraussetzung für die Entstehung des gültigen Vertrags, – statt dem wird ein gültiger Vertragsinhalt vorgeschrieben (vgl. Art. 1128, Code Civil; Henry et al., 2020, S. 1324–1325). Unter dem Inhalt des Vertrags versteht man die Gesamtheit der Rechte und Pflichten in Zusammenhang mit dem Gegenstand des Vertrags. Siehe z. B. Nach der Regelung des alten Code civil, Art. 1131.: L'obligation sans cause, ou une fausse cause, ou sur une cause illicite, ne peut avoire aucun effet. (Die Obligationen mit fiktiver oder verbotener Causa bleiben ohne Wirkung.) Nach der neuen Regelung des Cc-s, Art. 1128 *(la validité du contrat)* sind für die Gültigkeit des Vertrags die folgenden Voraussetzungen unentbehrlich: 1) die Willenseinigung der Parteien *(le consentement des parties)*; 2) Handlungsfähigkeit der Parteien *(leur capacité de contracter)*; 3) erlaubter und bestimmter Vertragsinhalt *(un contenu licite et certain)*. Siehe Henry et al., 2020, S. 1324. Also ist die Causa ausgeblieben, damit das Cc. sich dem deutschen BGB (1896, Schuldrechtsreform: 2001–2006) annähert, welches *ab initio* die antikausalistische Theorie vertrat.

[3] Nach der klassischen französischen Literatur versteht man unter der allgemeinen Wirkung des Vertrags die Rechte und Pflichten, die nach Vertragsschließung zwischen den Parteien entstehen. Der Vertrag verpflichtet nämlich die Parteien gleichermaßen wie das Gesetz, oder mit der gesetzlichen Kraft. *(Le contrats on force de loi les parties.)* (Siehe, Colin and Capitant, 1924, S. 309.) Ebenso wird in der ungarischen Rechtswissenschaft, nach den Autoren András *Földi* und Gábor *Hamza*, unter die Wirksamkeit des Rechtsgeschäfts die aktive Existenzphase verstanden, während die durch ein Rechtsgeschäft entstandenen Rechte und Pflichten die Parteien geltend machen können. (Földi und Hamza, 2018, S. 386, Rn. 1265)

weiterhin nach §§ 878–882 die Möglichkeit und Zulässigkeit, und schließlich nach §§ 883–890 die Form der Verträge. Nach § 869 des ABGB ist für die Entstehung und Wirkung des Vertrags die freie, ernsthafte, feste und verständliche Einwilligung unentbehrlich. Ist die Erklärung unverständlich, ganz unbestimmt, oder erfolgt die Annahme unter anderen Bedingungen, als unter welchen das Angebot gemacht worden ist, so entsteht kein Vertrag (Doralt, 2014–2016, S 98). Der *geheime Vorbehalt*, – nach der *Erklärungstheorie* (auch Verkehrstheorie), welche von der deutschen (z. B. *Kohler*, Studien über Mentalreservation; *Windscheid, Henle, Zitelmann, Schlossman*, siehe, Szalma, 2015a, S. 467–482) und der französischen Rechtslehre *(Saleilles)* in der II. Hälfte des XIX. Jahrhunderts als dominante Auffassung bewertet wurde –, hat keine Relevanz für die Wirkung des Vertrags, er hebt die Wirkung nicht auf, nicht zuletzt weil die andere Vertragspartei den suspensiven, geheimen Geschäftswillen nicht kennt, welcher der Erklärung gegenübersteht. So ist der suspensive Wille nichtig, welcher dem erklärten Willen entgegensteht [so auch § 6:92 (1) UBGB]. Nach der klassischen deutschen Literatur (Enneccerus) ist der geheime Vorbehalt bei einseitigen Geschäften, wie bei der Auslobung, unwirksam. (Enneccerus, Kipp, Wolff, 1958, S. 159; mit der Aufmerksamkeit auf § 657 des BGB) Der geheime Vorbehalt wird vom ABGB nicht unmittelbar geregelt. Doch der letzte Satz von § 866 enthält diesbezüglich eine indirekte Regelung, denn es wird bestimmt: „wer sich, um einen anderen zu bevorteilen, undeutlicher Ausdrücke bedient, oder eine Scheinhandlung unternimmt, leistet Genugtuung“ (Siehe Koziol, 2000, S. 126–127; Weiß, 1950, S. 49, Wolff, 1931; Doralt, 2014–2015, S. 98). § 6:92(1) des UBGB, welcher die Erklärungstheorie übernimmt, bestimmt eindeutig: *„der geheime Vorbehalt einer Vertragspartei berührt die Gültigkeit des Vertrags nicht.“* Die Hauptregel ist, dass der Geschäftswille nur dieselbe Geltung hat, welche die Parteien gegenseitig geäußert haben, was sie einander gegenseitig mitgeteilt haben. Der Grundsatz Treu und Glauben setzt wiederlegbar voraus, dass bei oder während der Annahme des Angebots, bei der Vertragsschließung, der innere und der geäußerte Wille miteinander in Einklang stehen.

Die *Willenstheorie*, – welche die Wirkung und Geltung des Rechtsgeschäfts mit dem inneren (psychologisch genannten) Willen verbindet, unabhängig vom geäußerten Willen, war die vorherrschende Lehre in der ersten Hälfte des XIX. Jahrhunderts. Nach der Willenstheorie ist der geheime Vorbehalt gültig, infolgedessen wird die Willensäußerung suspendiert, falls der Vorbehalt nach seinem Inhalt der Willensäußerung entgegensteht. Die Willenstheorie erkennt den geheimen Vorbehalt an, das heißt, ein solcher Vorbehalt suspendiert den geäußerten Willen. Mit anderen Worten, falls der Wille und die Erklärung gegeneinanderstehen, ist der Wille wirksam, das heißt auch der geheime Vorbehalt. Der geheime Vorbehalt hebt die Wirkung der Willensäußerung auf. Diese Theorie verlor jedoch die Unterstützung der Rechtslehre hinsichtlich des geheimen Vorbehalts wegen der Sicherheit des Verkehrs in der zweiten Hälfte des XIX. Jahrhunderts, und dies hatte auch eine Auswirkung auf die Gesetzgebung und Rechtsprechung. Doch die Willenstheorie ist in anderen Fällen, wie bei Schein- und verdeckten Geschäften,

noch bis heute in Kraft geblieben, auch in den Regelungen der europäischen Kodexen, welche am Ende des XIX. und während des XX. Jahrhunderts in Kraft getreten sind. Das Scheingeschäft ist nämlich deswegen nichtig, weil seine Wirkung die Parteien beiderseitig nicht gewollt haben, aber das verdeckte Geschäft zwischen ihnen wirkt deswegen, weil die Parteien es nicht nur als bloße Form wollen, sondern auch mit Wirkung. Diese Willenstheorie nimmt hinsichtlich des Scheingeschäfts auch § 6:92(2) des UBGB an. Weiterhin erwähnen andere europäische Kodifikationen noch, dass die Simulationseinrede gegen einen gutgläubigen Dritten (der seine Rechte auf einem simulierten Vertrag gründet) ohne Wirkung bleibt.

Die *französische* Rechtsprechung macht einen klaren Unterschied zwischen dem *Auftrag*, dem (geheimen) *Vorbehalt (réserve)* und der *Bedingung (condition)*. Beim ersten ist die Rede von der Erwartung einer zukünftigen gewissen Handlung; beim zweiten handelt es sich um den geheimen Vorbehalt seitens einer Partei, von welchen die andere Partei kein Wissen hat und deswegen hat der Vorbehalt keine Wirkung, er ist ungültig; beim dritten ist die Rede vom Einverständnis von beiden Parteien, dass im Vertrag enthaltene zukünftige ungewisse Ereignisse die Wirkung des Vertrags beeinflussen.[4] Im *deutschen Recht,* ebenso wie im französischen Recht, hebt der geheime Vorbehalt aufgrund § 116 des BGB den erklärten Geschäftswillen, also die Wirkung des Vertrags, nicht auf. Nach dem Wortlaut des BGB: *„Eine Willenserklärung ist nicht deshalb nichtig, weil sich der Erklärende insgeheim vorbehält, das Erklärte nicht zu wollen. Die Erklärung ist nichtig, wenn sie einem anderen gegenüber abzugeben ist und dieser den Vorbehalt kennt."* Das heißt, nach deutschem Recht hat der geheime Vorbehalt im Prinzip keine Wirkung, die Willenserklärung ist trotz dem Vorbehalt gültig. Die Ausnahme ist, falls die andere Partei vom Vorbehalt Kenntnis hat (Prütting, Wegen und Weinreich, 2007, S. 104–105). Im *schweizerischen* Recht (§ 2 Abs. 1 OR) ist für die Wirkung des Vertrags die ausdrückliche oder stillschweigende einvernehmliche Willenserklärung der Parteien notwendig. Falls sich die Parteien hinsichtlich der wesentlichen Punkte des Vertrags einig sind, verhindert der *Vorbehalt von Nebenpunkten* nicht die Verbindlichkeit des Vertrags. Falls sich aber die Parteien später nicht einigen können, kann das Gericht über diese Nebenpunkte, unter Berücksichtigung der Art, Natur und des ursprünglichen Zwecks des Rechtsgeschäfts entscheiden. In Art. 11 des schweizerischen OR wird geregelt, dass die Form die Gültigkeit des Vertrags nur dann voraussetzt, falls das Gesetz dies als verbindlich vorsieht. Falls die Formvorschrift nicht etwas anderes vorsieht, führt die Nichteinhaltung der vorgeschriebenen Form zur Ungültigkeit des Vertrags. Im geltenden ungarischen

[4] Siehe: Cour de cassation, V. Paris, 5. juill. 1972: Gaz. Pal. (Gasette du Palais), 1973.2.535 (bon de commande précisant que l'ordre de publicité, meme payé, pourrait étre refusé, sauf restitution du versement effectué); Comparer. Com. (Chambre commerciale de la Cour de cassation) 9. dec. 1980: Bull. civ. (Bulletin des arrets des chambres civiles de la Cour de cassation), IV. no. 421; D. (Recueil Dalloz) 1981. IR (Informations rapides du Recueil Dalloz), S. 441, abs. Audit (bon commande d'une véhicule automobile signé par une préposé du vendeur et subordonné à l'agrément de celui-ci).

Recht, nach § 6:63(1): *„Der Vertrag entsteht durch Ausdruck des gegenseitigen, einvernehmlichen Willens der Parteien."* Nach Absatz (2): *„Für die Entstehung des Vertrags ist die Einigung der Parteien über wesentliche oder irgendwelche von den Parteien als wesentliches Element gewerteten Punkte des Vertrags unentbehrlich. Die Einigung über wesentliche Fragen ist dann Voraussetzung für die Entstehung des Vertrags, falls die Partei eindeutig erklärt hat, dass sie ohne die Einigung über wesentliche Fragen den Vertrag nicht schließen will."*

Vom theoretischen, rechtsvergleichenden Standpunkt betrachtet, sowie im Lichte des geltenden ungarischen Rechts ist es unentbehrlich, einen Unterschied zwischen der *Nichtigkeit (absolute Nichtigkeit)* und der *Anfechtbarkeit (relative Nichtigkeit)* zu machen, weil sie einen verschiedenartigen Einfluss auf den Zeitpunkt des Vertrags – auf die Wirkung, bzw. die Aufhebung der Wirkung – haben.

Die *absolute Unwirksamkeit* des Vertrags[5] entsteht wegen dem Verstoß gegen die zwingenden gesetzlichen Regeln (im Falle der verbotenen Verträge, § 6:95 UBGB), wegen dem Verstoß gegen die guten Sitten – Sittenwidrigkeit (§ 138 BGB; siehe Schmoeckel, 1997; Zimbler, 1928; Sack, 1985; Mayer-Maly, 1994); *bonnes moers*, (fr., Art. 6 Code civil), wegen dem Verstoß gegen die Erwartungen des Grundsatzes Treu und Glauben (§ 1:3 des UBGB; *Treu und Glauben*, § 242, BGB), und gegen die gute Moral (§ 6:96 UBGB), wegen dem Verstoß gegen den Grundsatz der öffentlichen Ordnung (*l'ordre public*, Art. 6. Code civil),[6] Die Nichtigkeit entsteht

[5] Im französischen Recht *nullité absolues et nullités relatives*. Die absolute Nichtigkeit, Unwirksamkeit entsteht, wenn eine der Voraussetzungen für die Entstehung eines gültigen Vertrags fehlt, wie z. B. Fähigkeit, Willenseinigung *(consetement)*, Gegenstand des Vertrags *(objet)*, und vor der Schuldrechtsreform auch der sogenannte Rechtstitel, oder Causa *(cause)*. Dagegen ist bei der relativen Nichtigkeit, Anfechtbarkeit die Rede vom Willensmangel, falls die Partei im Irrtum war *(erreur)*, oder wenn sie von der anderen Partei betrogen *(dol)*, oder gezwungen wurde *(violence)*, oder wenn die Rede von der Verletzung über die Hälfte ist *(lésion*). (Colin und Capitant, 1959, S. 351 und S. 425, 429)

[6] Nach der französischen wissenschaftlichen Literatur stehen in Art. 6 des Code civil vorgeschriebene Erwartungen, Ausdrücke über: *„l'ordre public et les bonnes moers"* und sie bestimmen die Begrenzungen der Vertragsfreiheit. Diese Erwartungen des Gesetzes sind Imperative und ihre Verletzung „bestraft" (sanktioniert) das Gesetz mit der Nichtigkeit des Vertrags. Die Vertragsschließung, dessen Inhalt hängt von der freien Entscheidung der Parteien ab. Aber diese Freiheitsgrenze ist einerseits konkret, andererseits hat sie allgemeine Grenzen. Konkrete Begrenzungen können bei der freien Wahl der anderen Partei bestehen (beispielsweise beim Adhäsionsvertrag), beim Vertragsgegenstand (beispielsweise beim Verkehrsmoratorium), beim Vertragsinhalt (beispielsweise in den allgemeinen Geschäftsbedingungen). Die allgemeine Begrenzung der Vertragsfreiheit liegt in der öffentlichen Ordnung und den guten Sitten. Der Vertrag soll demnach mit der öffentlichen Ordnung und den guten Sitten in Einklang stehen; falls der Vertrag ihnen entgegensteht, ist er nichtig. (Siehe z. B. Mazeaud, 1962, S. 93–99) In der klassischen französischen Literatur siehe auch: Julliot de La Morandiere; 1939; S. 381; Malaurie, 1939. Die französischen Autoren verweisen darauf, dass die Definition der öffentlichen Ordnung *(l'ordre public)* als allgemeine Begrenzung der Vertragsfreiheit besteht, und im Falle der Ordnungsstörung als Ursache der Nichtigkeit kommt es zu

von Anfang an, *ex tunc*, vom Zeitpunkt der Vertragsschließung. (§ 6:95, 6:96 UBGB) Von den *in concreto* verbotenen Verträgen nennt das UBGB die Wucherverträge (§ 6:97 UBGB).

In Fällen des Verstoßes gegen die imperativen Normen und Grundsätze ist die Nichtigkeit und Wirkungslosigkeit *ab initio* eine prinzipielle Rechtsfolge und dies gilt falls das Gesetz nicht etwas anderes für bestimmte, einzelne Fälle des rechtswidrigen Verhaltens vorschreibt. So z. B. beim formbedürftigen Geschäft, falls die Parteien nur einen mündlich vereinbarten Vertrag errichten, ermöglicht das schweizerische OR die *„Sanierung der initialen Nichtigkeit"*: Falls die Parteien trotz der Formvorschriften nur aufgrund *solo consensu* eine Vereinbarung schließen, bzw. ihren Vertrag ohne die notwendige Form konstituieren, kann die Nichtigkeit durch beiderseitige Erfüllung vermieden werden. Eine solche Möglichkeit besteht auch im geltenden ungarischen Recht.

Nach ihrer Funktion und nach der Rechtsfolge betrachtet, sind die Termini gute Sitten, Gutgläubigkeit, gute Moral, öffentliche Ordnung vergleichbar, und sie verfügen über gemeinsame Eigenschaften. Sie alle dienen zur Bestimmung der (äußeren) Grenze der Vertragsfreiheit, und ihre Verletzung führt im Prinzip zur Nichtigkeit des Vertrags. Nach ihrem Charakter, nach ihrer rechtlichen Natur sind sie alle Generalklauseln. Aber nach ihrem Inhalt, obwohl die Grenze zwischen ihnen nicht immer präzise bestimmbar ist, bestehen nuancierte verschiedenartige Bedeutungsmerkmale. Außerdem dienen sie zur Bestimmung der allgemeinen Grenzen der Vertragsfreiheit (§ 6:52 UBGB), und sie werden als zwingende Erwartungen des Gesetzes betrachtet, ausnahmsweise und unter bestimmten Voraussetzungen dienen sie auch zur Beseitigung von Gesetzeslücken (Szalma, 2020a, S. 335–363). Diese Generalklauseln verweisen tatsächlich auf die Anwendung der außergesetzlichen Normsysteme oder Werturteile (z. B. Moral, Sitte, Redlichkeit) und Normen, aber nach den Kriterien des Gesetzes. So zum Beispiel können die (Verkehrs)Sitten nach dem geltenden UBGB Bestandteil des Vertrags sein, falls sich die Parteien über diese schon vorher geeinigt haben, oder falls sie in einem bestimmten Geschäftszweig in breiten Kreisen bekannt sind, und wenn sie regelmäßige Anwendung finden. [§ 6:63. Abs. (5) UBGB] Sowohl nach dem UBGB als auch nach den anderen europäischen Kodifikationen können nicht alle Moralnormen als Teile des Gesetzes angesehen werden, sondern nur die gute Moral, gute Sitten. (Der Ausdruck „gute", ist hier als Einschränkung zu verstehen.)

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tendenziellen Änderungen in der Rechtsprechung (durch Kontrolle seitens *Cour de cassations*). Während des XIX. Jahrhunderts dominiert die Souveränität des Vertrags und der Vertrag isr nur dann nichtig, wenn er die allgemeinen Interessen verletzt *(domaine public)*, bzw. die zwingenden Vorschriften und individuelle Freiheiten. Während des XX. Jahrhunderts wird die Bindungskraft des Vertrags „geschwächt", im Sinne, dass der Vertrag nichtig ist, wenn er die sozialen Rechte verletzt, oder die Regelungen, welche sich auf die Organisation des Staates oder das gute Funktionieren seiner öffentlichen Organe beziehen *(l'organisation de l'état, ou à la bonne marche des services publics)* erzielten. (Siehe, Colin und Capitant, 1959, S. 394, Rn. 698, 699)

Es kann Gegenstand der richterlichen Rechtsvertiefung sein, welche Sitten oder moralische Regeln als Teile des Rechtssystems berücksichtigt werden können, und im Gegenteil, welche nicht in Betracht kommen können. Als Vertrag gegen die guten Sitten qualifiziert der österreichische Oberste Gerichtshof (OGH, Ö) den Vertrag zwischen Ehegatten, mit welchem die Parteien einander gegenseitig sexuelle Freiheit garantieren, oder den Vertrag, welcher die sexuelle „Prästation" („Leistung") mit einer geldlichen Gegenleistung „honoriert" (Prostitution).[7] Die Beschränkungen der Vertragsfreiheit durch Generalklauseln benennt die (französische) Literatur gesondert von anderen nichtigen Verträgen, dadurch dass diese Verträge als *„ordnungsverletzend"* qualifiziert werden *(les contrats contre l'ordre public et bonnes moers)*, weil sie die höchsten vom Recht geschützten Werte wie öffentliche Moral oder den normativen Teil des Grundgesetzes, oder die durch die Verfassung geschützten Grundprinzipien und Grundwerte, oder die Normen über die rechtliche Organisation und das Funktionieren des Staates verletzen. Im geltenden ungarischen Recht ist die Rede von den Werten, welche das Grundgesetz und aufgrund des Grundgesetzes die sog. Kerngesetze *(„sarkalatos törvény")* regeln, das heißt, Gesetze, für deren Verabschiedung die Zustimmung von zwei Drittel der Abgeordneten erforderlich ist. Es handelt sich um zwingende gesetzliche Regeln und rechtlich geschützte Werte, welche als Fortsetzung des Grundgesetzes dienen.

Auch die *Umgehungsgeschäfte* (§117, § 134 BGB) werden regelmäßig mit der absoluten Nichtigkeit sanktioniert (Siehe in der *deutschen* Literatur: Teichmann, 1962; Schurig, 1988, S. 375; Eccher, 1996, S. 143; Mader, 1994, S. 188; Graf, 1996.)[8] Bei diesen ist das Umgehungsverhalten im Einklang mit dem Wortlaut der

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[7] Siehe, OGH (Oberste Gerichtshof Österreichs), in: Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen, 62/123. Andere Auffassung (nach der die Umgehungsgeschäfte nicht die Nichtigkeitssanktion betreffen), welche von der Mehrheit der österreichischen Literatur nicht unterstützt wird, vertritt: Weitzenböck, 1990 S. 14. Man kann hinzufügen, dass nach § 879. ABGB „(1) ein Vertrag, der gegen ein gesetzliches Verbot oder gegen gute Sitten verstößt, nichtig ist. (2) Insbesondere sind folgende Verträge nichtig: 1. wenn etwas für die Unterhandlung eines Ehevertrages bedungen wird; 1.a. welche die Ergebnisse der ärztlichen Intervention von Geldzahlung voraussetzt; 2. wenn ein Rechtsfreund eine ihm aufvertraute Streitsache ganz oder teilweise an sich löst oder sich einen bestimmten Teil des Betrags versprechen lässt, der der Partei zuerkannt wird; 3. wenn eine Erbschaft oder ein Vermächtnis, die man von einer Drittperson erhofft, noch bei Lebzeiten derselben veräußert wird; 4. wenn jemand den Leichtsinn, die Zwangslage, Verstandensschwäche, Unerfahrenheit oder Gemütsaufregung eines anderen dadurch ausbeutet, dass er sich oder einem Dritten für eine Leistung eine Gegenleistung versprechen oder gewähren lässt, deren Vermögensrecht zu dem Werte der Leistung in auffallendem Missverältnisse steht. 5. Nichtig sind die allgemeinen Geschäftsbedingungen, welche einen Teil grob benachteiligen."

[8] Wie schon oben bemerkt, nach § 879 des *österreichischen* ABGB können die Umgehungsgeschäfte ohne Wirkung bleiben. Insbesondere dann, wenn die Parteien ein nicht gewolltes Scheingeschäft schließen, mit dem Ziel, das für sie ungünstige Gesetz zu umgehen, und mit einem anderen gewollten verdeckten Geschäft, und insgesamt damit

imperativen Normen des Gesetzes, aber es verstößt gegen den Sinn des Gesetzes *(agere in fraudem legis)*. Nach dem schweizerischen Autor *Máday, Denis* (aber auch nach deutschen Autoren) haben die Umgehungsgeschäfte drei Elemente: 1. die Norm, auf die das Umgehen ausgerichtet ist, soll zwingend sein; 2. das Umgehungsverhalten, welches sehr unterschiedlich sein kann, z. B. Scheingeschäfte. 3. Als Sanktion dienen die Normen, welche die Parteien umgehen wollen, und nicht die mit dem Umgehungsverhalten bezweckten Rechtsfolgen des „günstigen" Gesetzes. Aber das Umgehungsgeschäft selbst kann auch nichtig sein. Das Ziel des Umgehungsgeschäfts ist der Ausschluss der Anwendung des Gesetzes, welches für die Parteien ungünstig ist. Der Zweck der Umgehung können öffentlich- oder privatrechtliche zwingende (Verbots-) Normen sein. Die „Umgehung" des dispositiven Rechts wird nicht sanktioniert, weil die Parteien ihre Vertragsfreiheit nutzen können und sie können in ihrem Vertrag etwas anderes vereinbaren, als das dispositive Recht bietet. Aber die Normen des dispositiven Rechts ändern sich, und werden obligatorisch, falls die Parteien in ihrem Vertrag nichts anderes als die dispositiven Normen des Gesetzes vorsehen. Als Umgehungsgeschäfte bewertet man die Geschäfte, welche die rechtlich geschützten Interessen und die Rechte der anderen Partei verletzen *(agere in fraundem partis)*. Falls die umgangene imperative gesetzliche Norm eine von der Nichtigkeit abweichende Rechtsfolge vorsieht, dann kommt diese andere Sanktion zur Anwendung. Wenn z. B. ein unentgeltlicher Vertrag bzw. Schenkungsvertrag nur scheinweise geschlossen wurde [§ 6:92. Abs. (2) UBGB] wegen der niedrigeren Besteuerung, als welche für entgeltliche Geschäfte vom Gesetz vorgesehen wird, - das von den Parteien gewollte verdeckte entgeltliche Geschäft (z. B. Kauf) bekommt seine Wirkung, und infolgedessen, falls das Täuschungsmanöver „entdeckt" wird, kommt der höhere Steuersatz zur Anwendung. Die genannten Verträge, welche direkt oder indirekt die zwingenden

die Anwendung eines günstigeren Gesetzes zu erreichen. (Siehe z. B. Bydlinski, 1993, S. 827) Im *schweizerischen Recht* ist die fiduziarische Übereignung wegen der Sicherung einer Forderung nur dann nichtig, falls der Wert der übereigneten Sache enorm größer ist als die gesicherte Forderung. (Siehe Guhl et al., 2000, S. 134) Die schweizerischen Autoren fügen zu Recht hinzu, dass der fiduziarische Eigentümer mehr Rechte hat als die Erwartungen des Grundsatzes von Treu und Glauben gestatten. Das *neue UBGB* enthält vom Anfang seiner Geltung ein allgemeines Verbot für die fiduziarische Übereignung wegen der Sicherung einer Forderung, aber nach Änderungen des UBGB gilt dieses Verbot nur für die Verbrauchergeschäfte weiter. § 6:99 [Nichtigkeit der fiduziarischen Kreditsicherungen] (Szalma, 2015b, S. 271–295).

Normen verletzen, werden als nichtige Verträge (Nichtige Verträge[9], *nullité, contrats nulle*[10]) bezeichnet (§ 6:88 UBGB).

Die *relative Unwirksamkeit (Anfechtbarkeit, nullité rélatif)* betrifft die Verträge, welche irgendeinen Willensmangel haben (wie Irrtum, Täuschung, Zwang). Nach § 6:90, 6:91 des UBGB) beginnt die Nichtigkeitsfolge, die Unwirksamkeit des Vertrags nur ex nunc, „ab jetzt", bzw. vom Zeitpunkt der gerichtlichen Feststellung [§ 6:89 Abs. (1) UBGB]. Diese Verträge werden auch anfechtbare Verträge genannt (§ 6:89 UBGB). Das Anfechtungsrecht hat nur die von Irrtum, Täuschung oder Zwang betroffene Partei, in der Regel innerhalb einer kurzen Anfechtungsfrist.[11] Das Anfechtungsrecht kann innerhalb einer einjährigen Frist nach Vertragsabschluss

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9 Im deutschen Recht erfolgt die Nichtigkeitssanktion aus der Verletzung der Erwartungen der doppelten Generalklausel – Treu und Glauben, Verkehrssitten, des § 242 BGB: *„Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben auf die Verkehrssitten es erfordern."* Das heißt, der Schuldner soll seine Leistung erfüllen, wie dies Treu und Glauben und die Verkehrssitten erfordern. Diese Regel hat mehrere Funktionen, Korrektionsfunktion, Berechtigungsfunktion, Wirkungs-Ersatz-Funktion, Funktion der verbotenen Rechtsausübung, usw. Die Verletzung dieser Grundsätze prüft das Gericht ex officio. (Siehe: Prütting, Wegen und Weinreich, 2007, S. 342–358.)

10 In der neuesten französischen Literatur siehe (Arhab, 1999; Cuturier, 2001, S. 273; Ghestin, 2000, S. 593; Goubeaux, 2009, S. 63).

11 Nach der Auffassung der ungarischen Literatur und des positiven Rechts soll man das Anfechtungsrecht des Rechtsinteresses bei der relativen Nichtigkeit ähnlich interpretieren wie bei der absoluten Nichtigkeitsklage. (So: Vékás, 2021; S. 113, Rn. 259) Doch nicht nur unserer Meinung nach ist diese Auffassung strittig, umso mehr, weil das Anfechtungsrecht bei der relativen Nichtigkeit wegen der Verletzung des Privatinteresses besteht, und damit sind nur die Parteien interessiert. Aber bei der absoluten Nichtigkeit ist die Rede von der Gefährdung desöffentlichen Interesses – und daher betrifft das Anfechtungsrecht nicht nur den Interessierten, die vom Willensmangel berührte Partei, sondern auch die Dritte, insbesondere die Repräsentanten des öffentlichen Interesses, diese können – ex officio – die Nichtigkeit beklagen. Mit anderen Worten heißt das, das Anfechtungsrecht bei der relativen und absoluten Nichtigkeit liegt an wesentlich unterschiedlichen Gründen. Die absolute Nichtigkeit besteht wegen der Verletzung der öffentlichen Interessen und die relative Nichtigkeit ist die Folge der Verletzung von privaten Interessen der Parteien. Demzufolge können sich in der Mehrheit der europäischen Rechtssysteme auf die relative Nichtigkeit nur diejenigen berufen, deren (Privat)Interesse verletzt wird, – im Gegenteil, bei der absoluten Nichtigkeit wegen der Verletzung der öffentlichen Interessen besteht das Berufungsrecht auch für Dritte, und insbesondere für die Staatsanwaltschaft. Wegen der relativen Nichtigkeit kann nur die Partei klagen, deren Geschäftswille berührt oder mangelhaft wird, z. B. wegen dem (wesentlichen) Irrtum der Partei oder dem Zwang für die Partei bei der Willensäußerung hinsichtlich der wesentlichen Elemente *(essentialia negotii)* des Vertrags im Falle der relativen Nichtigkeit, falls die vom Willensmangel betroffene Partei ihr Anfechtungsrecht innerhalb der Anfechtungsfrist nicht ausübt, wird der Vertrag ex lege gültig gemacht. Nämlich, bei der relativen Nichtigkeit hängt die Anfechtung von der Entscheidung der für die Anfechtung ermächtigten Partei ab. bei den absolut nichtigen Verträgen hingegen sind für die Anfechtung ermächtigte Staatsorgane *ex offizio* dazu verpflichtet.

mit einer an die andere Partei gerichteten Rechtserklärung oder unmittelbar durch Geltendmachung vor Gericht ausgeübt werden [§ 6:89 Abs. (3) UBGB].[12] Der Irrtum dient nicht immer als Anfechtungsgrund des Irrenden, sondern nur in dem Falle, wenn der Irrtum *wesentlich* ist. Nach § 119 des deutschen BGB *(Anfechtbarkeit wegen Irrtums)*: „(1) Wer bei Abgabe einer Willenserklärung über deren Inhalt im Irrtum war oder eine Erklärung dieses Inhalts überhaupt nicht abgeben wollte, kann die Erklärung anfechten, wenn anzunehmen ist, dass er sie bei Kenntnis der Sachlage und bei verständiger Würdigung des Falles nicht abgegeben haben würde. (2) Als Irrtum über den Inhalt der Erklärung gilt auch der Irrtum über solche Eigenschaften der Person oder der Sache, die im Verkehr als wesentlich angesehen werden." Als wesentlicher Irrtum gilt, was den Inhalt des Vertrags, die Eigenschaften der anderen Vertragspartei, ihre Fähigkeiten (z. B. Fachkenntnisse) und den Gegenstand des Vertrags betrifft, vorausgesetzt, dass dies für den Rechtsverkehr als wesentlich gilt. (Prütting, Wegen, und Weinreich, 2007, S. 107–112) Nach § 118 des BGB (Mangel der Ernstlichkeit) ist das Geschäft auch wegen Mangel der Ernstlichkeit anfechtbar seitens des Interessierten *„Eine nicht ernstlich gemeinte Willenserklärung, die in der Erwartung abgegeben wird, der Mangel der Ernstlichkeit werde nicht erkannt werden, ist nichtig."* Z. B. falls aus den Umständen und Art der Äußerung klar hervorgeht, dass es sich um einen Scherz handelt, oder wenn die Willenserklärung in einem Schauspiel geäußert wurde (Prütting, Wegen, und Weinreich, 2007, S. 107). In diesen Sachverhaltsumständen fehlt der wahre, ernst gemeinte Vertragswille zum Vertragsschluss. Der Wille wurde ohne die *animus contrahendi* geäußert. Letztendlich, nach § 120 des BGB, kommt auch die Anfechtung wegen Übermittlung in Betracht, also wenn „eine Willenserklärung, welche durch die zur Übermittlung verwendete Person oder Einrichtung unrichtig übermittelt worden ist, kann unter der gleichen Voraussetzung angefochten werden wie nach § 119 eine irrtümlich abgegebene Willenserklärung". (Prütting, Wegen, und Weinreich, 2007, S. 113) Nach dem *französischen* Recht, nach der gemäß § 1110 des Code civil *(l'erreur)* entstandenen Literatur und auch nach der Regelung (Venandet et al., 2016, S. 1378) führt der Irrtum nur dann zur Anfechtbarkeit, wenn er den Gegenstand oder die Person bzw. die wesentlichen Elemente des Vertrags berührt (wesentlicher Irrtum). (Chauvel, 1990, S. 93) Einige französische Autoren bewerten aufgrund der Regelung des Cc-s, als wesentlichen Irrtum (Decottignies, 1951, S. 309), oder der Irrtum wird als Wert der Verbindlichkeit in den Vertragsinhalt inkorporiert (Goubeaux, 2001, S. 389; Malinvaud, 1972; Mouly, 2003, S. 2023–2030; Mouly 2012, S. 1346; Rouviere, 2014, S. 1782; Sérinet, 2001, S. 789). Auch im *ungarischen* Recht wird das Anfechtungsrecht der Interessierten nur im Falle des wesentlichen Irrtums gestattet. Nämlich nach § 6:90 Absatz (1) des UBGB: *„Jemand der während der Vertragsschließung im Irrtum über irgendwelche wesentliche Umstände war, könnte die Willensäußerung anfechten, falls der Irrtum von der anderen Partei verursacht*

[12] Nach § 121. des BGB-s wird der Anfang der Anfechtungstfrist beim Willensmangel an den Zeitpunkt angeknüpft, zu dem der Anfechtungsberechtigte vom Anfechtungsgrund Kenntnis erlangt hat. (Siehe, Prütting, Wegen, und Weinreich, 2007, S. 113).

wurde oder erkannt werden konnte.“ Hier kann man aber, de lege ferenda, bemerken, dass, falls die andere Vertragspartei den der Irrtum bewusst verursacht hat, ist die Rede nicht von Irrtum, sondern von Täuschung (§ 6:91 UBGB). Nämlich unter Irrtum versteht man einen solchen Willensmangel, bei welchem das falsche Wissen, Bewusstsein über wesentliche Elemente des Vertrags auch ohne äußere Wirkung (seitens der anderen Vertragspartei, Drittpersonen oder durch Selbstverschulden) entstehen konnte.

Die Rechtsfolge der *absolut unwirksamen Verträge* besteht darin, dass ihre Anfechtung nicht nur von der (interessierten) Partei abhängt, sondern in der Mehrheit der europäischen Rechtssysteme wird sie in einem breiteren Kreis gestattet, weil der Schutz der öffentlichen Interessen jedermann „interessiert“, auch wenn ein gesetz- oder sittenwidriger Vertrag nicht unmittelbar alle Menschen betrifft. Der absolut unwirksame, nichtige Vertrag kann nach ungarischem Recht nicht nur von den Interessierten, sondern auch, in gesetzlich bestimmten Fällen, vom Staatsanwalt, der die öffentliche Interessen vertritt, von Amts wegen angefochten werden, mit der Nichtigkeitswirkung *ex tunc*, von Anfang an, vom Zeitpunkt der Vertragsschließung. Demzufolge ist eine der wichtigsten Rechtsfolgen der absoluten Nichtigkeit *die Herstellung des vorigen Stands, (restitutio in integrum),* vor dem Zeitpunkt der Vertragsschließung, mit der Wirkung *ex tunc* [§ 6:88 Abs. (1) UBGB, erster Satz]. Weil die absolut nichtigen Verträge die *öffentlichen Interessen* verletzen (*l'ordre public*, fr., gute Sitten, d., jó erkölcs, ung.) können oder sollen sie nicht nur seitens der interessierten gutgläubigen Vertragspartei, sondern auch seitens irgendeiner (interessierten) Drittperson angefochten werden, oder von einem gesetzlich ermächtigten Staatsorgan, wie vom Staatsanwalt im ungarischen Recht, im Prinzip ohne Anfechtungsfrist. *(Quod ab initio vitiosum est, tractu temporis non est convalescere.)* Nach § 6:88 Absatz (3) des UBGB, falls das Gesetz nichts anderes voraussieht, kann sich jemand auf die Nichtigkeit des Vertrags berufen und wegen der Nichtigkeit einen gerichtlichen Zivilprozess einleiten, der diesbezüglich ein rechtliches Interesse hat oder jemand, den das Gesetz dazu ermächtigt. Nach der Entscheidung (Präzedenz) des ungarischen obersten Gerichtshofs (EBH 1999.14., EBH 2004.1042.), welche auch *Lajos Vékás* zu Recht in seinem UBGB Kommentar zitiert: *„Die prozessrechtliche Legitimation hinsichtlich der Streitigkeiten über die Nichtigkeit des Vertrags kann im Falle der Interessiertheit oder der vom Gesetz vorgeschriebenen klagerechtlichen Ermächtigung bestehen.“* Wegen dem Schutz des öffentlichen Interesses ermächtigt das UBGB den Staatsanwalt, einen Prozess über die Nichtigkeit des Vertrags (Feststellung der Nichtigkeit und Anwendung der Rechtsfolgen) wegen Wucher einzuleiten (Vékás, 2021, S. 112, 255, 256). Nach § 6:188 Absatz (1), zweiter Satz des UBGB, ist die folgende, unserer Meinung nach, teilweise bestrittene Regelung möglich: *„Bei der Feststellung der Nichtigkeit ist kein gesonderter Prozess notwendig, das Gericht nimmt die Nichtigkeit von Amts wegen wahr.“* Diese Bestimmung darüber, dass beim Nichtigkeitsprozess kein gesonderter Prozess notwendig ist, ist nur dann richtig, falls ein Prozess vor dem Gericht mit einem anderen Klageinhalt geführt wird, z. B. über Kündigung, und dann kann der Richter, wenn er bemerkt, dass die Rede von einem nichtigen Vertrag ist, den ersten

Prozess abbrechen und die Nichtigkeit ohne Einleitung eines neuen Prozesses von Amts wegen feststellen. Somit ist kein gesonderter Prozess zur Feststellung der Nichtigkeit nötig. Aber falls der Nichtigkeitsprozess seitens einer der Parteien initiiert wird, oder einer Drittperson, ist ein gesonderter Nichtigkeitsprozess notwendig. In der Rechtstheorie wird die Regelung über die gerichtliche Prüfung der Nichtigkeit nur so verstanden, dass wenn bei einem anderen Prozess die Nichtigkeit bemerkt wird, der Erstprozess eingestellt werden soll, und dann informiert der Staatsanwalt über die mögliche Nichtigkeit. Falls der Staatsanwalt innerhalb der vom Gericht bestimmten Frist keine Nichtigkeitsklage einlegt, setzt das Gericht den ersten Prozess fort, ohne Nichtigkeitserklärung. Es scheint, das ist die übliche Lösung, weil nach der Grundregel der Zivilprozess ohne Klage nicht eingeleitet werden kann, und dieser Prozess ist kontradiktorischer Art. Das Gericht nimmt neben seiner Entscheidungsrolle nicht gleichzeitig auch die Funktion des Klägers an. (Das Gericht kann nicht gleichzeitig klagen und entscheiden.) Weiters, nach der Regelung des UBGB, falls die Feststellung der Nichtigkeit seitens einer der Parteien initiiert wird, kann das Gericht abweichend von den von ihnen vorgeschlagenen Rechtskonsequenzen entscheiden. [Aufgrund von § 6:108 Abs. (3) UBGB] Das UBGB macht bei Nichtigkeitsstreitigkeiten eine Ausnahme von der in Zivilprozessordnungen üblichen und herrschenden Hauptregel über das Antragsprinzip, bzw. die Bindung des Gerichts an den Antrag, weil das Gericht in seiner Entscheidung vom Antrag abweichen kann. Das Prinzip über die Bindung des Gerichts an den Antrag ist auch in der geltenden ZPO Ungarns (Gesetz CXXX von 2016) enthalten, indem der Grundsatz *nemo iudex ultra et extra petitum partium* anerkannt wird. So ist es nach § 342 Abs. (1), § 2 Abs. (2) des ZPO Ungarns oder gemäß dem Grundsatz über die freie Verfügung der Parteien über ihre Rechte hinsichtlich des Verfahrens [§ 2 Abs. (1)–(2) ZPO Ungarns] – Verfügungsgrundsatz. Das UBGB schreibt nach § 6:108 Abs. (2) vor, dass die Vertragspartei vom Gericht nur die Feststellung der Nichtigkeit verlangen kann, ohne dass auch die Anwendung der konkreten Rechtsfolgen vorgeschlagen wird. Somit macht das UBGB in Nichtigkeitstreitigkeiten eine Ausnahme von der in bürgerrechtlichen Streitigkeiten herrschenden Hauptregel über die Bindung des Gerichts an den Parteiantrag.

In der Entwurfsphase des UBGB hat scheine wertvolle wissenschaftliche Diskussion über die Frage entfaltet, was man unter dem Syntagma versteht, dass das Gericht die Nichtigkeit von Amts wegen prüft. Nach der Bewertung der Literatur und der Rechtsprechung: „Die neuen Auffassungen über die rechtliche Natur der Nichtigkeit umfassen zuerst die offizielle Prozedur des Gerichts." Der Entwurf besagt ausdrücklich: „Das Gericht soll die Nichtigkeit in einem Prozess von Amts wegen feststellen, weil für deren Feststellung kein gesonderter Prozess notwendig ist. Dies entspricht auch den klassischen ungarischen Auffassungen. Die *offizielle Wahrnehmung der Nichtigkeit bedeutet jedoch nicht, dass das Gericht gleichzeitig auch die Rechtsfolgen von Amts wegen anwenden soll.* Die Wahrnehmung der Ursachen der Nichtigkeit bedeutet ausschließlich, dass der *von den Parteien beabsichtigte Zweck nicht erreichbar ist,* bzw. aufgrund eines nichtigen Vertrags kann das Gericht die Parteien nicht zur Vertragserfüllung verpflichten, auch wenn

sich keine der Parteien auf Nichtigkeitsgründe beruft, oder wenn beide Parteien verlangen, dass diese Gründe vom Gericht außer Acht gelassen werden. Die Anwendung der Unwirksamkeit von Amts wegen besteht nur darin, dass das Gericht die *Forderung aus dem nichtigen Vertrag als unbegründet ablehnt.* Über die anderen Rechtsfolgen der Nichtigkeit entscheidet das Gericht nicht. Das heißt, dass das Gericht *von Amts wegen nicht über die Herstellung des vorigen Standes oder über andere Rechtsfolgen der Nichtigkeit entscheidet.* Aus diesem Grund, falls eine Partei über die Vermögensbewegung, welche aufgrund eines für nichtig erklärten Vertrag erfolgt ist, eine Entscheidung wünscht, soll sie zu diesem Zweck einen besonderen, mit einer gesonderten Klage oder Widerklage eingeleiteten Prozess initiieren." (Figula et al., 2014) Beachtenswert ist die *Veröffentlichung der Ungarischen Justiz-Akademie*, in der steht vor: „In den Normtext wurde auch die Auffassung der bisherigen Rechtsprechung aufgenommen, dass das Gericht die Nichtigkeit während eines Prozesses *von Amts wegen* wahrnehmen soll. Im Kreis der Unwirksamkeit und Nichtigkeit werden die eingeführten Änderungen im neuen UBGB dadurch verwirklicht, dass die Prinzipien der neueren Rechtsprechung des Obersten Gerichtshofs in den Normtext aufgenommen wurden, insbesondere: [Gerichtsgutachten von Curia Nr. 1/2005. (VI. 15.) PK, Nr. 1/2010. (VI. 28.) PK, Nr. 2/2010. (VI. 28.) PK]. Wichtig ist die Aussage der gesetzlichen Regel, nach welcher das Gericht die Nichtigkeit des Vertrags – weil für ihre Feststellung kein gesonderter Prozess notwendig ist –, in irgendeinem Prozess von Amts wegen wahrnehmen soll. Aus dieser Regelung folgt, dass das Gericht die Parteien zur Erfüllung des Vertrags auch dann nicht verpflichten kann, falls sich keine der Parteien auf die Ursachen der Nichtigkeit beruft, nicht einmal wenn beide Parteien fordern, dass die Ursachen der Nichtigkeit vom Gericht außer Acht gelassen werden. In diesem Fall soll das Gericht die aufgrund eines nichtigen Vertrags erhobene Klage als unbegründet ablehnen. Die *Feststellung der Nichtigkeit von Amts wegen bedeutet jedoch keineswegs, dass das Gericht auch gleichzeitig die Rechtsfolgen der Unwirksamkeit von Amts wegen anwenden soll, – dafür ist eine gesonderte Klage oder Widerklage unentbehrlich.*"

(Auch) im *französischen Recht* ist die Möglichkeit ausdrücklich ausgeschlossen, dass das Gericht selbst einen Nichtigkeitsprozess einleiten kann. Dies gilt auch dann, wenn der Vertrag aufgrund des Gesetzes von Anfang an wegen der Ordnungsverletzung nichtig ist. Aber die Rolle des Gerichts ist keineswegs nur passiv, weil das Gericht die zur Anfechtung ermächtigten Subjekte über die Nichtigkeitsmöglichkeit unterrichtet. Im Falle der absoluten Nichtigkeit ist an der Anfechtung *jedermann* interessiert *(tout interessé si la nullité est absoltue)*. Im Gegensatz dazu interessiert die Feststellung der relativen Nichtigkeit nur die *betroffenen* Subjekte (*certaines personnes si elles est [pour nullité] relative*; siehe Colin und Capitant, 1959, S. 428, Rnr. 758).

So ist in der ausländischen und heimischen Literatur, also in der Doktrin, bestritten, wie das Gericht prozessrechtlich vorgehen soll, falls es in einem anderen Prozessgegenstand, z. B. einer Streitigkeit über Vertragserfüllung gleichzeitig der Nichtigkeit des Vertrags begegnet: a) Nach einer Theorie soll das Gericht in dieser Situation den ursprünglichen Streit beenden und die Staatsanwaltschaft von Amts

wegen über die Nichtigkeits-Möglichkeit benachrichtigen, damit sie innerhalb einer bestimmten Frist einen Nichtigkeitsprozess einleitet. Mit der öffentlichen Einstellung des Verfahrens. Falls die gerichtliche Frist abgelaufen ist und die Staatsanwaltschaft keine Nichtigkeitsklage einleitet, wird das Gericht den ursprünglichen Prozess weiterführen und annehmen, dass die Nichtigkeit rechtlich nicht besteht. b) Die zweite mögliche Lösung ist, dass falls das Gericht bei der Verhandlung einer Klage mit einem ganz anderen Streitgegenstand bemerkt, dass der von den Parteien vorgebrachte Vertrag nichtig ist, kann es die Nichtigkeit auch ohne Klage feststellen. Nach dieser Auffassung ist also die gerichtliche Nichtigkeitserklärung möglich, ohne irgendeine Nichtigkeitsklage, weil das Verfahren dem Gericht dies von Amts wegen ermöglicht. Diese Auffassung kann man kritisch betrachten, weil in dieser Lösung die kontradiktorische Eigenschaft fehlt, welche den Zivilprozess charakterisiert, und daneben bekommt das Gericht bei dieser Lösung volens-nolens eine doppelte Funktion: die rechtsprechende und die klägerische Funktion, was *contradictio in adiecto* ist. Nach der allgemein anerkannten Auffassung der Doktrin kann das Gericht in Zivilsachen im Einklang mit dem („älteren") Prozessgrundsatz *„nemo iudex ultra et extra petitum partium"*, aufgrund des („jüngeren") Grundsatzes über Verfahren von Amts wegen den Nichtigkeitsprozess nicht selbst einleiten und die Nichtigkeit nicht feststellen, weil das Gericht in diesem Fall gleichzeitig eine doppelte Funktion von Kläger und Entscheider hätte, die sich gegenseitig ausschließen. l. Die Klage kann, wie das UBGB prinzipiell bestimmt, nur die ermächtigte interessierte Partei oder das Organ anwenden. (De lege ferenda, im Sinne der interessierten Partei ist vielmehr ein anfechtbarer Vertrag anwendbar, in welchem die Rede von der Gefährdung der Privatrechte ist, z. B. falls die interessierte Partei über die wesentlichen Elemente des Vertrags im Irrtum war, und die Rede ist auch von Verträgen, die gegen ein Gesetz verstoßen, bei denen die Rechtsfolge die absolute Nichtigkeit ist.) Aber im Falle der nichtigen Verträge sind „alle" interessiert, somit auch die Staatsanwaltschaft, welche aufgrund der gesetzlichen Ermächtigung ex officio in das Verfahren mit seiner Klage eingreifen sollte, und eine solche Ermächtigung haben auch die Subjekte, welche persönlich nicht betroffen waren. Im Falle der nichtigen Verträge sind somit „alle" interessiert, d. h. auch die Subjekte, welche persönlich nicht betroffen sind, und im konkreten Fall hat auch der Staatsanwalt das Klagerecht aufgrund der gesetzlichen Ermächtigung. Dies gilt besonders, falls sich der nichtige Vertrag gleichzeitig auch als strafbare Handlung erweist. Die interessierte Partei ist bei anfechtbaren Verträgen ganz anders, sie ist die Partei, deren freier Geschäftswille verletzt wird, und sie hat die freie Wahl, ob sie das Geschäft anfechten will oder nicht. Beim ordnungswidrigen Geschäft hingegen ermächtigt eine solche freie Entscheidung über die Anfechtung keinen zur Anfechtung. Die Anfechtung soll nämlich ex officio eingeleitet werden.

Andere europäische Gesetze, beispielsweise das deutsche BGB und das französische Code civil scheinen den Kreis der Ermächtigten für das Anfechtungsrecht im Falle der Nichtigkeit breiter zu bestimmen als das ungarische UBGB. Diese Gesetzbücher ermöglichen nämlich das Klagerecht zugunsten von

Drittpersonen, welche unmittelbar nicht betroffen, „nicht interessiert“ sind, weil die Gefährdung, Verletzung des öffentlichen Rechtsinteresses und dessen Schutz alle Rechtssubjekte interessiert. Aber es besteht eine Begrenzung durch die Regelung, das traditionelle Prinzip über *nemo auditur turpitudinem allegans*. Nach diesem Prinzip kann sich der bösgläubige Vertragspartner nicht auf die Nichtigkeit berufen, das heißt, der Partner, der zum Zeitpunkt der Vertragsschließung von der Nichtigkeit wusste oder wissen sollte. Diese alte Regel des römischen Rechts wird durch die französische Rechtsprechung insoweit interpretiert , dass wegen dem breiten Kreis der Klageberechtigten für die Anfechtung des nichtigen Vertrags, dieses Recht auch die bösgläubige Partei hat, und das Gericht kann ihren Vorschlag über die Nichtigkeit annehmen (akzeptieren), aber gleichzeitig kann das Gericht ihre Forderung bezüglich weiteren Rechtsfolgen ablehnen, insbesondere die von der bösgläubigen Partei bis dahin erfüllten Prästationen in den vorigen Stand wiederherzustellen, also diese zurück zu leisten. In diesem Fall kann die gutgläubige Partei in die Lage der ungerechtfertigten Bereicherung kommen. Insbesondere im Fall, in welchem die gutgläubige Partei bis zur Nichtigkeitsfeststellung noch nicht geleistet hat, aber wenn die bösgläubige Partei ihre Prästation schon erfüllt hat. Als Folge der Feststellung der Nichtigkeit kann die gutgläubige Partei nämlich nicht mehr zur Erfüllung ihrer Prästation gezwungen werden, aber die schon erfüllte Prästation der bösgläubigen Partei kann auch beibehalten werden, insofern das Gericht die Wiederherstellung der Prästation von der bösgläubigen Partei ablehnt. Weil die gutgläubige Partei für ihre Prästation nicht weiter verpflichtet ist, und die schon erfüllte Prästation der bösgläubigen Partei behalten kann, kommt sie in die Lage der ungerechtfertigten Bereicherung. In dieser Sachlage gestattet die französische Rechtsprechung der bösgläubigen Partei die Wiederherstellung durch die Klage wegen ungerechtfertigter Bereicherung *(condictio indebiti – causa data causa non secuta)*. Die folgende Rechtsfolge der absoluten Unwirksamkeit ist die Herstellung des vorigen Standes *(restitutio in integrum)*, das heißt, die Herstellung des Standes vor der Vertragsschließung (Wiederherstellung des ursprünglichen Zustandes). Die schon erfüllten Leistungen soll man zurückgeben, bzw. zurückzahlen, aber die nicht erfüllten Verpflichtungen (Leistungen) verpflichten einen nicht weiter. Praktisch ist die Rede von der Wiederherstellung des ursprünglichen Zustandes, vor der Vertragsschließung. (§ 6:112 UBGB; Vékás und Gárdos, 2013, S 560) Nach der französischen Rechtsprechung hat die Nichtigkeitsfeststellung eine retroaktive Wirkung *(effects de l’annulation avec retroactivité)*. Die zweite Rechtsfolge ist die Art und Weise der Wiederherstellung , welche in Geld oder in Natur geschehen kann.[13] Die geldliche Restitution kommt erst in Betracht, falls die Naturalrestitution nicht möglich ist.

Die nächste Sanktion, Rechtsfolge ist mit der *Beseitigung der unberechtigten Bereicherung* (Bereicherung ohne Rechtsgrundlage) verbunden. Die schon oben genannten Beispiele zeigen, dass es tatsächlich geschehen kann, dass eine

[13] Cour de cassation, Civ. 1re., 11. juin 2002, Bull., civ. (Bulletin des arrets de l’assemblé plénière de la Cour de cassation), 1., no. 163.

Vertragspartei des nichtigen Vertrags bis zur gerichtlichen Entscheidung ihre Verpflichtung erfüllt hat, die andere Vertragspartei aber noch nicht. Die Partei, die noch nicht geleistet hat, könnte ihre Leistung zusammen mit der schon realisierten Leistung der anderen Partei behalten und sich somit ohne weitere Sanktion unberechtigt bereichern. Diese Frage wird nach § 6:113(1), (2) und (3) so gelöst, dass die bereicherte Partei zugunsten der anderen Partei statt der ausgebliebenen Leistung in Höhe des Werts dieser Leistung einen geldlichen Ersatz schuldet.

Weiters kann die Unwirksamkeit als eine Folge der absoluten Nichtigkeit nach der Grundregel *nicht gültig gemacht* werden: *Quod ab initio vitiosum est, tractu temporis non est convalescere*. Ein solcher Vertrag kann später nicht zur Wirkung gebracht werden. Es bestehen aber zwei Ausnahmen: Die erste ist mit der Konversion verbunden, die zweite mit der Teilnichtigkeit. Die dritte Möglichkeit, den Vertrag zur Wirkung zu bringen, die Gültigmachung, ist nur bei relativ nichtigen Verträgen möglich. Die europäischen Kodifikationen schreiben regelmäßig (wegen der Ordnungsverletzung) für die Einlegung der Nichtigkeitsklage keine *Frist* vor, die Anfechtung ist daher im Prinzip zeitlich nicht begrenzt, oder wenn eine Frist doch vorgeschrieben wird, dann ist diese Frist für die Anfechtung des absolut nichtigen Vertrags offensichtlich länger als die Anfechtungsfrist bei Fällen der relativen Nichtigkeit.

Der mit der absoluten Nichtigkeit sanktionierte Vertrag kann aufgrund der gerichtlichen Beihilfe und der Forderung der Parteien in Geltung gestellt werden, falls der nichtige Vertrag dem Ziele nach einem anderen gültigen Vertrag entspricht, durch eine entsprechende Änderung der Vertragsklauseln. Beispielsweise falls der Kauf nichtig ist, aber der Mietvertrag gültig ist, kann der ungültige Kauf im Sinne einer gültigen Miete modifiziert werden, und somit wird im geänderten Vertrag der Verkäufer zum Vermieter und der Käufer zum Mieter, der Eigentumsübergang als Zielsetzung und der Gegenstand des verbotenen Kaufs wurde geändert, als ein gültiger Besitz bewertet und der vorherige einheitliche Kaufpreis kann in einen Mietpreis geändert werden. Selbstverständlich stellt sich bei diesem hypothetischen Beispiel die Frage, wie der einmalige Kaufpreis in einen wiederholt bezahlten Mietpreis geändert werden kann, weil der Kaufpreis begrenzt ist, aber der Mietpreis ist bei einer Dauermiete unbegrenzt. [Siehe für *Konversion*, § 6:110(1) Unterabsatz a) und § 6:88(2) UBGB.][14] Im Gegensatz dazu kann der relativ nichtige Vertrag

[14] Nach dem schweizerischen Recht kann die Änderung des nichtigen Vertrags in einen gültigen Vertrag, mit der ähnlichen Wirkung, aufgrund des Vorschlags (Forderung) der Parteien (Konversion) nur durch gerichtliche Hilfe verwirklicht werden. Bei der Änderung des verbotenen Vertrags in einen gültigen Vertrag soll das Gericht in Betracht ziehen, dass das Ziel des geänderten Vertrags dem Ziel des ursprünglichen Vertrags entsprechen soll. Beispielsweise, falls die ursprüngliche Zielsetzung des verbotenen Geschäfts die Eigentumsübertragung war, dann soll auch das konvertierte Geschäft denselben Zweck haben. (Siehe, Guhl, 2000, S. 128.) Doch diese Auffassung ist hinsichtlich des konkreten Beispiels umstritten. Es scheint uns, dass der verbotene Kauf (welcher entgeltlich ist) nicht in eine unentgeltliche Schenkung umgewandelt werden kann, nur deswegen, weil beide dasselbe Ziel haben, die Eigentumsübergang. Der Zweck

durch Konvalidation eine Wirkung erhalten, falls die Parteien die Ursache der Unwirksamkeit selbst mit ihrer Einigung beseitigen (§ 6:117 UBGB), oder falls der Anfechtungsberechtigte innerhalb der Anfechtungsfrist sein Anfechtungsrecht nicht nutzt [§ 6:8(1), (3) und (5) UBGB]. Dies ist deswegen möglich, weil die relativ nichtigen Verträge nur das Privatinteresse gefährden bzw. das rechtlich geschützte Interesse der Partei, welche durch den Willensmangel benachteiligt wird. Dementsprechend hängt die Anfechtung von der Entscheidung der betroffenen Partei ab, ob sie eine Anfechtung einlegen will oder nicht.

Der absolut unwirksame, nichtige Vertrag kann auch in (partielle) Wirkung gebracht werden, falls die Rede von der Teilnichtigkeit ist, das heißt, wenn nur Teile des Vertrags gesetzwidrig sind und deswegen nur diese als nichtig erklärt werden. Der Vertrag kann in anderen rechtmäßigen Teilen nur dann in Wirkung bleiben, falls der Vertrag ohne die nichtigen Klauseln aufrechterhalten werden kann, und auch wenn der Vertrag ohne die nichtige Bestimmung weiterhin dem ursprünglichen Ziel und dem rechtsgeschäftlichen Willen der Parteien entspricht.[15] Die Aufrechterhaltung des Vertrags kann aber davon abhängen, ob die Nichtigkeit die Hauptelemente *(essentialia negotii)* oder die Nebenelemente *(negotii incidentalia)* berührt. Falls sich die Teilnichtigkeit auf die Hauptelemente des Vertrags bezieht, führt dies regelmäßig zur Nichtigkeit des ganzen Vertrags, weil der Vertrag mit den Nebenelementen allein keine Stabilität aufweisen kann. Und umgekehrt, falls die Nichtigkeit nur die Nebenelemente betrifft, kann der Vertrag ohne die Nebenelemente in Wirkung bleiben. Die Hauptelemente des Vertrags sind solche, ohne die der Vertrag nicht entstehen kann. Bei gesetzlich geregelten Vertragstypen werden die Hauptelemente normalerweise vom Gesetz geregelt (z. B. beim Kauf sind die Hauptelemente der Gegenstand und der Preis, und als Nebenelement dient z. B.

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von beiden Verträgen ist identisch (Eigentumsübergang), aber die Art, der Typ der Verträge ist unterschiedlich: der Verkauf ist engeltlich, die Schenkung ist ein unentgeltlicher Vertrag, also einander widersprüchlich. Das französische Recht versteht unter der Konversions des nichtigen Vertrags vielmehr die Reduktion der Vereinbarungen des nichtigen Vertrags, was selbst zur Annäherung der Konversion an die teilhafte Nichtigkeit führt. (Siehe, Boujeka, 2002, S. 223; Perrin, 1911; Lipinski, 2002, S. 1167.)

15 Siehe § 139 des BGB (Teilnichtigkeit). Nach dieser Regelung: „Ist ein Teil eines Rechtsgeschäfts nichtig, so ist das ganze Rechtsgeschäft nichtig, wenn nicht anzunehmen ist, dass es auch ohne den nichtigen Teil vorgenommen sein würde." Nach den Kommentaren kann die Teilnichtigkeit mit der Privatautonomie erklärt werden. Diese ermöglicht die Wirksamkeit des Vertrags, den Willen der Parteien in den Teilen, welche den imperativen Normen des Gesetzes nicht entgegenstehen (Prütting, Wegen, und Weinreich, 2007, S. 169). Siehe weiter, schweizerisches OR, § 20(2) in: Obligationenrecht vom 30. März, 1911, Hrsg. Bundeskanzlei, Bern, 1980, S. 5. Das schweizerische Obligationengesetz schreibt vor, dass falls die Mängel nur Teile des Vertrags berühren, dann sind nur diese Teile nichtig, mit der Ausnahme, falls eine Feststellung zeigt, dass die Parteien ohne diese nichtigen Vertragsteile den Vertrag nicht schließen wollten. Mit anderen Worten, falls die Parteien ohne die nichtigen Teile des Vertrags den Vertrag ursprünglich nicht schließen wollten, ist der ganze Vertrag nichtig.

die Erfüllungsfrist). Aber die Erfüllungsfrist, welche in anderen Verträgen nur ein Nebenelement ist, wird bei sog. Fixverträgen immer als Hauptelement betrachtet. Die Teilnichtigkeit regelt das UBGB in § 6:114 mit der folgenden Regel: „(1) Falls der Ungültigkeitsgrund nur einen bestimmten Teil des Vertrags berührt, soll die Rechtsfolge der Ungültigkeit nur diesen Teil betreffen. Im Falle der Teilnichtigkeit wird der ganze Vertrag nur dann nicht entstehen, wenn zu vermuten ist, dass die Parteien ohne die nichtigen Teile den Vertrag nicht geschlossen hätten. (2) Bei der Teilnichtigkeit werden Verbraucherverträge im Ganzen nur dann nichtig, wenn der Vertrag ohne den unwirksamen Teil nicht erfüllbar ist.“ Die Regelung des UBGB nimmt hier mit einer klaren und präzisen Regelung die allgemein anerkannten traditionellen Lösungen an (Siehe in der neuesten ungarischen Literatur: Vékás, 2021, S. 149, Rnr 361–362; Kiss und Sándor, 2014, S. 15, S. 187, Rnr. 7.3.4.).

Im Falle der Nichtigkeit des Vertrags wegen einem *Formfehler* bei formbedürftigen Verträgen und der beiderseitigen *Erfüllung* seitens beider Vertragspartner, erhält der Vertrag wieder seine Wirkung, *die Erfüllung saniert die Formfehler*. Diese Lösung wird unter Berücksichtigung der Tradition des gemeinen Rechts vom schweizerischen OR sowie von anderen europäischen Kodifikationen übernommen, inklusive das UBGB in § 6:94(1)(2).

Die absolute und relative Unwirksamkeit (Nichtigkeit) soll man von der *Unwirksamkeit außerhalb des Kreises der Nichtigkeit* unterscheiden. Die absolut nichtigen Verträge sind von Anfang an aufgrund des Gesetzes (ex lege) unwirksam. Aber die Unwirksamkeit kann auch bei gültigen Verträgen entstehen, wie z. B. bei Verträgen, bei denen die Wirkung aufgrund des Geschäftswillens der Parteien von einer Bedingung oder Zeitbestimmung abhängt, oder bei zweiseitig verbindlichen Verträgen, bei denen die Erfüllung der Leistung einer Partei die Erfüllung seitens der anderen Partei voraussetzt. Die Erfüllungsklage einer Partei kann die Erfüllung mit dem Einwand aufschieben, dass der Kläger vorher auch nicht zur Erfüllung seiner Leistung bereit war *(Exceptio non adimpleti contractus)*. In der deutschen Literatur ist bestritten, ob man die Zug-um-Zug-Leistung als Bedingung bewerten kann oder nicht. Nach Blomeyers Auffassung (Blomeyer, 1969, S. 114) kann die gemeinsame, beiderseitige Erfüllung, als Voraussetzung der Erfüllung, in die Kategorie der Bedingungen aufgenommen werden. Im Gegensatz dazu ist nach der Theorie von Karl Larenz (Larenz, 1979, S. 169) hier keineswegs die Rede von der Bedingung im engeren Sinne des Wortes, weil die gegenseitigen Verbindlichkeiten weiter, auch nach dem Einwand der Nichterfüllung gelten, aber bei Bedingungen, insbesondere bei der auflösenden Bedingung, wird nach der Erfüllung der Bedingung die Schuld, also die Wirkung des Vertrags, dauerhaft und definitiv aufgelöst. Der Einwand der Nichterfüllung kann die Erfüllung der Obligation bei Zug-um-Zug-Verbindlichkeiten nur vorläufig verschieben, bis zum Zeitpunkt, wenn auch die andere Partei zur Erfüllung bereit ist.

Im ungarischen Recht, kann man den Einfluss auf die Wirkung des Vertrags im breiteren Sinne des Wortes als Bedingung, oder eher als Voraussetzung einstufen, der auf einer gesetzlich vorgeschriebenen behördlichen (vorherigen oder nachherigen) Genehmigung des Vertrags, bzw. auf der Genehmigung oder

Einverständnis von Drittpersonen beruht. Falls die Genehmigung oder das Einverständnis realisiert wird, erhält der Vertrag seine Wirkung von Anfang an. Im Gegensatz dazu bleibt der Vertrag ohne diese Einwilligung oder dieses Einverständnis ohne Wirkung.

Die Vertragsverletzung sollte man von der Unwirksamkeit des Vertrags unterscheiden. Die Unwirksamkeit berührt das „Bestehen" des Vertrags, unter der Vertragsverletzung versteht man die rechtlichen Konsequenzen, Rechtsfolgen wegen der Vertragsverletzung oder wegen der fehlerhaften oder verzögerten Erfüllung (Szalma, 2018, S. 135).

Durch eine *Bedingung* oder *Zeitbestimmung* können die Parteien aufgrund ihrer rechtsgeschäftlichen Einigung die Wirkung des Vertrags dadurch beeinflussen, dass sie die schon eingetretene Wirkung aufheben oder die noch nicht eingetretene Wirkung verschieben oder modifizieren, was von bestimmten äußeren, von den Parteien nicht beeinflussten Ereignissen abhängt. Man kennt *mehrere Arten* von Bedingungen. Die erste ist die *aufschiebende Bedingung*, welche die Wirkung des vorher geschlossenen gültigen Vertrags bis zur Verwirklichung eines zukünftigen Ereignisses verschiebt. Die zweite Art ist die *auflösende Bedingung*, bei welcher die schon beim Vertragsabschluss entstandene Wirkung des Vertrags nach ihrer Verwirklichung aufgelöst wird. Beim dritten Bedingungstyp wird die vorherige *Wirkung* des Vertrags ab der Realisation der Bedingung *verändert* (Potestativbedingung, „wirkungsändernde" Bedingung). Nach der vierten Unterteilung kann die Bedingung negativ oder positiv sein. Nach der *negativen* Bedingung wird die Wirkung des Vertrags verschoben oder aufgelöst, falls das zukünftige Ereignis nicht geschehen wird. Unter der *positiven* Bedingung versteht man, dass das vorgesehene zukünftige Ereignis zur Entstehung, Auflösung oder Modifikation der Vertragswirkung geschehen soll.

Ein Definitionsversuch der Bedingungen. Die Bedingung ist a) unsicher, b) zukünftig, c) von den Vertragsparteien nicht beeinflusst, d) hat ihre Wirkung durch nebenvertragliche Vereinbarungen vorgesehene äußere Ereignisse, welche die Entstehung, Auflösung oder Veränderung der Wirkung des Vertrags beeinflussen (vergleiche in der ungarischen Literatur: Vékás, 2021, S. 153, Rn. 347).[16] Nach der

[16] Vékás zitierte die Auffassung des Ungarischen Obersten Gerichtshofs (Kúria) über aufschiebende (BH 2009.18.) und auflösende (BH 2013.13.) Bedingungen.

Für das österreichische Recht siehe Koziol, 2000, S. 171–173. Siehe weiter die Regelung des ABGB über Bedingungen im Schuldrecht, §§ 897–900, welche auch auf Bedingungen im Erbrecht verweisen, weiterhin §§ 695–712. (Siehe auch: Welser und Zöchling-Jud, 2015, S. 557, Rn. 2032.) Siehe z. B. § 897 ABGB – Bedingungen, Nebenbestimmungen bei Verträgen; § 898 – Unerlaubte Bedingungen beim letzten Willen. Nach § 899. des ABGB „ist die in einem Vertrage vorgeschriebene Bedingung schon vor dem Vertrage eingetroffen; so muss sie nach dem Vertrage nur dann wiederholt werden, wenn sie in einer Handlung dessen, der das Recht erwerben soll, besteht, und von ihm wiederholt werden kann". Nach § 900. des ABGB: „Ein unter einer aufschiebenden Bedingung zugesagtes Recht geht auf die Erben über."

näheren Definition der österreichischen Autoren ist die Bedingung nichts anderes als eine von den Parteien vorgesehene Begrenzung des Vertrags, welche die Entstehung, Auflösung oder Modifizierung der Wirkung des Vertrags von ungewissen Umständen abhängig macht. Die Funktion der Bedingung besteht für die Parteien darin, dass das Rechtsverhältnis zwischen den Parteien von solchen ungewissen Umständen abhängen wird, deren Bestehen oder Nichtbestehen zum Zeitpunkt der Vertragsschließung noch nicht voraussehbar ist. Die Bedingung kann auch eine subjektive Tatsache wie das Motiv sein. Die Bedingung kann aufschiebend (aufschiebende Bedingung) oder auflösend (auflösende Bedingung, Resolutivbedingung) sein. Falls die testamentarische Verfügung unmöglich oder verboten ist, oder wenn sie von einer aufschiebenden Bedingung abhängt, ist sie nach § 698 des ABGB unwirksam. Falls das Testament verbotene, unmögliche oder aufschiebende Bedingungen enthält, welche nichtig, unwirksam sind, führt das nicht unbedingt zur Nichtigkeit des ganzen Testaments selbst, weil das Testament so betrachtet wird, als ob eine solche Bedingung nicht vorgesehen wäre.

Man soll man unterscheiden zwischen den Voraussetzungen für die Entstehung des Vertrags (Voraussetzungen des Vertrags, d., condition de formation, fr.), ohne

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Siehe die weitere deutsche und deutschsprachige, österreichische Literatur über die Bedingungen: (Enneccerus, 1889; Oertman, 1924; Blomeyer, 1938/39; Henke, 1959; Schmidt-Rimpler, 1968; Egert, 1974; Knütel, 1976, S. 613; Peter, 1994; Bydlinski, 1990, S. 53). Auch die Auflage, Auftrag kann als Bedingung dienen. So z. B. falls das Testament oder ein unentgeltlicher Vertrag eine solche Nebenbestimmung enthält, welche sie zur Erzielung der Rechte der Adressaten zu einem bestimmten Verhalten verpflichtet (z. B. jemand macht der Universität ein bestimmtes Geldgeschenk unter der Bedingung, dass die Universität den Studenten bei der Beschaffung von Lehrbüchern hilft). (So, Koziol, 2000, S. 175). Das heißt, in der deutschen und deutschsprachigen Literatur ist eine Reihe von theoretischen und für die Rechtsanwendung relevanten praktischen Fragestellungen über die Bedingungen entstanden, z. B. der Anfangstermin, die Beidseitigkeit bei einseitig bestimmten Bedingungen, die Fiktion der Erfüllung oder Nichterfüllung bei Bedingungen, die Wirkung der Verträge, die mit der gerichtlichen Genehmigung vorausgesetzt sind usw.

Im französischen Recht regelt der Code civil (Cc) in §§ 1168–1174 die aufschiebenden, auflösenden und rechtsverändernden Bedingungen. (In der Kommentar-Literatur siehe z. B.: Venandet et al., 2016, S. 1609–1611.) Nach der Regelung des Code civil sind die vorausgesetzten Obligationen (l'obligation conditionnelle) solche, deren Wirkung vom Bestehen oder Nichtbestehen eines zukünftigen unsicheren Ereignisses abhängt, welches zur Auflösung oder Verschiebung der Vertragswirkung führt. (Siehe, Code civil, § 1168, und Venandet et al., 2016, S. 1609.) Über rechtsändernde Bedingungen siehe die folgende neuere Literatur: Chénedé, 2013, S. 291 und 1131. In der klassischen französischen Literatur siehe: Lepelletier, 1889; Panien, 1899.) Diese Dissertationen vom Anfang des 20. Jahrhunderts betrachten mehrere wichtige Fragestellungen, wie die Wirkung oder das Ausbleiben der Wirkung wegen verbotenen Bedingungen, wegen Bedingungen, die sittenwidrig, verboten oder unmöglich sind. Das heißt, diese Werke sprechen darüber, dass die unmöglichen, verbotenen oder sittenwidrigen Bedingungen, gegen den Willen der Parteien, keine aufschiebende, auflösende oder modifizierende Wirkung haben.

welche kein Rechtsgeschäft entstehen kann, wie die Geschäftsfähigkeit, Willenseinigung, Gegenstand des Vertrags und ausnahmsweise die gesetzlich verbindliche Form – und den Bedingungen, bei denen die Wirkung des Rechtsgeschäfts von ungewissen zukünftigen Ereignissen abhängt, bei welchen der ursprüngliche Geschäftswille, aufgrund der Einigung der Parteien, überwiegt. (Bedingung, d., la condition désigne, fr.) (Simler, 1969, S. 52)

Das Ausbleiben der Vertragsentstehung kann wegen dem Ausbleiben der Vertragseinigung (aber nicht als Willensmangel) geschehen, wie beim Missverständnis (Dissens). In diesem Fall ist die Rede vom nicht vorhandenen Vertrag (negotion null, fr.). Beim nicht vorhandenen Vertrag ist die Wirkung des Vertrags von Anfang an ausgeblieben. Den Begriff des nicht vorhandenen Vertrags verbindet die französische Literatur mit Voraussetzungen für die Entstehung des Vertrags. Falls die Willenseinigung fehlt, falls die Parteien keine Rechtsfähigkeit haben, falls die Leistung des Vertragsgegenstands von Anfang an unmöglich ist, soll der Vertrag als nicht vorhanden bewertet werden. Aber vom nicht vorhandenen Vertrag soll man die (nachherige) Leistungsstörung und Leistungsunmöglichkeit unterscheiden. Bei der Leistungsstörung ist die Rede vom nachherigen Leistungshindernis bei einem gültigen, wirksamen Vertrag, z. B. nach dem Vertragsschluss wird der Gegenstand des Vertrags als eine individuell bestimmte Sache zerstört, ohne Schuld der dazu verpflichteten Partei. Dadurch wird der Vertrag aber nicht als nichtexistierend bewertet, er bleibt weiterhin ein gültiger Vertrag. Hier ist die Rede von einer solchen Leistungsstörung, welche auf die Entstehung und die Gültigkeit des Vertrags keine Wirkung hat. Somit, falls der Gegenstand des Vertrags (als eine individuell bestimmte Sache) von Anfang an unmöglich war (anfängliche Unmöglichkeit der Leistung), ist die Rede von einem nicht vorhandenen Vertrag, aber falls diese Sache zum Zeitpunkt der Vertragsschließung möglich war, aber nachher unmöglich geworden ist, wegen der vis maior-Wirkung, spricht man von einer Leistungsstörung (nachherige Unmöglichkeit), welche auf das Bestehen des Vertrags keine Wirkung hat. Mit anderen Worten, falls die Unmöglichkeit der Leistung nach der Vertragsschließung geschehen ist, führt dies nicht zu den Folgen der nicht vorhandenen Geschäfte, und es hat keine Wirkung auf das Bestehen und die Gültigkeit des Vertrags, und sie stellt nur ein Leistungshindernis dar. Im Gegensatz dazu richtet sich die anfängliche Leistungsunmöglichkeit auf einen nicht vorhandenen Vertrag. Die Unmöglichkeit kann neben der anfänglichen und nachträgliche auch objektiv, subjektiv, dauerhaft, vorläufig, vollständig oder teilweise sein. (Fikentscher, 1976, S. 188–190)

Somit unterscheiden sich die nichtigen Verträge von den nicht vorhandenen Verträgen.[17] Gemeinsam ist, dass sowohl die nicht vorhandenen Verträge, als auch

[17] In der ungarischen Literatur siehe z. B., Siklósi 2013, S. 79. Die französische Literatur und Rechtsprechung *(Cour de cassation)* knüpft den Begriff der nicht vorhandenen Verträge *(inexistence du contrat)* insbesondere an den Ehevertrag an (contrat de marriage inexistant), falls der freie Wille der Parteien fehlt. Es wird erwähnt, dass für den nicht vorhandenen Vertrag regelmäßig zwei Ursachen „Schuld“ sind. Die eine ist die

die nichtigen, von Anfang an keine Wirkung haben. Wie schon oben bemerkt, ist die Rede von Verträgen, bei welchen die Grundvoraussetzungen für die Entstehung des Vertrags fehlen, wie z. B. beim Dissens, oder wenn eine Partei nicht geschäftsfähig ist, oder wenn der Vertragsgegenstand von Anfang an unmöglich war. In dieser Situation bleibt der Vertrag von Anfang an *(ab initio)* ohne Wirkung. Nach Auffassung der allgemein anerkannten Theorie, sind die Rechtsfolgen der nichtexistierenden Verträge identisch mit den Konsequenzen der nichtigen Verträge, mit Ausnahme der Konversion: was nicht bestanden hat, kann man nicht umgestalten. Falls die Parteien jedoch aufgrund eines nicht vorhandenen Vertrags einen neuen Vertrag schließen, wird ein solcher Vertrag als neuer Vertrag betrachtet, ohne Vorgeschichte, und nicht als umgestalteter Vertrag. Ein Vertrag, dessen Gegenstand von Anfang an unmöglich ist, wird als nicht vorhandener Vertrag bewertet, falls aber der Vertragsgegenstand von Anfang an verboten ist, ist die Rede vom nichtigen Vertrag.

Die Zeitbestimmung ist nichts anderes als eine Bedingung, bei welcher die „Realisierung", das Eintreten sicher ist. Nach der Literatur ist die Zeitbestimmung eine Beschränkung mit einer Frist, mit einer zeitlichen Begrenzung des

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Unbestimmtheit der vertraglichen Verfügungen *(incertaine)*, die zweite ist die praktische Unanwendbarkeit des Vertragsinhalts *(inutile)*, weil beispielsweise der Gegenstand unmöglich ist. Die Literatur ist sich einig, dass man beim Nichtvorhandsein des Vertrags die Rechtsfolge der Nichtigkeit anwenden soll, mit Ausnahme der Konversion (weil ein „nichts" nicht in „etwas" umgestaltet werden kann). (Siehe, Colin und Capitant, 1959, ad S. 424, Rn. 748.) Auch andere berühmte französische Autoren betonen die unterschiedlichen Merkmale der nicht vorhandenen, absolut und relativ nichtigen Verträge. Bei absolut und relativ nichtigen Verträgen *(nullité absolues et nullités relatives)*, weisen sie darauf hin, dass bei absolut nichtigen Verträgen charakteristisch ist, dass sie entgegen der öffentlichen Ordnung sind *(l'ordre public)* (Code civil, § 6), oder deren Rechtstitel (Kause, cause) ist verboten, weiter welche ein Verbot einer konkreten imperativen Regel des Gesetzes verletzen, z. B. beim Wucherverbot, oder sie stehen im Gegensatz zum Ziel einer imperativen Regel des Gesetzes *(la fraude)*, also sie haben Umgehungszwecke *(agere in fraudem legis)*. Dagegen gefährden die relativ nichtigen Verträge nur die Interessen der Parteien und wegen dem Willensmangel *(vices du consentement)* sind sie anfechtbar. Die absolute und die relative Nichtigkeit stellt das Gericht fest, und gleichzeitig (Anm.: anders als im ungarischem Recht die Lage ist, wobei über die konkreten Rechtsfolgen das Gericht in einem gesonderten Prozess entscheidet, falls die Nichtigkeit nicht im Nichtigkeitsprozess bemerkt wird) entscheidet es über die einseitige oder beiderseitige Restitution, was davon abhängt, ob aufgrund des nichtigen Vertrags bis zur Nichtigkeitserklärung tatsächlich die ein- oder beiderseitige Erfüllung erfolgte. Die absolute Nichtigkeit und ihre Folgen bestimmt das Gericht von Anfang an, bei der relativen Nichtigkeit nur vom Zeitpunkt der gerichtlichen Entscheidung über eine solche Nichtigkeit. Die relativ nichtigen Verträge kann man konvalidieren, falls die Anfechtungsgründe aufgelöst werden, oder falls die interessierte Partei ihr Anfechtungsrecht innerhalb der Anfechtungsfrist nutzt. Der nicht vorhandene Vertrag kann im Gegensatz zum absolut und relativ nichtigen Vertrag nicht konvalidiert und nicht konvertiert werden. (Mazeaud et al., 1962, S. 244–270)

Rechtsgeschäfts, bei der die Rechte, welche aus dem Rechtsgeschäft stammen, zu einem bestimmten Zeitpunkt beginnen oder enden. Von der Bedingung unterscheidet sich die Zeitbestimmung darin, dass die Wirkung des Vertrags im Fall der Bedingung von einem unsicheren zukünftigen Ereignis abhängt, aber bei der Zeitbestimmung ist der anfängliche und finale Zeitpunkt immer sicher. Angesichts der Zeitbestimmung sind im Übrigen die Regeln über die Bedingung sinngemäß anwendbar. Eine Zeitbestimmung kann an irgendeine Bedingung geknüpft werden. Hier ist aber nicht die Rede von der Erfüllungsfrist, sondern davon, dass der Zeitpunkt der Verschiebung, Aussetzung oder Änderung der Vertragswirkung dient. Den Bestand der Wirkung des Vertrags kann man durch eine Kalenderfrist bestimmen, beispielsweise falls die Parteien den Kaufvertrag am 15. März schließen, wird er seine Wirkung am 1. Dezember erlangen. (Koziol, 2000, S. 164) Die Zeit ist im rechtsphilosophischen Sinne des Wortes eine Frage mit vielen juristischen Bedeutungen, die viel weiter gefasst sind als die Zeitbestimmung, und im Privatrecht berührt sie mehrere verschiedene Rechtsinstitutionen. Bei Rechtsgeschäften kann die Zeit die Erfüllungsfrist bedeuten (die nicht mit der Bedingung oder Zeitbestimmung verbunden ist), sie kann sich auch auf die Verjährung (préscription, fr.) beziehen, oder auf die Präklusion (préclusion, fr.), nicht zuletzt auf die zukünftige Wirkung der zivilrechtlichen Gesetze, und das Verbot ihrer Rückwirkung enthalten, welche zusammen die Rechtssicherheit bezwecken , die Frist kann auch gerichtlich sein, mit dem Ziel der Erfüllung von prozessrechtlichen Verpflichtungen, z. B. die Sicherung und Vorlegung von Beweisen, usw. (Karácsony und Techet, 2011, S. 269–293; Karácsony, 2007, S. 15–18; Karácsony, 2005, S. 27–31, Karácsony (Hrsg.), 2010, S. 269–293; Peschka, 2000, S. 73; Csehi, 2013, S. 31; Matúz, 1996; Pusztahelyi, 2015, S. 82; Rudolf, 1961)

Bestimmte Bedingungen und Zeitbestimmungen können auch nichtig sein, weil sie die Privatautonomie, also die Vertragsfreiheit begrenzen (Gschnitzer et al., 1952, Band III, S. 656). Diese können nach der österreichischen Theorie in zwei Gruppen geteilt werden. Zur ersten Gruppe zählt man die (verbotenen) Bedingungen, welche die Statusrechte entgegen der guten Sitten begrenzen, wenn z. B. die Dauer des Ehevertrags oder der Adoption mit einer Frist begrenzt wird, welche die Ehe oder Adoption zu einem bestimmten Zeitpunkt beendet. Zur zweiten Gruppe zählt man die Zeitbestimmungen, welche die Begrenzung der Dauer des Mietverhältnisses und dadurch die Beeinträchtigung der Rechte des Mieters bezwecken (Koziol, 2000, S. 174–175). Nach der Regelung des ungarischen Rechts (UBGB, Par. 6:100) sind die Bedingungen nichtig, welche die Verbraucherrechte beeinträchtigen: „In Verträgen zwischen dem Verbraucher und dem Unternehmer ist die Klausel nichtig, die von den gesetzlich bestimmten Verbraucherrechten abweicht.“ Im französischen Recht, in § 900 des Code civil, „irgendeine rechtsgeschäftliche Verfügung zwischen lebenden Personen oder testamentarisch, welche eine unmögliche, gesetz- oder sittenwidrige Bedingung enthält, wird als nicht vorgeschrieben erachtet“. (*Les conditions impossibles, qui seront contraires aux lois ou moeurs, seront réputées non écrites*; Simler, 1969, S. 3.)

Das heißt, auch die Bedingungen selbst können nichtig sein, falls sie irgendeiner imperativen gesetzlichen Regelung entgegenstehen, oder wenn sie unmöglich sind. In dieser Situation hat die Bedingung wegen der Widerrechtlichkeit keinen Effekt auf die Wirkung des Vertrags. Daneben kann die Bedingung, welche rechtmäßig ist, keine in der Bedingung vorgeschriebene aufschiebende oder auflösende Relevanz haben, falls die Parteien die Entstehung der Bedingungen bewusst unterstützt oder hervorgerufen haben. Hinsichtlich der Verhinderung oder Herbeiführung des Bedingungseintritts § 162 des deutschen BGB besagt Folgendes: „(1) Wird der Eintritt der Bedingung von der Partei, zu deren Nachteil er gereichen würde, wider Treu und Glauben verhindert, so gilt die Bedingung als eingetreten. (2) Wird der Eintritt der Bedingung von der Partei, zu deren Vorteil er gereicht, wider Treu und Glauben herbeigeführt, so gilt der Eintritt als nicht erfolgt“ (Prütting, Wegen und Weinreich, 2007, S. 211). Es ist die Rede von einer (negativen) rechtlichen Fiktion, nach welcher die Realisation der Ereignisse als nicht geschehen betrachtet wird. In der französischen Rechtsprechung stellt sich die Frage, welche die Rechtsfolgen sind, wenn bei unentgeltlichen Geschäften eine bestimmte Bedingung nicht erfüllt wird. Die Frage ist, ob der Geschenkgeber das Geschenk zurückziehen kann, falls der Beschenkte die Bedingung nicht erfüllt hat. Die Antwort ist positiv (Simler, 1969, S. 48–49).[18] Es ist allerdings darauf hinzuweisen, dass die bedingte Schenkung nicht als wahre Bedingung im engeren Sinne des Wortes bewertet werden kann. Im gegebenen Fall ist die Bedingung eine Gegenleistung, die der Schenker vom Schenkungsempfänger erwartet hat, und deren Wert offensichtlich kleiner ist, als der des Geschenks. Hier ist das Geschenk vielmehr ein *negotium mixtum,* und die Gegenleistung ist keine Bedingung, vielmehr eine Voraussetzung. Deswegen auch, weil die Bedingung in der Regel ein solches Ereignis ist, dessen Realisierung nicht vom Willen der Parteien abhängt. Das normalerweise unentgeltliche Geschenk wandelt sich teilweise in ein entgeltliches Geschäft. Bei der Bedingung im engeren Sinne des Wortes ist die Rede von einem zukünftigen, unsicheren, vom Parteiwillen nicht abhängigen Ereignis, welches die Wirkung des Geschäfts durch seine Verschiebung oder Auflösung beeinflusst. Bei der Schenkung unter Auflage hängt die Wirkung des Vertrags vom Willen der anderen Partei ab, welche die Auflage erfüllen soll, d. h. hier ist keineswegs die Rede von einem Ereignis, das nicht vom Parteiwillen abhängt. Bei gemischten Geschenken ist die Rede von einer Gegenleistung und nicht von einer Bedingung. Falls diese Gegenleistung nicht erfüllt wird, ermöglicht das die Revokation des Geschenks.

Die Bedingung und die Zeitbestimmung sind nicht nur für die Beeinflussung der Vertragswirkung, sondern auch für die Beeinflussung der Wirkung von anderen

[18] Es ist die Rede vom Rechtsstreit aus der ersten Hälfte des XIX. Jahrhunderts: Cour de Pau du 2. janvier 1827, application de l’ art. 900 Cc. Das Gericht genehmigt die Rückforderung des Geschenks, weil die beschenkte Partei die Bedingung nicht erfüllt hat. Ganz anders ist die Lage, falls die Bedingung nichtig ist, weil sie verboten ist, oder der Moral entgegensteht, – weil in solchen Fällen die Revokation des Geschenks ohne Wirkung bleibt. (Simler, 1969, S. 49–50)

Typen von Rechtsgeschäften geeignet. So ist das Legat beim singulären (individuellen) Erben mit einer Bedingung verknüpft. Der Erbe kann die Erbschaft nur dann antreten, falls er die vom Erblasser bestimmten Bedingungen erfüllt.[19]

Hinsichtlich der unwirksamen Verträge kann man als gemeinsame Rechtsfolge feststellen, dass die Parteien die Vertragsverbindlichkeiten vor dem Gericht, also mittels gerichtlichen Zwang nicht realisieren können.

Als ein Sonderfall der bedingten Wirkung ist der Versicherungsvertrag zu erwähnen. Durch den Versicherungsvertrag kann man die Entschädigungspflicht dem Versicherer (der Versicherungsgesellschaft) überlassen. Diese Überlassung ist für Fälle vorgesehen, bei welchen im Vertrag oder in den allgemeinen Versicherungsbestimmungen festgelegte ungewisse zukünftige Schadensrisiken (z. B. Unfall) eintreten (Szalma, 2020b, S. 33–34, 212). Das heißt, die „Bedingung" (Risiko) kann bei fakultativen Versicherungsarten der Versicherungsvertrag, die allgemeinen Versicherungsbedingungen, oder bei der Pflichtversicherung das Gesetz enthalten. Beim Eintritt des Risikos geht der dadurch entstandene Schaden hinsichtlich der Haftung für diesen Schaden zugunsten des Geschädigten vom versicherten Schadensverursacher auf die Versicherungsanstalt, die Versicherungsgesellschaft über. Die Wirkung des Versicherungsvertrags beginnt, hinsichtlich der Übertragung der Haftung, vom Zeitpunkt der Realisierung des vereinbarten Risikos.

Die nötigen Voraussetzungen und Umstände für das Zustandekommen und die Gültigkeit des Vertrags sollen zum Zeitpunkt der Vertragsschließung bestehen (Vékás, 2021, S. 110, Rn. 246), aber die Bedingungen und die Zeitbestimmungen, welche die Wirkung des Vertrags beeinflussen, hängen immer vom Eintritt eines zukünftigen Ereignisses, bzw. Umstands ab.

Wirkungslos sind auch die Naturalobligationen *(obligatio naturalis)*, (z. B. verjährte Forderungen), weil man sie auf gerichtlichem Wege nicht geltend machen kann, bzw. insbesondere falls der Beklagte den Verjährungseinwand einreicht. Aber durch die freiwillige (außergerichtliche) Erfüllung bekommen die Naturalobligationen ihre rechtlich anerkannte Wirkung [§ 6:121(3) des UBGB], weil man die erfüllte Leistung aufgrund der ungerechtfertigten Bereicherung nicht erfolgreich zurückfordern kann, mit der Behauptung, dass hier die Rede von einer nicht geschuldeten Leistung ist *(condictio indebiti)*. Nach dem Eintritt der aufschiebenden Bedingungen wird gleichzeitig auch die Wirkung des Vertrags aktiviert, und damit wird die Vertragsverpflichtung klagbar. Im Gegensatz dazu können die verjährten Forderungen nach dem Verjährungseinwand vor Gericht nicht geltend gemacht werden. Bei mit einer präklusiven Frist (Ausschlussfrist, Frist des Rechtsaus-

[19] Im österreichischen Recht kann der Erblasser durch das Testament den Erben eine Auflage, oder im Fall von Schenkung, der Geschenkgeber den Geschenknehmern eine Gegenleistung voraussetzen. So z. B. falls der Erblasser (A) in seinem Testament bestimmt, dass der Erbberechtigte (B) sein Haus erben kann (C), unter der Voraussetzung, dass er Teile seines Hauses zur Nutzung zugunsten einer bestimmten Drittperson übergeben soll. Das Geschenk, welches mit einem Auftrag vorausgesetzt ist, soll vom bloßen Auftrag unterschieden werden. (Koziol, 2000, S. 175)

schlusses) vorausgesetzten Verträgen (wie beim Fixgeschäft) führt das Fristende zum definitiven Rechtsverlust, und man kann es auch nicht als Naturalobligation geltend machen. Falls eine solche Obligation trotzdem erfüllt wird, wäre die Klage über unberechtigte Bereicherung erfolgreich.

2. EINFLUSS DER VERTRAGSWIRKUNG DURCH BEDINGUNGEN UND ZEITBESTIMMUNGEN IM GELTENDEN UNGARISCHEN RECHT (UBGB)

Der VII. Titel des UBGB enthält Regelungen über die Wirkung und Wirkungslosigkeit des Vertrags, diesbezüglich kann man die §§ 6:116 und 6:117 betonen. Diese Regelung bezieht sich auf die Bedingungen im engeren Sinne des Wortes. Mit anderen Worten, hier ist die Rede von solchen Bedingungen und Zeitbestimmungen, welche aufgrund des rechtsgeschäftlichen Willens der Parteien die Wirkung des Vertrags beschränken, mitbestimmten, von ihnen nicht herbeigeführten Ereignissen, abhängig von deren Eintreten oder Nichteintreten. Diese Regelungen werden heutzutage schon von der bedeutenden ungarischen Literatur verfolgt und ausgelegt, mit Berücksichtigung der europäischen und ungarischen klassischen und zeitgenössischen Literatur (Vékás, 2018; Weiss, 1969; Földi und Hamza, 2018, S. 392–397, 642; Menyhárd, 2000; Siklósi, 2014; Osztovits, 2014; Kiss und Sándor 2014, S. 15; Barzó, 2015; Kriston und Sápi (Hrsg.), 2019, S. 7–9, 12, 25, 60; Tőkey, 2014; Kemenes, 2016; Barta, 2018). Der schon erwähnte § 6:116(1)(2) spricht von der aufschiebenden und der Auflösungsbedingung. Nach der Regelung über die aufschiebende Bedingung: „(1) Falls die Parteien das Eintreten der Vertragswirkung von unsicheren zukünftigen Ereignissen abhängig machen, beginnt die Vertragswirkung nach dem Eintritt der Bedingung.“ Diese Regelung entspricht der traditionellen Regelung über aufschiebende Bedingungen. Bei diesen entfaltet der schon vorher geschlossene Vertrag seine Wirkung nicht gleichzeitig mit der Vertragsschließung (wie es in der Regel der Fall ist), sondern später, und er hängt vom Eintritt eines von den Parteien vereinbarten bestimmten zukünftigen, unsicheren Ereignisses ab. Im Gegensatz dazu regelt der Absatz (2) die Auflösungsbedingung: „Falls die Parteien die Beendigung der Wirkung des Vertrags von einem zukünftigen, unsicheren Ereignis abhängig machen, verliert der Vertrag nach Eintreten der Bedingung seine Wirkung.“ Der Einfluss der Auflösungsbedingung ist entgegengesetzt zum Einfluss der aufschiebenden Bedingung. Bei der Auflösungsbedingung wird die Wirkung des Vertrags, welche mit der Vertragsschließung gleichzeitig eingetreten ist, nach dem Eintreten der Bedingung aufgelöst.

Die Zeitbestimmung unterscheidet man auch im ungarischen Recht von der Bedingung (bei der es sich um ein unsicheres zukünftiges Ereignis handelt), im Sinne, dass die Zeit ein sicheres „Ereignis“ ist, weil das Vergehen der Zeit gewiss ist. In anderen rechtlichen Eigenschaften wird die Zeitbestimmung von denselben Rechtsfolgen begleitet wie die Bedingungen, d. h. gemäß dem Parteiwillen aus dem Vertrag führt sie zur Verschiebung, Auflösung oder Änderung der Wirkung des Vertrags. Nach Absatz (3) des oben zitierten Paragrafen des UBGB: „Die

Regelungen über die Bedingungen sind sinngemäß anzuwenden, falls die Parteien den Eintritt oder die Auflösung der Vertragswirkung an einen Zeitpunkt knüpfen."

Das UBGB verbietet im Einklang mit anderen europäischen bürgerlichen Gesetzbüchern ausdrücklich den Parteien ihre Wirkung auf das Eintreten eines unsicheren Ereignisses, d. h. seine Herbeiführung. Falls eine der Parteien entgegen dieses Verbots schuldig ist für die Herbeiführung oder Vereitelung des Eintritts des unsicheren Ereignisses, treten die ursprünglichen Rechtsfolgen der Bedingung wegen der Einwirkung auf die Bedingung nicht ein. Eine Ausnahme ist die gutgläubige Drittperson, welche ihre Rechte aufgrund eines entgeltlichen Vertrags erwirbt. Das heißt, das Recht einer gutgläubigen Drittperson wird vom Fehlen oder dem Eintreten der Bedingung nicht berührt. Der § 6:117 des UBGB (anstehende Bedingung) stellt fest: „(1) Während das Eintreten der Bedingung ansteht, kann keine der Parteien etwas unternehmen, was die Rechte der anderen Partei durch das Eintreten oder Nichteintreten der Bedingung beeinträchtigt oder vereitelt. Diese Regel beeinträchtigt nicht die gutgläubig und entgeltlich erworbenen Rechte." Das UBGB schreibt in Absatz (2) auch vor: „Aufgrund des Eintretens oder Nichteintretens der Bedingung kann niemand Rechte begründen, falls er das selbst verschuldet hat."

Bestimmte Regeln des UBGB, insbesondere im Bereich des Erbrechts, verbieten ausdrücklich, die Wirkung des Rechtsgeschäfts durch Bedingungen oder Zeitbestimmungen der Parteien zu beeinflussen. Das UBGB verbietet auf dem Gebiet des Erbrechts im Normenkreis vom Inhalt des Testaments die Benennung eines Nacherben, bedingt durch ein bestimmtes Ereignis oder eine Zeitbestimmung (§ 7:28 UBGB) (Siehe Vékás, 2021, S. 155). Das UBGB besagt: „(1) Nichtig sind solche Maßnahmen des Erblassers, nach welchen für den Nachlass oder Teile des Nachlasses der bisherige Erbe von einer anderen Person abgelöst (gewechselt) wird, abhängig vom Eintreten eines von den Parteien bestimmten Ereignisses, ab dem Zeitpunkt des Eintretens des Ereignisses." Aber „(2) die Benennung von Nacherben für den Todesfall des erstgenannten Erben bleibt in Wirkung, falls dafür die Voraussetzungen bestehen (gegeben sind)." Die Benennung der Nacherben ist auch gestattet: „(3) im Falle des Todes des primär benannten Ehepartners für die Teile des Nachlasses, welche ihnen zukommen (zufallen) sollen". „(4) Weiterhin ist die Benennung von Nacherben auch dann gültig, falls der primäre Erbe keine Geschäftsfähigkeit hat und ohne diese Fähigkeit verstorben ist."

Neben der Hauptregel regelt das UBGB den gestatteten Einfluss auf die Wirkung durch Bedingungen und Zeitbestimmungen, und es regelt auch die verbotene (anfechtbare) Art von Bedingungen (Bedingungen im breiteren Sinne des Wortes), den Vertrag zum Deckungsentzug. [§ 6:120 (1)–(5) UBGB].[20] Einen solchen Vertrag

[20] Nach der Meinung von Lajos Vékás sanktioniert das UBGB den Vertrag zum Deckungsentzug mit Anfechtbarkeit (relative Nichtigkeit), mit Berufung auf die Argumentation der folgenden Autoren: (Tőkey 2020, S. 198; Molnár, 2006, S. 2, 58–70). Nach der Definition von Vékás ist der Vertrag zum Deckungsentzug ein unentgeltlicher Vertrag oder eine einseitige Willenserklärung, welche die Entziehung

qualifiziert man als Umgehungsgeschäft, weil dieser Vertrag die rechtlich geschützten Interessen der anderen Partei schuldhaft gefährdet *(agere in fraudem partis)*. Dieser Vertrag erzielt nämlich die Umgehung der rechtlich geschützten Interessen des Gläubigers. Der Zweck des Vertrags zum Deckungsentzug ist die Vermeidung der Erfüllung der vorher vereinbarten Obligation zugunsten der Drittperson oder die Vollstreckung der Forderung durch eine scheinbare Zahlungsunfähigkeit. Die wichtigsten Tatbestandsmerkmale und Ziele solcher Verträge bestehen darin, dass der Schuldner unter Missachtung der Interessen und Rechte seines Gläubigers das für die Erfüllung vorher genügende Vermögen, meistens zugunsten von Verwandten, durch unentgeltliche Verfügungen mindert. Dieses Vermeidungsziel des Schuldners wird gegebenenfalls durch fiktive oder Scheingeschäfte verwirklicht. Das Scheingeschäft ist nichtig, und die aufgrund dieses Geschäfts verwirklichte Übereignung ist auch ungültig, und somit tritt die Leistung aufgrund dieses Vertrags nach der Wiederherstellung des vorigen Standes wieder in das Vermögen des Überträgers ein. Diese Wiederherstellung ermöglicht die Verwirklichung oder Exekution der Forderung des Gläubigers. Das heißt, der Vertrag über Deckungsentzug ist unwirksam. Infolgedessen, nachdem das Gericht festgestellt hat, dass die Übereignung zur Umgehung des Gläubigers diente, damit die Exekution der Forderung vereitelt wird, wird die Wiederherstellung in den vorigen Stand zugunsten des Gläubigers ermöglicht. Auch beim Vertrag zum Deckungsentzug sind, wie bei anderen Umgehungsgeschäften, hinsichtlich der wichtigsten Bestandteile zwei Haupttheorien vertreten: Die erste ist die subjektive, die zweite ist die objektive Auffassung. Die objektive Theorie ist der Auffassung, dass die Umgehungsabsicht, neben dem Umgehungsverhalten, nicht Teil der Tatbestandsstruktur des Umgehungsgeschäfts ist, genügend ist das objektiv genannte Umgehungsverhalten und das Umgehungsergebnis. Im Gegensatz dazu ist nach der subjektiven Theorie die Umgehungsabsicht (angesichts einer gesetzlichen Regel oder eines rechtlich geschützten Interesses der anderen Partei) ein unentbehrliches Element, Bestandteil des Umgehungsgeschäfts. In der ungarischen Rechtsprechung findet man Entscheidungen über Verträge zum Deckungsentzug, welche die erste oder gegebenenfalls die zweite Theorie vertreten, unter besonderer Berücksichtigung der konkreten Umstände.

Wie andere europäische Gesetzbücher vertritt auch das UBGB die Auffassung, dass der Vertrag die Parteien wie ein Gesetz bindet, und die Parteien sollen den Vertrag so erfüllen, wie er lautet. (Nach dem Grundsatz *pacta sunt servanda*.) Dies gilt als Hauptregel. Aber aufgrund der Vertragsfreiheit können die Parteien durch eine neue Einigung ihren (entgeltlichen oder unentgeltlichen) Vertrag nachträglich ändern, und somit verändern sie die bisherige Wirkung des Vertrags (§ 6:191 UBGB). Die Wirkung des Vertrags kann auch durch richterliche Mitwirkung, auf Initiative der Parteien geändert werden, wenn die vertragsmäßige Erfüllung eines entgeltlichen dauerhaften Vertrags wegen veränderter Umstände für eine der

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des Befriedigungsfonds zur Forderung von einer Drittperson erzielt. (Vékás, 2021, S. 150, Rn. 380)

Parteien übermäßig erschwert wird *(veränderte Umstände, clausula rebus sic stantibus)* (§ 6:192 UBGB). Die veränderten Umstände setzen voraus, dass die Erfüllung erschwert ist, und somit wird der Wert der Leistung von einer Partei enorm größer als die Gegenleistung der anderen Partei. In dieser Lage kann man nach ungarischem Recht, aufgrund der richterlichen Mitwirkung, den Vertrag aufrechterhalten – durch die Modifikation des Vertrags, zum Zweck des Gleichgewichts der Leistungen. In manchen anderen europäischen Rechtssystemen besteht neben der richterlichen Änderung des Vertrags auch die Möglichkeit, aufgrund des Vorschlags der Partei, die in Zwangslage ist, den Vertrag aufzulösen.

Die Wirkung von Verträgen kann auch durch gesetzliche Regeln, behördliche Genehmigungen oder das Einverständnis einer Drittperson vorgeschrieben werden. Auch dies ist eine Art der Bedingung im breiteren Sinne des Wortes. Bei der Bedingung im engeren Sinne des Wortes liegt die Grundlage der Bedingung (Voraussetzung) nicht im rechtsgeschäftlichen Willen der Parteien, sondern in der gesetzlichen Regel. Gemeinsam ist, dass die Genehmigung unsicher ist, wie die mit dem Rechtsgeschäft vorgeschriebene Bedingung. Falls die Genehmigung verweigert wird, entsteht die Wirkung des Vertrags von Anfang an nicht, der Vertrag ist *ab initio* wirkungslos. Und umgekehrt, falls die Genehmigung bestätigt ist, tritt die Wirkung des Vertrags von Anfang an ein. Diesen Fall regelt § 6:118 des UBGB: „(1) Falls die Wirkung des Vertrags aufgrund einer gesetzlichen Regel das unentbehrliche Einverständnis einer Drittperson oder die Genehmigung einer Behörde voraussetzt, entsteht die Wirkung des Vertrags mit der Genehmigung und dem Einverständnis, rückwirkend vom Zeitpunkt der Vertragsschließung."

Das UBGB schreibt in den Regelungen über die Rechtsfolgen der wirkungslosen Verträge als grundlegende Sanktion vor, dass nach dem Eintreten der Unwirksamkeit die Erfüllung des Vertrags nicht gefordert werden kann. Für die Erfüllung aufgrund wirkungsloser Verträge gelten sinngemäß die Rechtsfolgen für ungültige Verträge (d. h. die Herstellung des vorigen Standes, also des Standes vor der Vertragsschließung – *restitutio in integrum*, inclusive die Rückgabe der schon erfüllten Leistungen). § 6:119 des UBGB (Wirkung von wirkungslosen Verträgen) schreibt folgendes vor: „(1) Falls die Wirkung des Vertrags noch nicht eingetreten ist, oder wenn der Vertrag seine Wirkung verliert, auch in dem Fall, wenn für den Vertrag das Einverständnis eines Dritten oder eine behördliche Genehmigung notwendig ist, und wenn letztere fehlt, kann die Erfüllung des Vertrags nicht gefordert werden." Weiter schreibt der Absatz (2) vor, dass „die Rechtsfolgen von ungültigen Verträgen auf die Erfüllung aufgrund wirkungsloser Verträge sinngemäß angewandt werden sollen".

3. STATT EINER ZUSAMMENFASSUNG – SCHLUSSFOLGERUNGEN

Aufgrund der Analyse des geltenden ungarischen und des vergleichenden Rechts kann man feststellen, dass die Bedingung und Zeitbestimmung im engeren Sinne des Wortes nur die Wirkung des Vertrags beeinflussen, also die Rechte und Pflichten der Parteien, aber sie berühren die Gültigkeit nicht. Die verschiedenen Modalitäten der

Bedingungen im breiteren Sinne des Wortes sind mit unterschiedlichen Rechtsfolgen verbunden. So ist bei entgeltlichen zweiseitig verbindlichen Verträgen die Erfüllung der Leistungen mit der Gegenseitigkeit vorausgesetzt *(exceptio non adimpleti contractus)*. Falls eine Partei, nach der Erfüllungsklage der anderen Partei, den Einwand der Nichterfüllung einlegt, mit der Behauptung, dass auch der Kläger vorher zur Erfüllung seiner Pflicht nicht bereit war, führt das nur zur zeitweiligen Aufschiebung der Erfüllung, verursacht aber selbst nicht die Aufhebung der Obligation. Durch behördliche Genehmigung oder durch das Einverständnis eines Dritten bedingte Verträge verlieren ohne die Genehmigung oder das Einverständnis ihre Wirkung von Anfang an. Umgekehrt, die Genehmigung und das Einverständnis führen zur Gültigkeit und Wirkung des Vertrags, auch von Anfang an, vom Zeitpunkt des Vertragsschlusses.

Bei den Bedingungen im engeren Sinne des Wortes führen die verschiedenen Arten von Bedingungen hinsichtlich der Vertragswirkung zu unterschiedlichen Rechtsfolgen. Die auflösende (resolutive) Bedingung beendet nach ihrem Eintreten die Wirkung des Vertrags, welche schon ab der Vertragsschließung bis dann besteht. Die aufschiebende Bedingung kann beim abgeschlossenen Vertrag ihre Wirkung nicht gleich nach der Schließung entfalten, sondern später, nach dem Eintreten der Bedingung. Bei der rechtsändernden (potestativen) Bedingung wird mit ihrem Eintreten die ursprüngliche, nach der Vertragsschließung gleichzeitig eingetretene Wirkung abgeändert, und somit werden statt der vorherigen Rechte und Pflichten neue Rechte und Pflichten ins Leben gerufen. Für alle Arten von Bedingungen gilt, dass sie ein zukünftiges, unsicheres, nach der Vertragsschließung eingetretenes, von den Parteien nicht beeinflusstes Ereignis oder Umstand sind. Da es sich bei der Bedingung um ein ungewisses zukünftiges Ereignis außerhalb der Kontrolle der Parteien handelt, macht die vorsätzliche Herbeiführung oder Verhinderung der Bedingung durch eine von den Parteien die Bedingung ungültig oder erzwingt sie. Nach der Regelung des deutschen BGB gilt die Bedingung als nicht erfüllt und daher ohne Wirkung, wenn der Eintritt der Bedingung von der daran interessierten Partei vorangebracht wurde, und man kann bewerten, dass das Eintreten der Bedingung nicht geschehen ist, und dass damit auch die mit der Bedingung verknüpfte Wirkung nicht in Kraft getreten ist.

Für die Zeitbestimmung gelten die Regeln über die Bedingungen, mit Ausnahme der Unsicherheit, weil die Zeit, auch rechtlich, als sicheres „Ereignis“ bewertet wird. Die unwirksamen, insbesondere die absolut nichtigen Verträge, erhalten ihre Wirkung nicht von Anfang an, ab der Vertragsschließung. (Mit Ausnahme der anfechtbaren Verträge, welche ihre Wirkung, falls die Anfechtung erfolgreich war, vom Zeitpunkt der richterlichen Feststellung verlieren.) Im Gegenteil, mit der Bedingung verliert der begrenzte Vertrag seine Wirkung oder sie beginnt, abhängig vom Eintreten des von den Parteien vorgesehenen zukünftigen Ereignisses. Die Ursachen der unwirksamen Verträge stehen von Anfang fest (Sitten-, Ordnungs-, oder Gesetzesverletzung einerseits, Willensmangel andererseits) und sie entstehen zum Zeitpunkt der Vertragsabschließung. Im Kreis der unwirksamen Verträge verstoßen nichtige Verträge gegen imperative gesetzliche Normen und sind daher

von vornherein unwirksam. Die mit der Bedingung beeinflusste Vertragswirkung basiert hingegen auf dem Geschäftswillen der Vertragsparteien. Die Wirkung der anfechtbaren, relativ nichtigen Verträge hängt von der Partei ab, bei welcher der Willensmangel besteht, d. h. davon, ob sie ihr Anfechtungsrecht innerhalb einer kurzen Anfechtungsfrist nutzen will oder nicht. Falls sie das Anfechtungsrecht nicht nutzt, erhält der Vertrag durch Konvalidation wieder seine ursprüngliche Wirkung. Die Konvalidation von nichtigen Verträgen ist ausgeschlossen, weil sie die öffentlichen Interessen verletzen, und deswegen sind sie ex officio anfechtbar. Doch auch im ungarischen Recht ist die Konversion gestattet, wie in anderen europäischen Rechtssystemen, d. h. durch richterliche Hilfe kann ein absolut nichtiger Vertrag seine Wirkung bewahren, durch die Umgestaltung des nichtigen Vertrags in einen gültigen Vertrag, (z. B. beim nichtigen Verkauf in einem gültigen Mietvertrag), selbstverständlich mit der Änderung der Verpflichtungen und Vertragswirkungen, falls dies den ursprünglichen Erwartungen der Parteien entspricht. In der ungarischen Doktrin ist die Interpretation der Regelung des UBGB bestritten: „Zur Feststellung der Nichtigkeit ist kein besonderer Prozess notwendig, das Gericht soll die Nichtigkeit von Amts wegen erwähnen." [§ 6:88 (1) zweiter Satz UBGB] In den analysierten Rechtssystemen fehlt eine solche Regelung mit diesem Inhalt. Die zweite in der ungarischen Literatur bestrittene Regelung des UBGB ist die Regelung des § 6:88(3), welche das Anfechtungsrecht der absolut nichtigen Verträge regelt. Diese Regelung bestimmt nach unserer Ansicht einen engeren Kreis von Berechtigten als jene, die in anderen Rechtssystemen üblich sind. Nach der Regelung des UBGB haben nämlich die Interessierten oder die dafür vom Gesetz Ermächtigten das Anfechtungsrecht. In den analysierten Rechtssystemen berührt das Berufungsrecht (Recht auf Anfechtbarkeit) bei der absoluten Nichtigkeit nicht nur den „Interessierten", dies ist vielmehr für die relative Nichtigkeit charakteristisch, sondern für die Anfechtung sind wegen dem Verstoß gegen die öffentlichen Interessen im Prinzip „alle" berechtigt, die auf Grund des Gesetzes ermächtigt sind, im Ziele des Schutzes der allgemeinen Interessen. Im Bereich des Anfechtungsrechts bei absolut nichtigen Verträgen stellen wir auch die Frage, ob dieses Recht der bösgläubige Vertragspartner (der von der Nichtigkeit wusste) hat oder nicht. Die Antwort ist (wegen dem sehr breiten Kreis von Berechtigten für die Anfechtung) bejahend, aber nur teilweise: Das Gericht kann die Forderung der Nichtigkeitsklage annehmen, aber den Vorschlag der Restitution abweisen. Nach der französischen Rechtsprechung kann das Gericht die Klage annehmen, welche von der bösgläubigen Partei eingereicht wurde, weil sich auf die Nichtigkeit irgendeine Person berufen kann, und infolgedessen auch die bösglaubige Vertragspartei, aber wegen seiner Bösgläubigkeit kann das Gericht den Restitutionsantrag verweigern. (Nach dem Grundsatz *nemo auditur turpitudinem allegans*.) Aber falls die bösgläubige Partei ihre Leistung schon erfüllt hat, aber die gutgläubige Partei (welche nicht von der Nichtigkeit wusste) ihre Leistung noch nicht geleistet hat, kann sich die gutgläubige Partei ohne Rechtsgrundlage bereichern. Die französische Rechtsprechung gestattet hier die Bereicherungsklage zugunsten der bösgläubigen Partei. Die Klage der ungerechtfertigten Bereicherung wird auch im ungarischen Recht anerkannt.

Unserer Meinung nach kann man die Regelung, dass das Gericht die Nichtigkeit von Amts wegen prüft, so interpretieren, dass wenn das Gericht in einem anderen Rechtsstreit auf die Nichtigkeit aufmerksam wird, soll der ursprüngliche Prozess unterbrochen werden, und dann erwägt der Staatsanwalt, ob er innerhalb einer gegebenen Frist eine Nichtigkeitsklage erhebt. Falls diese Frist ohne Erfolg abgelaufen ist, das heißt, es wird keine Nichtigkeitsklage seitens der zuständigen Behörde eingelegt, führt das Gericht den unterbrochenen ursprünglichen Prozess weiter. In anderen europäischen Rechtssystemen kann selbst das Gericht ohne Nichtigkeitsklage nicht über die Nichtigkeit entscheiden. Nach ungarischem Recht ist dies möglich, aber nur hinsichtlich der Deklaration der Nichtigkeit, für die anderen konkreten Rechtsfolgen ist ein gesonderter Prozess unentbehrlich. In anderen Fällen, nach dem ungarischem Recht, wenn der Nichtigkeitsprozess *ab initio* von Anfang an seitens der vom Gesetz Ermächtigten mit einer entsprechenden Klage eingeleitet wurde, entscheidet das Gericht nicht nur über die Feststellung der Nichtigkeit, sondern gleichzeitig, im Rahmen desselben Prozesses, auch über die Folgen der Restitution.

Die Bedingung selbst kann auch unmöglich oder nichtig sein. In diesen Fällen werden die Bedingungen mit ihren vorausgesetzten Wirkungsfolgen nicht ausgelöst.

Von der Bedingung sollte man den Auftrag *(modus)* unterscheiden.[21] Vom letzten ist dann die Rede, wenn jemand zwischen lebenden Personen oder im Todesfall aufgrund eines unentgeltlichen Geschäfts (z. B. Geschenk) oder durch eine testamentarische Verfügung (letztwillige Verfügung) eine Prästation verspricht, unter der Voraussetzung, dass der Berechtigte eine solche Gegenprästation leisten soll, deren Wert niedriger ist als der Wert der Prästation.

Die Bedingung soll man auch vom geheimen Vorbehalt (Mentalreservation) unterscheiden. Die Mentalreservation ist eine mit einem inneren, geheimen Vorbehalt vorausgesetzte rechtsgeschäftliche Willenserklärung. Nach der älteren (erste Hälfte des XIX. Jahrhunderts, deutsche und entsprechende französische) Willenstheorie ist diese geheime Reservation gültig, d. h. sie suspendiert die Erklärung. Nach der neuesten und heutzutage auch angewandten (deutschen und französischen) Theorie bekommt der erklärte Wille wegen der Verkehrssicherheit die prinzipielle Geltung, d. h. der geheime Vorbehalt suspendiert die rechts-geschäftliche Willenserklärung nicht, weil die andere Partei keine Kenntnisse vom geheimen Vorbehalt hat. Im Gegenteil, bei der Bedingung ist die Rede von solchen zukünftigen Ereignissen, von welchen beide Parteien von Anfang an, vom Zeitpunkt der Vertragsschließung, Kenntnisse haben, umso mehr, weil sie selbst diese Umstände und ihre Wirkung mit ihrer vertraglichen Nebenklausel schon vereinbart haben.

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[21] Siehe § 7:33 des UBGB: „(1) Falls der Erblasser sein Erbe mit einer Verpflichtung zugunsten einer Drittperson belastet, ist für die Forderung ihrer Erfüllung die im Testament nominierte Person berechtigt. Die Erfüllung eines Auftrags, bei welchem im Testament keine Person nominiert wurde, kann der Testamentsvollstrecker oder irgendein testamentarischer Erbe fordern. Die Erfüllung des Auftrags im öffentlichen Interesse kann die zuständige Behörde fordern. (2) Im Zweifelsfall belastet der Auftrag den Erben."

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ILLEGAL AND IMMORAL CONTRACTS IN THE CONTEXT OF THE ROMANIAN CIVIL CODE

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Abstract: The article deals with the current regulation of contractual invalidity in the Romanian Civil Code in force from the 1st of October 2011. Based on millennial traditions of Roman law, the regulation is influenced by all the modern solutions or developments of civil law codification, resulting in a complex system of rules, sometimes shaped by the legal practice. The article focuses on the overall design of invalidity and its specific forms: nullity, voidability, and unwritten clauses. An emphasis stands on the specificities of the Romanian rules and also on some current developments of legal cases.

Keywords: *Romanian Civil Code, invalidity, nullity, voidability, unwritten clauses*

1. INVALIDITY: GENERAL ASPECTS AND DELIMITATION

Contractual invalidity is the sanction affecting illegal or immoral contracts. Traditionally, a distinction has to be made between invalidity and other civil law sanctions, opening the question of how to integrate invalidity into the broader system of civil law sanctions.

First, a distinction between invalidity and cancellation of the contract has to be made. Under Romanian civil law, cancellation is a sanction for breach of contract by the obligor, which terminates the valid contract according to the unilateral will of the obligee, with retroactive effect to the date of conclusion of the contract (*ex tunc* cancellation, in Romanian: *rezoluțiune*), or with prospective effect (*ex nunc* cancellation, in Romanian: *reziliere*).

Ex nunc cancellation is a sanction for breach of a contract that involves continuous or periodic performance, where it is impossible to return to the situation before the contract was concluded. For example, a tenant fails to pay the rent for three months in bad faith, and the landlord unilaterally cancels the contract. In the example, thus, it is not possible to return the use of the dwelling made by the tenant, and it would be pointless to return the rent previously paid. *Ex nunc* cancellation, therefore, terminates the lease with effect only for the future.

If Primus is the seller and Secundus is the buyer, and Primus does not deliver the property over which the contract has transferred ownership within the contractual deadline, Secundus may cancel the contract. The otherwise valid contract will be cancelled retroactively, and therefore if Secundus has paid the price or part of the price, Primus will have to pay it back. This is the case of *ex tunc* cancellation.

A clear distinction must be made between invalidity and cancellation, as both have very similar legal effects. The fundamental differences are:

Invalidity can arise concerning any legal transaction, not only contracts (for example, wills); cancellation can only occur in the case of bilateral (synallagmatic) contracts (a contract is bilateral, or synallagmatic when the parties obligate themselves reciprocally so that the obligation of each party is correlative to the obligation of the other).

Invalidity is caused by reasons existing at the time of the conclusion of the contract (the sanction is for the breach of the rules governing the valid formation of that agreement). In contrast, the cancellation can only be considered in the case of valid bilateral contracts because of the obligor's default occurring after the conclusion of that contract.

The cause of the civil sanction is also different: in the case of invalidity, the cause is the breach of the law; in the case of cancellation, the cause is the partial or total non-performance of the obligor.

A separation must also be made between invalidity and frailty *(caducitas)*. The frailty of a legal transaction cannot be identified with the invalidity. In the first case, the legal transaction is valid but does not produce legal effects due to specific subsequent causes. For example, if the beneficiary predeceases the testator, the will is terminated by the effect of frailty.

2. ILLEGAL CONTRACTS

Contracts infringing mandatory norms or, in general, the public order are considered illegal (Romanian Civil Code, hereinafter: RCC, Art. 1169, 1246). The sanction is invalidity. Invalidity plays both a preventive role (the parties, knowing that the contract will be invalid, should not enter into it) and a repressive, sanctioning role (if the parties do enter into an illegal contract, that agreement cannot produce the desired effects) (Boroi et al., 2021, p. 532). The law uses the institution of invalidity as a defense against the creation of contracts that are contrary to the public or private interest. A contract is invalid if it appears to exist (materially) but does not produce the legal consequences intended by the parties under the existing law. The cause of invalidity must exist at the moment the contract is concluded.

Invalidity is, therefore, a sanction affecting a contract depriving it of the legal effects for which it was concluded. The essential sanction of invalidity is that it precludes the intended legal effect: the invalid contract does not bind the parties (the invalid contract does not have to be performed), nor can the invalid contract be enforced by the state or by the courts. It is not sufficient to identify invalidity simply with the lack of any legal effects. It must be stressed that the invalid contract also

produces legal consequences, but these are not the same as those that the parties intended to achieve. For example, services performed under an invalid contract must be returned *(restitutio in integrum)*, even though the parties intended that the services performed should remain valid.

What causes a contract to be invalid? Invalidity is caused by the absence of one of the general conditions of validity of contracts (capacity, consent, a definite, permissible, and possible object, a legitimate scope, or form, in the case when this represents a condition of validity). Also, invalidity can be caused by the infringement of a specific condition of validity, resulting in the breach of the prohibitory and mandatory rules of the law.

The invalidity, under Romanian law, has two general and one specific forms. The two general forms are also degrees of invalidity: nullity and voidability. The specific form is the institution of unwritten clauses, existent in the Romanian legal system from 1st October 2011.

Invalidity = nulitate	*nullity*	*nulitate absolută*	*negotium nullum*
	voidability	*nulitate relativă*	*negotium rescissibile*
	unwritten clauses	*clauză considerată nescrisă*	*clausa pro non scripto habetur*

Source: own editing

3. NULLITY

The nullity (RCC, Art. 1247) of a contract is a civil sanction that occurs when the norms protecting the public interest have been violated, and therefore the contract has no intended, legal transactional effect at all.

A contract is sanctioned by nullity in *the following cases*: (For further details, see Boroi et al., 2021, pp. 289–294; Nicolae, 2018, pp. 552–555)

a) there is a total absence of (legal) intention to conclude the contract, for example, if the signature on the contract is not that of the contracting party (obviously if the signatory has no right of representation either, but the signature is forged, for example);
b) it comes from a person who does not have the legal capacity to conclude the contract in question;
c) it is in direct breach of a mandatory norm protecting a general interest; for example, Primus agrees with Secundus to sell him his kidney. The contract is null because it is contrary to the Romanian Civil Code (Art. 66 provides that any transactions which have as their object conferring of a pecuniary value on the human body, its elements, or its products are subject to nullity, except in the cases expressly provided for by law);

d) it is in indirect breach of a mandatory norm protecting a general interest, representing an evasion of the law *(in fraudem legis)*, that is to say, a contract which, although not directly prohibited, are intended to circumvent the purpose of a prohibitory law by a roundabout way;
e) contracts contrary to public policy (ordinea publică) or good morals (bunele moravuri). Contracts contrary to public policy include those that are not in themselves immoral, nor are they expressly prohibited, but which contravene legal principles that are generally the basis of the legal order or of certain institutions of public law. For example, a contract that excessively restricts individual freedom contradicts public policy. There is no doubt that the vagueness, indefiniteness, and elasticity of the public policy concept raises interpretation problems.[1]
f) does not comply with the prescribed formalities, provided that the contract is subject to a formality, for example, authentic form.

The following consequences characterize nullity: (For further details, see Nicolae, 2018, pp. 557–560; Veress, 2021, pp. 132–133)

a) The nullity exists whether or not proceedings for a declaration of nullity have been brought. The nullity is independent of the will of the parties. Since the contract does not exist, if proceedings for a declaration of nullity have been brought, the court does not annul the contract but merely finds that it is null.
b) In principle, nullity may be sought by any person, therefore it may also be sought by (interested) third parties. The contract must be declared null even against the will of the parties who may be interested in its maintenance. Nullity is also effective against all parties before the contract is declared null, e.g., the invalidity of a contract of gift (contract de donație) in a private deed can be successfully invoked against the creditors of the donee (donataire).
c) The court of its own motion can also establish the nullity. This is the case even if both parties request that the nullity to be disregarded.
d) It follows from the foregoing that the nullity of a contract cannot be remedied by the parties' subsequent confirmation of it *(quod ab initio vitiosum est, non potest tractu temporis convalescere)*, since confirmation is tantamount to waiving the action for a declaration of nullity. This action belongs not only to the contracting parties. However, according to Art. 1260 of the Romanian Civil Code, it is possible to reclassify a null contract (conversiunea contractului lovit de nulitate absolută). This refers to a situation where the contract sanctioned by nullity contains the essential elements of another valid contract and can therefore be reclassified as valid if this is not contrary to the parties' presumed intention. For example, a contract for the sale of immovable property concluded as a private deed (which is void for lack of authentic form) can be reclassified as a preliminary contract for sale (which is also valid as a private deed).

[1] For contracts breaching good morals, see sub-chapter 8.

e) An action for a declaration of nullity of a void contract is not time-barred. "Time cannot hide the illegality of such a nature because it would mean legitimizing a practice by which the system of law itself can collapse." (Rizoiu, 2021, p. 572) A declaration of nullity may be sought even where it appears that the contract has ceased to have an effect due to its performance.

4. VOIDABILITY

The voidability (RCC, Art. 1248) of a contract is a consequence of breaching legal norms protecting private interests, and therefore voidability of the contract can be invoked by the party whose interests are protected by the violated norm.

Therefore, the voidable contract creates a contingency situation: the contract is provisionally in force, but the law gives one of the parties (except third parties) the power to ask for a retroactive annulment. The principle of freedom of contract permeates the legal institution of voidability because the party entitled to initiate the annulment is free to choose whether to accept the voidable contract or to exercise the action for annulment. If the contract is annulled, it becomes void with retroactive effect *(ex tunc)*.

In cases where the nature of the invalidity is not determined or is not clear from the law, the contract is voidable.

A contract may be voided if: (For further details, see Boroi et al., 2021, pp. 294–296; Nicolae, 2018, pp. 555–556)

a) the will of one of the parties has been manifested in a defective manner (mistake, deceit, duress, disproportionality);
b) the contract lacks the scope *(causa)*;
c) it comes from a person who could only have made a valid contract with the prior consent of another person, which was lacking;
d) the law expressly provides for the sanction of voidability in the event of a breach.

Voidability has the following characteristics: (For further details, see Nicolae, 2018, p. 560–563; Veress, 2021, pp. 134–136)

a) The contract exists until a court decision annuls it. However, if this happens, the contract is deemed not to have been concluded from the outset. If the contract is annulled, the effects of the contract hitherto acquired are retroactively extinguished. Once the contract has been annulled, the voidability is therefore no different from nullity. Therefore, the difference between the two forms of invalidity (nullity and voidability) is primarily one of degree, which is reflected in the conditions and not in the effects. Once successfully challenged, the consequences of a voidable contract must therefore be judged according to the same principles as those of a null contract. The agreement of the parties may also specify the voidability of the contract.
b) Unlike nullity, voidability, whether by action or by plea, may be raised only by the party who has suffered an infringement of his interests as a result of the

contract, for example, a person subjected to duress or deceit. Neither the other party nor a third party may successfully ask for annulment (there is one exception in this respect: the prosecutor may bring an action for invalidity to protect the interests of incapacitated persons).

c) Since the invalidity of a contract depends solely on the party, the latter has the right to enforce the invalid contract by confirmation. By this, the uncertainty hanging over the contract is removed, and it is considered as if it had been valid from the moment it was concluded. The confirmation is, therefore, retroactive. Confirmation does not affect rights acquired by *bona fide* third parties (RCC, Art. 1265). Confirmation can only be valid if it is made with knowledge of the grounds for the voidability and if the circumstances giving rise to the infringement of a legal norm do not exist at the time of confirmation (otherwise, the confirmation itself may be challenged). In order to remove uncertainty, the law recognizes the possibility to ask the person entitled to either challenge or confirm the contract. If the person does not challenge the contract within six months of receiving the notice, he loses his right to challenge (RCC, Art. 1263). Confirmation may also be implied. Voluntary performance of the voidable contract after the ground for voidance has ceased to exist tacitly confirms the contract. For example, after the cessation of the duress, the obligor may perform the contract, knowing the ground for voidance, but not asserting his right to challenge the contract.

Voidability can only be raised in court action ("attack") within the limitation period. This is usually three years. By contrast, it can be raised at any time by way of a plea ("defense") *(quae temporalia sunt ad agendum perpetua sunt ad excipiendum)*. There is, exceptionally, a time limit on the voidability by way of a plea. For example, a plea of disproportionality *(laesio)* can only be raised within the limitation period of one year (RCC, Art. 1223).

5. FURTHER TYPES OF INVALIDITY

Further forms of invalidity (which may also refer to nullity or voidability):

a. *Total invalidity (nulitate totală) or partial invalidity (nulitate parțială)*, depending on whether the invalidity deprives the contract of its legal effects in whole or partially (Boroi et al., 2021, p. 273; Nicolae, 2018, p. 549). If part of the contract is illegal, the general question arises whether this affects the whole contract or whether only the relevant part contrary to the law is invalid. In other words, the question is whether the invalidity is total or partial. The main rule is partial invalidity, where the contract binds the parties by omitting the invalid part. The invalidity of certain clauses does not void the contract as a whole if it can be presumed that the contract would have been concluded without the invalid part being included. In such cases, the contract remains valid as a whole,

and only the illegal part becomes void.[2] The corresponding legal norms replace the illegal part, or, if possible and equitable, the invalid part is simply deemed not to exist. Total invalidity is established when it is found that there is such a relationship of interdependence between the invalid part and the rest of the contract that it is reasonable to assume that the parties would not have consented to the contract without the invalid clauses (RCC, Art. 1255).

A specific problem in Romanian case law is related to unfair contract terms and total or partial nullity. Law 193/2000 establishes that unfair terms are ineffective (Art. 6). This legal text has been equated with the sanction of nullity. The law further states that the contract will persist, but only if it can continue after the unfair terms have been removed. The problem arose when the courts found that the interest in a credit agreement between a financial institution and a consumer was fixed by an unfair term.

The application of the penalty of total nullity is undoubtedly not the right one, as in this case, the consumer would have to pay the entire debt. Thus, some courts have removed this clause, practically turning the contract into a gratuitous one. The borrower only had to pay the principal instalments. But such a solution is clearly contrary to the parties' intention at the time of contracting. Other courts have struck out the unfair clause but forced the parties to negotiate a new, this time non-abusive, interest clause. These solutions have given rise to new problems: the parties have failed to reach an agreement as ordered by the court.

The European Court of Justice has ruled that these guidelines must be specific: if the variable interest rate in a loan agreement have been found to be unfair,

> "and when that contract cannot continue to exist following the removal of the unfair terms in question, annulment of the contract would have particularly unfavourable consequences for the consumer and there are no supplementary provisions under national law, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from annulment of the loan agreement in question. In circumstances such as those in question in the main proceedings, nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that that court sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties taking into account in particular the objective of consumer protection."[3]

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[2] As it was stated, "It only affects that part of the transaction, which is contrary to the law. Its purpose is not to abolish the act but to ensure its legality, its conformity with the law. Like Procust's bed, it cuts away only what is in excess, leaving the rest intact. That is why, as a rule, it acts only surgically, removing the spoilt part of the content of the transaction. The principle of *favor contractus* imposes the rule of partial nullity." (Rizoiu, 2021, p. 554)

[3] Judgment of the Court (First Chamber) of 25 November 2020 in case Banca B. SA v A.A.A (C-269/19; ECLI:EU:C:2020:954).

b. *Express invalidity (nulitate expresă) or virtual invalidity (nulitate virtuală)*, where in the first case, the law expressly provides for the sanction of invalidity. However, in the second case, invalidity is not expressly provided for by the law but is undoubtedly implied from the mandatory norm governing the conditions of validity of the contract (RCC, Art. 1253). (See Boroi et al., 2021, p. 275; Nicolae, 2018, p. 547)

6. THE UNWRITTEN CLAUSES

Besides nullity and voidability, the actual Romanian Civil Code also introduced a specific, transitional form of invalidity: the unwritten *(pro non scripto habetur)* clauses *(clauză considerată nescrisă)*. Similar rules are also contained in the French, Belgian, and Swiss Civil Codes and the Civil Code of the Canadian province of Quebec.

The legal nature of the unwritten clauses is disputed. According to the opinions expressed in the legal literature, such clauses are forms of partial nullity or partial voidability, and there is also a view that they are a distinct, *sui generis* type of sanction. In our opinion, unwritten clauses represent a specific form (subtype) of partial nullity *(nulitatea absolută parțială)*, where a provision of the parties included in a contract and which is contrary to the law and is eliminated from the contract as null and void automatically, and is automatically replaced by the mandatory provisions of the law, thus saving the contract but making it legal (Veress, 2021, pp. 137–139).

In general, partial invalidity (nullity or voidability) can only exist if the invalidity does not affect the essential elements of the contract. However, an unwritten clause may be an essential element, but it does not lead to the total invalidity of the contract because the mandatory rules of law replace the omitted provision.

Thus, for example, the following clauses are unwritten:

- the penalty provided for in the contract of engagement in the event of termination of the engagement [RCC, Art. 267(2)];
- a contract concluded for an indefinite period may be unilaterally terminated by either party subject to a reasonable period of notice, and any clause to the contrary or stipulation of a benefit in exchange for termination of the contract is deemed unwritten (RCC, Art. 1277);
- an impossible condition, contrary to law or good morals is considered unwritten, and if it is the cause of the contract itself, it entails the nullity of the contract (RCC, Art. 1402);[4]
- in the case of renting a dwelling, if the tenancy is for a fixed term, the tenant may unilaterally terminate the contract by giving at least 60 days' notice; any clause to the contrary shall be deemed not to have been written (RCC, Art.

[4] From this text also follows the distinguishing criterion between nullity and unwritten clause. The unwritten clause saves the contract by restoring the legality of the breach, eliminating the condition contrary to the law, morality, or the impossible condition. But in case that such a condition is the very cause of the contract, then the contract cannot be saved, as the destructive effects of nullity, in this case, are total.

1825); in the case of the same contract, any clause under which the tenant is obliged to take out insurance with an insurer imposed by the owner is unwritten (RCC, Art. 1826);
- in case of a partnership contract, any clause setting a guaranteed minimum level of benefits for one or some of the partners is considered unwritten [RCC, Art. 1953(5)];
- termination if it is based on the conduct of the other party, which makes it impossible to perform the contract following good morals or if it is based on unjustified non-performance of the maintenance obligation, may only be ordered by the court, any clause to the contrary is deemed to be unwritten (RCC, Art. 2263);
- any contractual clause limiting the carrier's legal liability [RCC, Art. 1995(1)], etc.

In judicial practice, it has been held that unwritten clauses and nullity are similar in their effects, the distinction being based on the fact that the unwritten clause in itself is sanction-remedy *(sancțiune remediu)* which does not require the intervention of the courts and that the corresponding legal text replaces the unwritten clause by the effect of the law. Consequently, if a contract contains an unwritten clause, this clause will not have any effect, and the relevant mandatory rule of law will inevitably take the place of the clause. The other provisions of the contract will have effect as if the unwritten clause had not been included in the contract. However, if the unwritten clause has been performed, the effects of the clause will be retroactively discharged, as in the case of invalidity.

Looking at the list of unwritten clauses mentioned in the legislation, we can conclude that the relevant provisions of the Romanian Civil Code in these cases mainly protect private interests and are therefore closer to voidability.[5]

Therefore, the fundamental question is who can rely on the unwritten character of a contractual clause: only the protected contracting party or any interested person? In our view, when the law deems a contractual provision to be unwritten, the effects of the law in eliminating the clause, in purifying the contract from the unlawful provision, are automatic and without any party's discretion. Therefore, the unwritten character of a clause may be invoked by any interested person so that the institution of unwritten clauses is in fact, closer to nullity than to voidability. However, unlike nullity, which also exists in a virtual form, a contractual clause can only be declared unwritten if there is an express legal basis for it (Veress, 2021, pp. 137–139).

[5] Mainly, because in some cases, such clauses protect general interest as well. For example, debtor protection can be an issue of general interest. Therefore, the legal text, for example, according to which "the clause authorizing the mortgagee to possess the mortgaged immovable property or to appropriate its fruits or revenues until the date of the commencement of enforcement shall be deemed not to be written" (RCC. Art. 2385), is a text close to a nullity and not voidability.

7. IMMORAL CONTRACTS

The Romanian Civil Code has several rules on contractual immorality, practically creating a set of rules to ensure morality. It does not contain a definition of good morals since this concept depends on the changing values of a particular society, and it is up to the judge to define its precise boundaries at a given time. As it was stated, good morals are a set of rules imposed by a certain social morality, existing at a given time and in a given place which, together with public order, represents a norm, a standard against which human behaviour is refereed. (Ungureanu, 2015, p. 33). Good morals were defined as

> "the totality of the rules of good conduct in society, rules which have taken shape in the consciousness of the majority of the members of society and the observance of which has become obligatory, through long experience and practice, in order to ensure social order and the common good, i.e. the achievement of the general interests of a given society". (Pop, 2019, p. 384)

In general, the law expresses in itself good morals. If such a specific mandatory rule which translates a moral value is infringed, we are in the presence of an illegal contract. But besides this, through general rules on good morals, are sanctioned also those contracts which are prejudicial to morality apart from any infringement of a specific legal text. In this way, the judge will have a more comprehensive power of appreciation and will be able to void a particular provision that affects public morality even when it is not contrary to a particular mandatory rule. The judges' power of appreciation, as it was considered, could give rise to arbitrariness and abuses if judges were too rigid or too keen in assessing what is and what is not contrary to morality. It is, therefore, necessary to be measured and prudent in this assessment (Hamangiu et al., 1928, p. 93).

We can group these above-mentioned general rules on good morals of the Romanian Civil Code in three clusters. The first set of rules is included in the general principles of civil law. In this context, no derogation may be made by agreements or unilateral legal acts from laws concerning good morals (RCC, Art. 11), and any natural or legal person must exercise their rights and fulfill their civil obligations in good faith and following good morals (RCC, Art. 14).[6] Good faith is an example of the intertwining of moral and legal norms (Gherasim, 1981, p. 228).

The second group of norms are included in the regulation of partnerships and legal persons. Every partnership must have a definite and lawful object in accordance with morality (RCC, Art. 1882). In the case of legal persons, invalidity is the sanction if the object of activity is contrary to good morals (RCC, Art. 196).

The third set of rules refers to contracts in general,[7] even if one of these articles is situated in the Book III of the Romanian Civil Code, which deals with the rights

[6] Good faith shall be presumed until proven otherwise.

[7] In completing the general rules, Romania has a specific regulation in the case of the maintenance contract. Where the other party's conduct makes it impossible to perform the

in rem. According to this legal text, the owner may consent to limit his right by a contract if it does not violate good morals (RCC, Art. 626). The other rules are also definitive for any contract. Regulating freedom of contract, the Romanian Civil Code states that the parties are free to conclude any contracts and determine their content within limits imposed by law, public policy, and good morals (RCC, Art. 1169). The subject matter of the contract must also be in accordance with good morals (RCC, Art. 1225), as the same condition is mandatory for the scope (causa) of the contract (RCC, Art. 1236). A contractual condition contrary to morality is considered unwritten (RCC, Art. 1402), and if it is the cause of the contract itself, it entails the nullity of the contract. However, as a general rule, the invalidity is partial: clauses which are contrary to good morals shall render the contract invalid in its entirety only if they are, by their nature, essential or if, in their absence, the contract would not have been concluded (RCC, Art. 1255).

In Romanian jurisprudence were measured as immoral contracts like the gift if the donor's purpose was to induce the recipient to enter into or continue a cohabiting relationship; or the gift if the donor's purpose was to induce the recipient to enter into a fictitious marriage, for the sole purpose of avoiding criminal liability for the crime of rape (Ionaşcu et al., 1973, pp. 47–51 and 62–63).

Where the criminal law leaves the punishment of certain offenses to the initiative of the injured party, allowing the offense committed by the defendant to remain unsanctioned by reconciling the parties or withdrawing the prior complaint, it has done so in order to make it possible for normal relations between the offender and the victim to resume, but not in order to open up to the person injured by the offense the possibility of making material profits disproportionately large in relation to the damage actually suffered, by speculating on the situation in which the offender finds himself. Of course, within the limit of reasonable compensation, the injured party may settle with the offender, who thus validly undertakes to cover the actual damage assessed by the parties themselves, but in this case, the victim of the offense is seeking to satisfy a legitimate interest, such a transaction having in itself nothing unlawful. The situation is quite different where taking advantage of his position in the criminal proceedings, the injured party obtains from the offender a sum considerably disproportionate to the actual damage, because in this case, the subjective right, recognized by civil law, to obtain compensation for the damage, is diverted from its economic and social purpose and can no longer enjoy legal protection (Supreme Tribunal of Romania, civil decision no. 107/1960).

Also, it was considered immoral the agreement by which a married man, temporarily abandoned by his wife, promised his concubine that he would marry her in case of his divorce and undertook to compensate his concubine with a sum of money if the wife returned to the marital home (Supreme Tribunal of Romania, civil decision no. 1912/1955).

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maintenance contract under good morals, the party concerned may request termination (RCC, Art. 2263).

8. CONSEQUENCES OF INVALIDITY

If the parties have agreed on the recognition of invalidity, there is no need for a judicial declaration of the consequences. However, as such recognition is rare, in the vast majority of cases a judicial finding is required, even if the invalidity is very obvious.

There are two ways of establishing invalidity (nullity and voidability) in court: an action for invalidity *(acțiune în nulitate)* before or after performance, and a plea of invalidity *(excepția de nulitate)* against an action for performance of the invalid contract.

An action is an act of enforcement, i.e., a means of asserting a right before a court in the form of an independent attack. In procedural law, an action is an act by which the plaintiff seeks the assistance of the court against the defendant in order to obtain recognition of a right or satisfaction of a claim. In private law, the action is the means of enforcing a right before a court, i.e., the *actio* is a component of the one person's right. A plea is a defence raised by the defendant. In the case of a plea of invalidity, the rightholder claims performance under the contract, but the defendant guards himself: challenges the validity of the contract, i.e., he uses the plea of invalidity.

The two forms of action for invalidity are: an action for a declaration of nullity (acțiune în nulitate absolută) and an action of annulment (acțiune în anulare) for voidability. While the action in the case of nullity is not time-barred, and is time-barred in the case of voidability, a plea may be successfully raised at any time in either case.

Until the court decision declaring invalidity, the parties are linked by an apparent legal relationship, and if performance has taken place by that time, a factual situation has also arisen. If the court has declared the invalidity, it has refused to recognize that the contractual relationship exists between the parties. Consequently, an invalid contract can have no legal effect either in the past or in the future *(quod nullum est, nullum producit effectum)*.

A declaration of invalidity, whether nullity or voidability, produces the following legal effects:

a) the nullity is retroactive, i.e. it deprives the contract of its effects from the moment of its conclusion;
b) the services rendered must be returned in full *(restitutio in integrum)*;
c) legal transactions entered subsequently into, on the basis of an invalid contract, are also invalid *(resoluto iure dantis, resolvitur ius accipientis)*.

These will be examined briefly.

The retroactivity is a natural consequence of invalidity: the law cannot recognize the legal effects of an invalid contract. Exceptions exist in family law and in relation to the invalidity of legal persons.[8]

[8] For example, in the case of a putative marriage, prior to the annulment of the marriage, the *bona fide* spouse legally retains his or her status as spouse for the period between the marriage and the annulment (RCC, Art. 304). Likewise, if a minor marries and, as a consequence, is recognized by law as having full capacity to act, the minor retains that capacity even if the marriage is dissolved (RCC. Art. 39). A legal person is dissolved only

Since an invalid contract cannot have legal effects, it is natural that the services received must also be fully returned. Indeed, the services received have no legal basis whatsoever and therefore cannot be kept by the parties. Restoration of the original situation may be sought in an action for a declaration of nullity or in an action for annulment, respectively in a separate action.

There are exceptions to restoration (restitution). Although the invalidity of a contract has a retroactive effect, i.e. the contract is lacking effects both in the past and in the future (it is to be regarded as having never having taken place), it does not always follow that the previous situation must be restored. This is not only because it is impossible in some cases (for example, the thing transferred has been destroyed), but also because the legislator does not wish to apply the rigour of full restoration in all situations. The legislator, on the contrary, wishes to protect persons whose transactions are invalid because they have been made in breach of the law.

For example:

a) A *bona fide* person is not obliged to refund the fruits (RCC, Art. 948). For example, if a person became the owner of a thing bearing fruit under an invalid contract, he must return the thing, but not the fruit brought by the thing during his period of good faith.
b) According to the provisions of the Romanian Civil Code, in the case of invalidity of contracts concluded by persons who are incapacitated or by persons with limited capacity, these persons are required to return only that part of the performances received during their incapacity which represents unjust enrichment for them (RCC, Art. 47). For example, if the minor has squandered the services received, he or she has no obligation to return them because he or she has not been enriched at all. The exception is if the incapacitated person intentionally or with gross negligence prevented the return. In such cases, full restitution may be ordered (RCC, Art. 1647).
c) A *bona fide* third party who has acquired title to and possession of movable property for consideration may retain the movable property (RCC, Art. 937), etc.

The problem of so-called subsequent legal transactions concluded on the basis of an invalid contract is the third issue to be examined. The consequence of the invalidity of the contract is the invalidity of the subsequent legal transactions.

This principle is also not without exceptions:

a) Legal acts intended to preserve and administer the thing remain valid. Thus, for example, if the landlord has acquired ownership invalidly, the lease will still be valid for most of a year if the tenant was in good faith (not knowing that the landlord's ownership was invalid).
b) In the case of immovable property, the *bona fide* third party retains ownership if no action has been brought against him/her after the registration of this right in the land register for 3 years (or 1 year if the real owner has also been served

by a court decision declaring its invalidity, i.e. in this case the invalidity has no retroactive effect (RCC, Art. 198).

with the registration order). In all cases, this period is 5 years in the case of gratuitous contracts.[9]

9. CONCLUSIONS

The above is necessarily a sketchy overview of the regulation of invalidity in Romanian law. This topic is extremely large, given the very high potential number of cases of invalidity. The aim was therefore rather to give an overview of the general rules. The number of relevant court decisions is also very large, but an analysis of these it is beyond the scope of this study, because an interpretation of the specific situations would require an opening up of the regulation of particular cases of invalidity, which was not the purpose of this introductory study. However, a concise description of the overall regime of invalidity is not without interest.

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[9] Exceptions exists also in the field of family law. For example, if the bona fide spouse of a person declared dead remarries, the new marriage remains valid despite the annulment of court decision declaring the death of a living person (Art. 293 RCC).

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INVALIDITY RULES IN THE GERMAN CIVIL CODE

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Abstract: German Law is an example of a Civil law system. A feature of this – probably in Germany in the most abstract system – is the conviction that all possible legal constellations are abstract, sufficient, and regulated by just one law. One would have merely to look into the Official Law Gazette to find for each case the prior regulated rule.

Invalidity is mentioned in different sections of the German Civil Code (GCC). The general part of the GCC contains Section 138 which as a general provision applies to all parts of the GCC. S. 138 subs. 1 reads: 'Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.' or in English: 'A legal transaction which is contrary to public policy is void.' Other translations for the term 'gute Sitten' could be 'good morals', 'public decency', or 'common decency'. Thereby the German legal system refuses to recognise immoral transactions via Section 138 GCC and thus the possibility of deriving enforceable legal consequences from an immoral legal transaction. The term 'gute Sitten' is a general clause. General clauses in the language of the law are usually understood as specific legal provisions containing various types of terms with flexible/undefined meanings. It means that the text recipient is referred to general assessment criteria of non-legal character – that is to say moral values, political values, or economic values.

In older German Courts decisions Section 138 GCC was interpreted in the way that a transaction is contrary to morality if it is 'contrary to the sense of decency of all fair and just thinkers'. The formulation used by case law in recent times reads: '[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.' German courts have developed case groups that can be used as a guide in the evaluation of a legal transaction as valid or invalid according to Section 138 GCC. The presentation focuses on the term 'gute Sitten' or 'common decency' as a gate to bring constitutional values into the sphere of private law. It will also refer to the history of this norm and the legal space it opens for judge-made-law.

Keywords: *common decency, indirect third-party effect of fundamental rights in private law, judge-made-law, general clauses*

1. INTRODUCTION

German Law is an example of a Civil law system. A Civil law system may be defined as a legal tradition that has its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian, and as subsequently developed mainly in Continental Europe.

The civil law legal tradition itself can be divided further into the Romanic laws, influenced by French law, and the Germanic family of laws, dominated by German jurisprudence (Lengeling, 2008).

A civil law system indicates for the contracting practice that the need for discussion and documentation has been limited by the existence of a large body of statute law, regulating relationships and limiting the room for debate (Cummins, 2010, p. 134).

A civil law system is a system in which regulation (by statutes and administrative acts) rather than litigation plays a stronger role in law-making and this influences also contracting.

As *Posner* puts it:

Regulation and litigation tend to differ along four key dimensions:

(1) regulation tends to use ex-ante (preventive) means of control, litigation ex-post (deterrent) means;

(2) regulation tends to use rules, and litigation standards;

(3) regulation tends to use experts (or at least supposed experts) to design and implement rules, whereas litigation is dominated by generalists (judges, juries, trial lawyers), though experts provide input as witnesses; and

(4) regulation tends to use public enforcement mechanisms, whereas litigation more commonly uses private ones — private civil lawsuits, handled by private lawyers although the decision resolving the litigation is made by a judge (with or without a jury), who is a public official (the jurors are ad hoc, public officials). (Posner, 2011, pp. 11–26)

A feature of this – probably in Germany in the purest prevailing system – is the conviction that all possible legal constellations are abstract, sufficient and regulated by just one law. One would have merely to look into the Official Law Gazette to find for each case the prior regulated rule (Döser, 2000, p. 1541). From this is deduced the principle that individual arrangements between the parties need to contain only the statutory basics for the *essentialia* of the case, but beyond this regulation, even if the wording of the contract leads to a different assumption, the contract can be completed by the statutory regulations which can be found for instance in Article 133 of the German Civil Code, Article 157 German Civil Code and Article 9 of the law on general terms and conditions (AGBG) (Döser, 2000, p. 1541).

Contracts concluded under German law (as an example for a civil law system) are ‘the better the shorter they are’, they are structured in a way that leads from general to specific and they are divided into sections with weighted logical subgroups (Döser, 2000, p. 1541). The detailed provisions this way will be located closest to the highest relevant superordinate topic/preamble and are formulated as abstractly as possible, to encompass all conceivable variations of the later following system levels (Döser, 2000, p. 1541). An example of this, though not taken from a contract but the Civil Code of Germany, would be the division, i.e. of the first book of the civil code, which contains the general part of the code. The first division is about persons, a more general description, followed by the first title about natural persons which are consumers and entrepreneurs, and then in the sections of this title,

there are regulated special questions concerning the beginning of legal capacity, residence, lack of full capacity, etc.

2. THE REGULATION

Invalidity is mentioned in different sections of the GCC. A search through the GCC looking for the words: "invalid" or "invalidity" led to 25 results. Most of them were in the general part, i. e., in the context of legal transactions of minors or persons of mental disturbances (Article 105), mental reservations (Article 116) invalidity due to a lack of form of a legal transaction (Article 125) and invalidity due to requirements which are regulated in the special parts or chapters of the GCC such as in the family law section or the heritage law section.

In my presentation, I will focus on Article 138 GCC which as a general provision applies to all parts of the GCC. In German Article 138 reads:

'(1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.

(2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.'

The translation given on the side of German Ministry for Justice and Consumer Protection reads:

'Section 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.'

Other translations for the term *'gute Sitten'* could be *'good morals', 'public decency'*, or, *'common decency'*.

The German legal system refuses to recognise immoral transactions via Article 138 GCC and thus the possibility of deriving enforceable legal consequences from an immoral legal transaction.

The term *'gute Sitten'* is a general clause.

General clauses in the language of the law are usually understood as specific legal provisions containing various types of terms with flexible/undefined meanings out of which the content of legal provisions is composed.

As far as the application of general clauses is concerned scholars favour the institution of 'reference'. It means that the text recipient is referred to general assessment criteria of non-legal character – that is to say moral values, political values or economic values. This stance finds confirmation in the following definition: 'a general clause is a flexible expression included in a legal provision

referring to certain assessments typical of a given social group, to which such a legal provision refers by obliging persons to abide by them when determining a factual state of affairs regulated by a given norm.' (Grzybek et al., 2015, p. 146).

Whoever concludes a contract may not act outside of all social value standards, even if these standards are not recorded as a special legal prohibition.

In all Western societies, it is now agreed that 'freedom of contract' is limited by something that, in reference to the Roman *boni mores* as *'bonnes moeurs'* or *'good morals'*. What is to be understood by this? (Haferkamp, 2003, p. 709)

Historical reviews of 'good morals' often refer to a passage in the motifs of the first commission. (Haferkamp, 2003, p. 711) The motives commented:

> "The provision presents itself as a significant legislative step, which may not be without concerns. Judicial discretion is granted a leeway as is hitherto unknown in large areas of law. Mistakes cannot be ruled out. However, given the conscientiousness of the German judiciary, there can be no doubt that the provision will only be applied in the sense in which it is given."[1]

Thus Article 138 appears to have granted the judge a position of power hitherto unknown 'in large areas of law'. (Haferkamp, 2003, p. 711)

The older definition of Article 138 by German courts since 1901 concluded that a transaction is contrary to morality in the sense of Article 138 if it is 'contrary to the sense of decency of all fair and just thinkers'; so-called *'Anstandsformel'* or 'decency formula.' (For more references see Haferkamp, 2003, p. 710)

Critics of this formula believe that clear material values are missing and that the pseudo-empirical 'decency formula' ends up in nothing but a judicial realism test at the desk (Haferkamp, 2003, p. 710).

3. CASE GROUPS

3.1. The example of usury

3.1.1. First period – circa 1900

Already in the first years of the GCC judges developed case groups dealing with Article 138 and thus acting contrary to the prevailing opinion that judges during this period were still acting along with legal positivism or even jurisprudence of concepts *(Begriffsjurisprudenz)*.

Yet, to the vast changing of social circumstances after 1900 (the year of the coming into force of the GCC) judges were more open to sociological concepts with an influence on judicial decisions, i.e., the methods of *Eugen Ehrlich* one of the first legal sociologists or the upcoming economic sciences, i.e., by *Max Weber*. So

[1] *Motive zu dem Entwurfe eines BGB für das Deutsche Reich, Vol. V, Erbrecht*. Amtliche Ausgabe, 1888. Available at: https://archive.org/details/motivezudementw03germgoog/page/n4/mode/2up (Accessed: 18 January 2022) = Mugdan, vol I, 469, pdf. Available at: https://collections.thulb.uni-jena.de/servlets/MCRFileNodeServlet/HisBest_derivate00010708/Band%201.pdf (Accessed: 18 January 2022).

already before WWI the judgments regarding Article 138 were referring to so-called case groups (Haferkamp, 2003, p. 711) and developed judge-made law.

It has been brought forward the theses of the change of function of Article 138 GCC: 'The function of Article 138 had shifted from the reception of self-imposed moral norms of bourgeois society, especially after 1914, to judicial and at the same time state intervention, even judicial economic policy.' (Haferkamp, 2003, p. 714) The theory of a change in function thus suggests double: a shift in competence (from the legislator to the judge as social engineer) and a change in content (from the liberal to the social contract model). (Haferkamp, 2003, p. 714)

This theory is challenged. However, the antithetical scheme of the ethical and economic concept of 'good morals' misses the contemporary standpoints from circa 1900. *Gottfried Planck* clarified this underlying position of the GCC in 1903:

> 'A legal transaction that violates the great principles of modern law, in particular the principles of personal freedom, freedom of conscience, freedom of association, freedom of trade, freedom in the exercise of the right to vote, etc., is always also to be regarded as a legal transaction that violates morality.' (Planck, 1903; cited in Haferkamp, 2003, p. 722)

The Reichstag Commission, which prepared the new usury law of 24 May 1880 in 1879, stated: *'It has been argued that usury was first created by the usury laws and will disappear with their elimination.'* (Haferkamp, 2003, pp. 724–725; with further reference to Luig, 1982, p. 186).

But this view has not been borne out; usury had not disappeared, money had not become cheaper, but the rate of interest had risen.

The idea that the free play of natural forces would bring about normal conditions of its own accord was already considered a failure in the 1870s, barely 10 years after the start of the legislative interest-free policy. According to *Luig*, even during the period of interest-free rates between 1867 and 1880, jurisdiction had accepted excessively high interest rates 'only for lack of legal authorisation' and not 'out of overreaching.' (Luig, 1982; cited in Haferkamp, 2003, pp. 724–725). This was corrected by the jurisdiction under the new usury statute. *De facto*, shifts in the burden of proof allowed for largely free control of equivalence already under this regulation. In this environment, the judicature adopted a relatively strict interest rate control. As early as 1890, the 'Reichsgericht' formulated:[2]

'Rather, it must be regarded as an immoral exploitation of the embarrassment and need of others if interest and commissions are calculated and accepted to such an exorbitant extent and under such oppressive conditions that they completely lose the character of remuneration for the enjoyment of the capital or the efforts and risk of the lender.' (Haferkamp, 2003, p. 726)

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[2] Ibidem, with reference to RGZ (14.2.1890-III 26/90) 25, 177, 179. Available at: https://research.wolterskluwer-online.de/document/9a0be60a-52d1-4ea8-a414-20e9a10681cc (Accessed 18 January 2022).

With the new GCC, usury was regulated in Article 138(2) and the jurisdiction continued its line of judgments already formulated before (Haferkamp, 2003, p. 726).

3.1.2. Second period – 1914–1933

Against the backdrop of extensive state price fixing and tightened criminal usury legislation, so-called *war usury* also came into view in civil law. The demands for combating 'price gouging', supported by war-related rhetoric about the common good, aimed to expand the offence of usury, especially about *usury in kind*. In the literature, there were more and more calls for a general judicial equivalence control under the rule of Article 138(1) GCC and not Article 138(2). (Haferkamp, 2003, p. 727)

3.1.3. Third period – 1933–1945

During this time one could say, that the perspective shifted from the protection of the unjustly disadvantaged contracting party to macroeconomic considerations in the service of Nazi- economic policy (Haferkamp, 2003, pp. 728–730).

In the year 1936 RGZ 150/1[3] stated the following:

> A legal transaction in which performance and consideration are conspicuously disproportionate to each other, but the other characteristics of usury [Article 138(2) GCC] are not present, is void pursuant to section 138 (1) GCC if, in addition to the disproportion, such an attitude on the part claiming the excessive benefits can be ascertained that the legal transaction, according to its content, motive, and purpose, offends against the popular opinion *(gesundes Volksempfinden)*. Under certain circumstances, this attitude can be inferred from the disproportion. If one party maliciously or grossly negligently closes its mind to the fact that the other party is agreeing to the difficult conditions out of an awkward situation, this, in conjunction with the disproportion, can render the legal transaction null and void.

By referring to the motion of the popular opinion *(gesundes Volksempfinden)* the court referred to national-socialist law-principles. (Haferkamp, 2003, pp. 729–730) There occurred a shift in the perspective away from a breach of morals, toward the self-interest of the national comrade *(Volksgenosse)* that inflicts the national interest. The 'good customs (morals)' that were characterised by the jurisprudence up to 1933, above all in their openness to value, were to be given a clear thrust as a tool of National Socialist exclusionary policy and as an expression of general state supremacy (Haferkamp, 2003, pp. 736–737).

3.1.4. Contemporary interpretation of Article 138 GCC after 1945

The definition of 'gute Sitten/good morals' by the German Courts since the 1950th formulated by German case law in recent times reads:

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[3] Pdf available at: https://opinioiuris.de/sites/default/files/RG,%2013.03.1936%20-%20V%2018435%20-%20RGZ%20150,%201.pdf (Accessed 18 January 2022).

> '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.' (Creifelds et al., 2011, p. 1085)

The notion of incompatibility with the fundamental values of the legal and moral order according to its overall character refers to the theory of effect on the third party of the human rights set out in the Constitution. Traditionally human or civil rights are only protecting the people or citizens from interference with their rights by public authority.

The theory of effect on the third party leads to indirect binding also between private persons by the fact that human rights influence also the sphere of private law through their application via general clauses[4] (Jarass/Pieroth, 1995, pp. 48–49) such as 'good morals' in Article 138 GCC.

The legal content of fundamental rights acts through the medium of the provisions directly dominating the individual field of law, in particular, the general clauses and other terms that are open to interpretation and need to be filled in (BVerfGE 73, 261 [269]).

3.2. Another Case group – Surety agreements

Surety agreements with banks with relatives of borrowers to secure their loan when the relative has no income- or other assets and thus assumes high liability risks as guarantors.

The Constitutional Court decided that civil courts must – especially when concretising and applying general clauses such as Article 138 and Article 242 GCC (principle of good faith) – observe the fundamental right guarantee of private autonomy in Art. 2(1) Basic Law. This results in their duty to review the content of contracts that place an unusually heavy burden on one of the two contracting parties and are the result of structurally unequal bargaining power (BVerfGE 89, 214 [214]).

The Constitutional Court argued in the reasons of the decision that the constitutional complaint is directed against civil court rulings on payment. The normative foundations on which the decisions are based are not challenged; the relevant provisions of the Civil Code remain unchallenged. Rather, the complainants' complaints concern the interpretation and application of those general clauses which require the civil courts to review the content of contracts under the law of obligations, above all Article 138 and Article 242 GCC. When concretising these clauses, the constitutional guarantee of private autonomy and the general right of personality had to be taken into account, which the civil courts had failed to recognise in the original proceedings. This reasoning accurately captures the significance of fundamental rights for the concretisation of general clauses under civil law (BVerfGE 89, 214 [214]).

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[4] Another notion instead of "indirect influence" is: *Ausstrahlungswirkung der Grundrechte*, "broadcast effect".

In its fundamental rights section, the Basic Law contains basic constitutional decisions for all areas of law.

These fundamental decisions unfold through the medium of those provisions which directly govern the respective area of law and are above all also significant in the interpretation of general clauses of civil law (BVerfGE 7, 198 [205, 206]; 42, 143 [148]). In that Article 138 and Article 242 GCC refer in general to good morals, custom, and good faith, they require the courts to concretise them according to the standard of values which are primarily determined by the fundamental decisions of the constitution. Therefore, the civil courts are constitutionally obliged to observe the fundamental rights as "guidelines" when interpreting and applying the general clauses. If they fail to do so and therefore decide to the disadvantage of a party to the proceedings, they violate that party's fundamental rights (See BVerfGE 7, 198 [206, 207], established case law).

The case group of Surety agreements is not new. Already in 1910, the OLG Dresden agreed to the violation of Article 138 GCC in a case in which a young woman of low income who lived still in the household of her parents agreed to a surety for a due loan of her parents that was then extended for 8 more days (Haferkamp, 2003, p. 715).

4. SUMMARY

The invalidity of legal transactions in Article 138 on the ground of being against good morals has been a way to influence the private law sphere with the prevailing social or political system in the way that the text recipient is referred to general assessment criteria of non-legal character – that is to say moral values, political values or economic values.

As the norm put under regard here came into force 121 years ago in 1900 it has a long history during which the interpretation was influenced by world wars, the Weimar Republic, and the Nazi Regime. In the German Democratic Republic, it was obliging in parts until 1976, and after the reunification of Germany, it came into force in the whole of Germany.

While it was at first concluded from the omission of the phrase 'public policy' *(öffentliche Ordnung)* in Article 138 GCC which was contained in the first draft of the GCC that the definition of an act against good morals was to be understood from a more personal angle in the way that the partners of the contract should be in such a position that the weaker partner was protected by the good morals from the exploitation of his weaker position by the other partner. It soon turned out though that the common interest which was rather understood as relating to the term 'public interest' that was omitted in the final formulation of Article 138 GCC, was re-interpreted into the notion of 'good morals'.

Since early 1900 until now there is a dispute about what good morals are: Are they rather changing due to developments in the sphere of society, economy, and other relevant social spheres, or are good morals unchangeable and eternally the same? At least for the *de facto* change in the meaning throughout the time they *de*

facto were not always understood the same although there are many parallels in the cases that were decided by the Courts throughout the 121 years.

From the perspective of the Basic Law which states in Article 79(3) a so-called eternal guarantee by excluding any amendment of the principles laid down in Article 1 and Article 20 Basic Law (human dignity and constitutional basic principles).

Already according to Roman law the *bona mores* were gathered around case groups. Also based on Article 138 GCC case law and case groups were developed. By controlling good morals along the basic rights also the Constitutional Court (CC) plays a role in the creation of judgments. Still, the CC is not a 'supreme court of appeal' as it is controlling the decisions of the courts of the instances not in a narrow way. The intensity of Constitutional Court review is decisively determined by the intensity of the impairment of the fundamental right. Furthermore, it is significant how far the fundamental right can be waived. The possibility under private law to bind oneself is often an exercise of fundamental rights. The more the burden can be attributed to the persons concerned as their own decision, the weaker the fundamental right obligation (private autonomy).

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ERROR OF CONTRACTUAL WILL AND SYSTEM OF GROUNDS FOR INVALIDITY

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Abstract: Articles 6:90–6:93 of Act V of 2013 on the Civil Code (hereinafter, referred to as CC) settle invalidity due to the mistake of will on the part of the parties. In my study, I would like to analyse these grounds of invalidity, highlighting the meaning of 'error of will'. As part of this, I also make relevant delimitations, including the legal institution of pseudo-representation. My aim is not only to present certain grounds for invalidity, i.e. error, deception, secrecy, sham (simulated) contract, but to summarise the most important conclusions that can be drawn upon the case law. In doing so, the issue of proof and the applicable means of proof must be examined separately, as in the case of these grounds of invalidity the principle of will as an aspect of interpretation has fundamental significance.
In the second half of my paper, during the analysis of the sham (simulated) contract, a brief overview of the foreclosure contract and the demarcation of the two legal issues are inevitable, taking into account the provisions of Art. 6:120 CC and the Civil Department Opinion no. PK 1/2011. (VI. 15.) of the Curia of Hungary on certain application issues of the margin agreement. In my work, in connection with the individual grounds for invalidity, I also deal separately with the special rules for gratuitous contracts (Art. 6:93 CC).

Keywords: *principle of will, declaration principle, mistake, sham contract*

1. STARTING POINT

Act V of 2013 on the Civil Code of Hungary in Art. 6:8(1)–(2) combines the principle of will and the principle of declaration in the interpretation of legal declarations. The significance of the rule is that the Art. 6:10 CC, this level of interpretation also applies in the case of non-contractual law declarations.

However, among the grounds for invalidity attributable to an error in the contract will, the CC emphasizes the principle of will, i.e. the invalidity of a contract can be traced back to some will. In this study, I analyse the individual grounds for invalidity based on contractual intent.

2. THE CONCEPT OF WILL ERROR

It should be noted first that Art. 6:58 CC requires consensus for the conclusion of the contract. That is, in the case of dissent, we can speak of a non-existent contract.

Thus, for example, if the reciprocity and unanimity of the will of the parties are lacking [Art. 6:63(1) CC] because one of the contracting parties has not made a legal declaration at all (for example, pseudo-representation Art. 6:14 CC), or the unanimous declarations of the parties do not cover all material issues or what they consider relevant [Art. 6:63(2) CC], no contract is concluded.

In the opinion of *Attila Menyhárd*, there is a will to do so:

> 'A contract may be vitiated by an error of will if the contractual statement of at least one of the parties does not reflect a genuine contractual will, or if the declaration expresses a real contractual will, but that will arise in a situation in which the party was not the party to the contract. in the possession of all the information necessary to form his intention or in the formation of his intention, volunteering did not prevail.' (Menyhárd, 2000, p. 9)

Errors of will can be divided into groups of deliberate will errors following the classification of the legal literature (sham contract, or outside the scope of invalidity: secret provisos or hidden motives) and unperceived will errors (mistake, deception, illegal threat which are not obvious to the aggrieved party). Errors of will can also be grouped according to their legal consequences: thus, a distinction can be made between voidability (e.g. deception, unlawful threat) and nullity (legal capacity, limited legal capacity, and sham contract) (Wellmann, 2021, p. 211).

3. Occurrence of will error in the Civil Code

The choice of the present subtitle was justified by the fact that although Articles 6:90–6:93 CC, the law collects the grounds for invalidity due to a mistake of will, apart from these provisions, there is also an error of will in the law. The CC regulates the invalidity of certain juridical acts due to defects of will in several places:

- the legal transactions of an adult person (i.e. of legal age) who has no legal capacity to act [Art. 2:9(1) CC];
- the juridical acts of an adult person placed under guardianship and having partially limited capacity to act [Art. 2:20(1) CC];
- has limited capacity to act due to minority [Art. 2:12(1) CC];
- incapable of acting due to a minority [Art. 2:14(1) CC];
- the legal transactions of an adult person placed under guardianship with full restriction of legal capacity [Art. 2:22. § (1)] (Vékás, 2020b, p. 1585).

In my opinion, regarding an error of will, an independent reason for a challenge is the Art. 4:111(2) CC, according to which, if the presumed father made the fully enforceable acknowledgement of paternity in error, or under misrepresentation or duress, he may bring an action for challenging the presumption within one year from the date on which he detected such error or misrepresentation, or from the date of cessation of duress.

For the cases of invalidity relating to the legal transaction of an adult who is partially limited in his or her capacity to act (Art. 2:24 CC) and the juridical acts of the minor (Art. 2:17 CC), the Civil Code does not regulate challengeability but

relative nullity, i.e. a fault in the will can only be invoked in the interests of weaker parties.

Apart from the disguised stipulations and sham contracts, in case of invalidity attributable to a fault of will, it is not possible to challenge the contract, but only the legal transaction. In contrast, in the case of invalidity due to an error in the intended effect, the question is – in all cases – the validity or invalidity of the contract 'as a whole'.

In my opinion, the discrepancy can be traced back to the fact that in the event of a will, only the validity of the legal declaration made by the given party is always called into question since the contract is a mutual and unanimous legal declaration of the parties (Art. 6:58 CC). The Civil Code is in line with this grammatical formulation: while the Art. 6:90(1) CC regulates the challenge of the contract law declaration, the Art. 6:90(2) CC already states that if the parties were in the same erroneous assumption on a material issue at the time of concluding the contract, any of them may challenge the contract. At that time, the use of the term 'contract' was already justified, because the ground for challenge relates to the contract, as the parties were in the same erroneous assumption. The Civil Code is based on the same argument. Under the Art. 6:90(3) CC, the contract may not be challenged by anyone who may have recognized the mistake or assumed the risk of the mistake. The legislator of the Civil Code excludes not only the contestation of the contractual declaration of rights but also the contestation of the entire contract.

Exceptions to this argument are secret provisos and hidden motives respectively sham contracts. Within the scope of a sham contract, the exception is simple: we can speak of a sham contract in the case of a bilateral error of will, i.e. precisely because of the bilateral nature of the error of will, only the nullity of the given contract (and not the contract statement) can be interpreted here. In the context of the contractual intention deliberately concealed, I refer to the case law, according to which disguised stipulations and concealed motives are immaterial concerning the validity of the contract (Curia decision No. BH 2001.384).

4. THE MANIFESTATION OF CONTRACTUAL INTENTION ERRORS

4.1. Mistake

Under the case law, a contract may be challenged on the ground of error if the party was mistaken regarding any substantial circumstances. What is relevant is a circumstance that, according to the public perception, fundamentally affects the contractual will of the parties, in respect of which the party would not have concluded the given contract with the correct content (Curia decision No. BH 2016.114.). It should be noted that Art. 6:90. CC was adopted with the same content within the scope of error.

Concerning this ground of appeal, the question to be decided is what constitutes an essential circumstance that may justify an appeal on the ground of error. By the legislature's objective:

> '[a]s the conclusion of the contract requires the agreement of the parties on the substantial issues, it is justified that it can also be substantial only in the event of an error in which the party would not have concluded the contract with the given content'.[1]

The significance of this reasoning is that the conclusion of the contract requires the agreement of the parties on the issues that are essential and considered essential by either of them [Art. 6:63(2) CC]. In other words, the conclusion of the contract occurs because one of the parties was at fault in one of the essential circumstances of the contract, and that error was the result of the other party's conduct. The other party's behaviour may be active (the mistake was caused by the other party) or passive (the mistake may have been recognized by the other). This distinction between an invalid contract and a non-existent contract is based on the differentiation among the types of error.

Under the case law, the relevant factor for the contract of sale of a car is whether the actual condition of the car corresponds to the data/information in the service book (Curia decision No. BH 2010.245). Furthermore, the highest judicial forum of Hungary stated:

> '[t]he insurer misleads the party – regarding the substantial circumstances – who is concluding a life insurance contract with the insurer by promising that the party will be entitled to take out a preferential home loan after a certain period if this loan scheme does not exist at the time of conclusion with the conditions communicated' (Curia decision No. EBH 2006.1402).

The judgment concludes that 'a contract for the sale of a racing horse may be challenged if the seller fails to inform the buyer regarding the disease of the horse, which renders the horse to be unfit for racing' (Szeged Regional Court of Appeal decision No. BDT 2019.4099).

The case law has also established the principle that, for the purposes of a contract for selling a shareholding in a non-profit public undertaking employing a disabled person, the non-profit company continues to receive the wage subsidies which it can carry on. In the event of termination of the wage subsidy, the buyer of the business unit may challenge the contract by mistake (Szeged Regional Court of Appeal decision No. BDT 2015.3412. I.).

Following the above-mentioned case-by-case analysis, it should be noted that an error in the subject matter, person, or content may be substantial. Most often, however, an error in the quality and extent of the service is the relevant basis for the challenge. At the same time, the public perception must be taken into account, i.e., what the public perception considers (would consider) to be an important issue concerning the given contract (Benedek, 1992, p. 531).

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[1] Bill on the Civil Code of Hungary No. T/7971, 2012, p. 574.

There is also an important limitation regarding an error, according to which, a person who may have recognized the error or assumed the risk of the error may not challenge the contract [Art. 6:90(3) CC]. Referring to the legislature's objective:

> 'The case law on error has so far examined whether or not the party alleging the error could have recognized the error with due diligence. This aspect, as a legal condition for error, is set out in the Proposal as an itemized provision and excludes the right to challenge an error even if the party to the error has assumed the risk of error (for example, if the contract contains a chance element, i.e., aleatory contract).'[2]

This provision is set out in Art. 1:4 among the principles. Under this Art. 1:4(2), a person who may have recognized the error but entered the contract, would – by challenging it later – rely on his attributable conduct to obtain an advantage (Vékás, 2016, p. 122).

Therefore, the contract of sale cannot be challenged on the grounds of error and the rights arising from the defective performance cannot be exercised, if the buyers became aware of the existing defects of the property to be purchased, before concluding the contract (Curia decision No. BH 2011.221). And the phrase 'risk of error' can be relevant for contracts that are dependent on chance (aleatory contract).

4.2. Misrepresentation, unlawful threat

Concerning misrepresentation(deception), it is primary to distinguish it from error. According to the Ministry Explanatory Notes on the 1959 Civil Code[3], *'the cause of an error is not the same as that of deception: an error may be caused in good faith or through negligence, without the intention of the party causing the error being to circumvent the other party'*. This also means that deception is a special, more serious case of causing an error, which requires wilful and deliberate conduct expressed or implied by the party.

It is relevant that misrepresentation may take the form of both active and passive conduct, but in each case, it must relate to a circumstance relevant to the contract. The difference with the error is that the possible negligence of the deceived person is not relevant, so the deceptive party cannot claim that the other party could have recognized the deceptive conduct with due diligence (Wellmann, 2021, p. 214).

At the same time, a decision containing an opposite opinion is also known, according to which, the contract of sale has not been challenged on the grounds of error, and the rights arising from the defective performance cannot be exercised if the buyers became aware of the defects of the property to be purchased before concluding the contract (Curia decision No. BH 2011.221).

In judicial practice, the most common question regarding misrepresentation is that if the deceptive conduct constitutes a criminal offence (typically fraud), it is a

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2 Bill on the Civil Code of Hungary No. T/7971, 2012, p. 574.

3 Act IV of 1959 on the Civil Code of the Republic of Hungary.

prohibited contract (and thus void), or a contract that can be challenged due to invalidity based on misrepresentation. Following the case law, a deceptive and fraudulent legal transaction that also constitutes a criminal offence does not automatically render the legal transaction null and void. The contract thus concluded can be challenged only by those who were in error or who have been deceived (Curia decision No. BH 1996.200). In its content, the criminal offence of 'fraud', in relation to a contract, refers to misrepresentation or deception, which is not a ground for nullity but a ground for avoidance (Curia decision No. BH 1996.253).

This important principle is stipulated from time to time in the judgments of the judicial fora. Accordingly, the buyer of the real estate property, who makes a purchase statement at the time of concluding the contract with the knowledge and intent not to pay the purchase price, committed fraud under the scope of criminal law, however, from the viewpoint of civil law, his actions resulted in the fact that the sale contract is to be challenged on the ground of misrepresentation. In such a case, a final judgment establishing criminal offence is not required to establish the facts relevant to the civil law legal consequences (Szeged Regional Court of Appeal decision No. BDT 2008.1903, Part I.)

It should be emphasized, that if one of the parties has misled the other party in concluding the contract, this fact alone does not mean that the contract is also contrary to good morals. To establish that the contract is immoral, it is necessary to establish the additional circumstances in addition to the deception (Budapest-Capital Regional Court decision No. BDT 2009.2168).

Misleading conduct may be committed not only by the contracting party but also by a third party, as Article 6:91(1) and (2) CC shall apply even if the misrepresentation or unlawful threat was committed by a third party and the other party knew or ought to have known of it.

In the case of an unlawful threat, a characteristic circumstance is that the party is persuaded to conclude the contract with the prospect of some disadvantage. This also means that there is a causal link between the unlawful threat and the contractual intent of the party, thus the conduct which constitutes an unlawful threat must be specifically expressed for the contract to be concluded. It should be highlighted that the illegal threat may be directed not only to the contracting party but also to a third party having a legal relationship with the contracting party, the decisive factor being that the unlawful threat (regardless of its direct addressee) should lead to the conclusion of the contract.

The legal literature emphasizes that the disadvantage affected by a characteristic threat can be both material and moral. For example, entering into a contract for reporting an infringement as an illegal threat. That is, if the party does not sign the contract, a complaint will be filed with the competent authority about the actual violation. It is important, that the threat of a lawful act is the basis of the 6:91(2) CC provided that it is abusive (Wellmann, 2020, p. 214).

The case law includes, for example, if the lessor forces the lessee to amend the contract to the detriment of the latter by failing to hold an event organized by the

lessee in the lessee's business as part of the lessee's business (Budapest-Capital Regional Court decision No. BDT 2012.2651).

4.3. Secret provisos, sham contract

Concealed motive is also a question of contractual intent, however, to which private law does not attach legal relevancy. Thus, it is also hammered out in the case law that a secret proviso does not affect the validity of the contract (e.g., Curia decision No. BH 2014.177; Curia decision No. BDT 2001.390). The intentional lack of will does not be governed by the rules for challenging the contract, but for contracts concluded with secret provisos or concealed reasons and for sham contracts (Curia decision No. BH 2001.234. point II).

Within the scope of a sham contract, a bilateral and deliberate error of will can be established (which is why the law does not provide for the nullity of the contract statement, but of the contract). A contract is fictitious if the contracting parties, by common will and agreement, make a legal declaration that does not correspond to their real will, giving a false appearance to a third party (Vékás, 2020b, p. 1591). However, the contract of sale does not imply that the parties enter into it for a specific purpose (e.g. to obtain a soft loan) if at least one of them has a real intention to acquire property (Curia decision No. BH 2013.339).

Similarly, a contract for the transfer of property in which the parties had a real and common intention to transfer the property was not a pretended motive for concluding the contract, therefore, it is not deemed as a sham contract. However, their common aim to be achieved with this contract was to deprive a third party from the basis of satisfying his claim, entirely or in part. That means that an action for challenging the contract based on invalidity due to the fact of this fraudulent purpose must be dismissed (Curia decision No. BH 2013.299). That is, the sham contract and the fraudulent contract differ in both factual and legal consequences. The supreme court of Hungary summarized the difference between the two rules as follows:

> 'Contract aimed at concealing assets to the detriment of a creditor is a valid contract, its relative ineffectiveness towards the third party, the creditor, can be established only if the contract was not fictitious with regard to the intention to transfer the debtor's assets, so the other party actually acquired it, which was the basis for the satisfaction of the creditor's claim. The situation is different if, to prevent the recovery of the claim, the debtor wishes to give the impression that the given assets in his property are not owned by him anymore but by a third party. Such a contract is a sham contract due to the lack of a contractual intention aiming to transfer property, therefore, this contract shall be deemed null and void. Without a real transfer of property under such a contract, this asset serves as a basis for the satisfaction of the creditor's claim' (Curia decision No. BH 2001.62).

The relationship between the sham contract and the contract aimed at concealing assets is also explained in Civil Department Opinion no. PK 1/2011. (VI. 15.) in detail, especially point 10 and its justification.[4]

Under Art. 6:92(2) CC, sham contracts shall be null and void; if a sham contract disguises another contract then the parties' rights and obligations shall be assessed based on the disguised contract. The court stipulates that, if there is another contract that is concealed, there is no place to apply the legal consequences of invalidity. Nevertheless, if the concealed contract is also invalid, the consequences of invalidity take place within the framework of the latter contract (Curia decision No. BH 2010.148).

Accordingly, the court also considered a contract as invalid which was aimed at the division of joint property of spouses where the spouse wanted to transfer a half proportion of his ownership registered as a whole to his spouse to avoid the possible consequences of criminal proceedings initiated against him (Curia decision No. BH 2012.195).

4.4. The relevancy of the legal declaration of the false representative

In the era when the 1959 Civil Code was in effect, it was controversial how the legal declaration made by the pseudo-representative (acting without powers of representation) should be dealt with. It is also known that due to the missing contractual intention of the contracting party, the invalidity of the given legal transaction could be established. According to another approach, the contract is non-existent, with the interpretation that the contract concluded by the pseudo-representative was not concluded at all, since there is no contractual declaration on the part of one of the parties, i.e. there is no consensus between the parties (Curia decision No. EBH 2004.1146). This interpretation is based on the opinion that the pseudo-representative has not made a juridical act on behalf of the party to the contract, so, his act cannot be regarded as an act made by the party (Kisfaludi, 2021, p. 60).

The Art. 6:14(1) CC also states this principle, i.e. if a person makes a legal declaration without the right of representation or exceeding his or her powers of representation, his statement shall produce legal effects subject to the approval of the party being represented.

It may be disputed whether the third party is required to await clarification of the right of representation with a statement, i.e. whether or not the represented person approves the statement of the pseudo-representative. According to the interpretation of the supreme judicial forum, if a pseudo-representative unilaterally terminates the contract, meanwhile it is obvious that he or she has no powers to represent the contracting party, this notice does not result in any legal effect. That means, this situation cannot be deemed as a pending legal situation until the 'represented' person has approved the juridical act, it does not trigger the analogous application of the

[4] Pursuant to Point 1 of the uniformity decision of Curia No. 1/2014. PJE, this PK opinion shall be deemed to be relevant to the application of the new Civil Code of Hungary.

legal consequences of a pending condition of a contract, nor does it create an obligation for the presented party to make a declaration (Curia decision No. EBH 2009.2038; see also Vékás, 2020a, p. 1465).

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