Multidiszciplináris tudományok, 12. kötet. (2022) 3 sz. pp. 24-35 **https://doi.org/10.35925/j.multi.2022.3.3**

INTERPRETATION AND CONTRACTUAL INTENTION – SOME ISSUES CONCERNING THE PARTIAL INVALIDITY OF THE CONTRACT

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Abstract

The interpretation of both the judicial act and the contract is an essential and much-researched topic of contract law since interpretative questions relating to the contract are raised in almost all cases. The intention is a basic 'building block' of contractual agreements, therefore, in case of a legal dispute, revealing the parties' real intention is indispensable. Nevertheless, there are also cases where the application of certain legal consequences raises the need for interpretation. For instance, when a ground for invalidity concerns only a certain part of the contract, the legislator provides partial invalidity or the invalidity of the contract in its entirety. Regardless of what type of invalidity is declared as a general rule, contractual parties, or in case of debate, the court shall decide about the legal status of the parties' contract. In the lack of the parties' expressed declaration, the decision shall be made on the real, interpreted, or ultimately, on the hypothetic contractual intention of the parties.

In the study, both the issues of the interpretation of the contract and the problem of partial invalidity are examined comprehensively by the review and analysis of both the Hungarian and foreign literature. It is also reviewed, how the interpretation theories and methods can help the exploration of the contractual parties' real intention, if parties did not provide the future legal status of their contract for the case of partial invalidity.

Keywords: *interpretation of the contract, supplementary interpretation, implied contract terms, partial invalidity, severability, divisibility of contract, hypothetical intention*

1. Introductory thoughts. Intention as a basic element of the judicial act

The intention and its expression are basic building block which is of particular importance in contract law.

Article 6:58 of Act V of 2013 on the Hungarian Civil Code (hereinafter referred as to HCC) declares the contract is concluded upon the *mutual and congruent expression of the parties' agreement* intended to give rise to obligations to perform services and to entitlements to demand services. A *legal statement*, a unilateral act intended to have legal effect [Article 6:4 (1) HCC], encompasses the intention of the civil law entity on the one hand. This is the *inner side* of the legal transaction, which is supplemented by the *exterior side*, i.e. the expression of the intention: the statement made orally, in writing, or by implicit conduct (Barzó, 2018, p. 87). As it is well known, in the lack of consent, i.e. when the parties' legal statements do not meet, there is no contract *(contractus non existens)*.

During the existence of a contract, there may be a large number of situations in which the intention of the contractual parties and the meaning of their legal statements need to be examined. In one part of the legal transactions, the real will of the party making statement is obvious. However, in other cases, the intention of the party is unclear or debated. Thus, when parties conclude a written contract, several issues remain unwritten, since parties can't consider all possible eventualities and provide for them in their contract. Therefore, it has been recognized for a long time that the express terms of a written contract can be supplemented with other, unexpressed, terms (Cornelius, 2012, p. 293). Moreover, when a legal statement's content is unclear, interpretation is needed to reveal the party's intention.

The need for the interpretation of a legal statement is basically can be traced back to three main causes: a) the ambiguity or unclarity of a given contract term, b) the inconsistency between the expressed intention and the true intention of the contractual parties, and, c) gaps in the contract. The interpretation of the contract is primarily for the parties. But, when they cannot agree, the court shall interpret the debated term of the contract. However, it is a governing principle that the court shall make its decision not upon the literal meaning of the words used in the contract, but upon the intention of the contractual parties.

2. Unclear and incomplete statements – a need for interpretation

The interpretation of legal statements is a much-researched topic of private law, particularly concerning contractual relationships. The significance of the meaning of the contractual parties' legal statements and the explanation and exploration of their real intention is proved by the very rich literature on the topics. Scholars typically distinguished between interpretation theories and examined the potential methods of interpretation. However, in recent times contract interpretation has become one of the most controversial areas of the law of contract (McLauchlan, 2009, p. 5).

In English law, the interpretation of a contract is an objective exercise based on the identification of the meaning of the words the parties chose to express their intentions. The *literal approach* to the interpretation was accepted for a long time by the English courts. As it was stated in *Lovell and Christmas Ltd v. Wall* ([1911] 104 LT 85), *'(…) [i]t is for the court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument intended or understood. What is the meaning of the language that they have used therein? That is the problem, and the only problem.'* Nevertheless, over time, *literalism* has gradually pushed into the background and a new approach, *contextualism* has gained ground, according to which a contextual analysis takes place leading to departure from the clear wording of the contract.

The decision made in *Prenn v. Simmonds* ([1971] 1 WLR 1381) shall be mentioned as a turning point in this shifting process. As it was stated by Lord Wilberforce, a contract *'must be placed in its context'* and the court shall *'inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view'.*

The change in emphasis is discernible since contract documents are no longer to be interpreted 'purely' on internal linguistic considerations. Rather, they are to be placed in their 'context'. In other words, the court must have regard for the wider circumstances surrounding the conclusion of the contract. (McKendrick, 2012, p. 373)

After this change in the approach to the interpretation of the contract, the starting point for the court is to identify the intention of the contracting parties. The general principles on which a contract should be interpreted are relatively well established.

As it was re-stated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* ([1998] 1 WLR 896, 912–913), 'interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.' The background as the *'matrix of fact'* is an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes *absolutely anything* which would have affected how the language of the document would have been understood by a reasonable man. Nevertheless, the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. Although the significance of this judgment cannot be disputed, some expressions used by Lord Hoffmann were criticized. As Sir Staughton said, the use of 'absolute anything' is particularly difficult, since it can encourage the lawyers to collect all the documentation relating to the transaction and try to introduce them as part of the 'matrix of fact'. (Staughton, 1999, p. 306–307; McKendrick, 2012, p. 380)

Although the criticism, this well-known restatement is nowadays accepted by academic commentators and widely applied by the courts as well. As Lord Steyn set out in *Westminster City Council v National Asylum Support Service* ([2002] 1 WLR 2956), '[t]he starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is, therefore, wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen (…).' The general principles of interpretation were also confirmed in *Chartbrook Ltd v Persimmon Homes* ([2009] AC 1101). As Lord Hoffmann set out, *'(...) the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'*.

However, it is also true that recently some judgments were made, where English Supreme Court seems to move toward a more literal approach and put less emphasis on the commercial context, while maintaining the dominant principle of interpretation as an objective exercise in determining the intention of the parties. (See for example the decisions in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; Arnold v Britton [2015] UKSC 36) As Lord Hodge stated in Wood v Capita Insurance Services Limited ([2017] UKSC 24), *'[t]extualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement.'* The success of judicial interpretation depends on several factors. Therefore, some contracts can be successfully interpreted principally by textual analysis, for example, because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. Nevertheless, the correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example, because of their informality, brevity, or, the absence of skilled professional assistance.

In the common law tradition, the *doctrine of implied contract terms* is closely linked to the interpretation of the contract. If having regard to the express words of the agreement, it is still not possible to ascertain the meaning, the court may be willing to imply certain terms. This topic can designate a whole new research direction. Therefore, its comprehensive elaboration is not possible within the framework of this study. However, some thoughts can be summed regarding the doctrine of implied contract terms which can point out its significance in English contract law.

As it was summarised in the *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* ([1918] 1 K.B. 592, 15 January, 1918) by Lord Scrutton, a term would only be implied if, 'it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied: "Of course, so and so will happen; we did not trouble to say that; it is too clear.' The test to determine whether an implied term can be inferred in a contract must be objective. As it was stated in *Trollope & Colls v N.W.M.R. Hospital Board* ([1973] 1 W.L.R. 601 613C) it shall be revealed what would the parties as reasonable people have agreed to.

Although the doctrine of implied contract terms is existing and well-known the judicial practice, English courts are reluctant to depart from the express wording, particularly if the contract is detailed and appears comprehensive. In practice the situations in which courts are prepared to imply a term into a contract are limited. According to the case law, *Cornelius* declares that a term can be implied into a contract in one of two instances only. 'Firstly, a term can be implied *ex lege* as a general default rule which applies to all contracts of a particular form. Secondly, a term can be implied on an *ad hoc* basis in a contract between particular parties if it is strictly necessary to fill a gap to arrive at the objective meaning of the contract' (Cornelius, 2012, p. 297). As he added, this is also the predominant view amongst the authors of textbooks on the interpretation of contracts.

In German private law, the explanation or interpretation of a judicial act *(Auslegung des Rechtsgeschäfts)* has also been a regularly examined and researched, practically 'evergreen' topic with extremely rich literature. Numerous scientific works were dedicated to this problem over the centuries (Danz, 1897; Larenz, 1966; Lüderitz, 1966; Mittelstädt, 2016).

The most fundamental provision of the German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter referred as to BGB), on the interpretation of contracts, is § 133 BGB (Auslegung von Willenserklärung). According to Article 133 BGB, when a declaration of intent is interpreted, it is necessary to *ascertain the true intention (wirkliche Wille)* rather than adhere to the literal meaning of the declaration. The BGB, therefore, precludes interpreting parties' statements literally. Relating to the interpretation of contracts, Article 157 BGB qualifies the above-mentioned subjective approach and states that contracts shall be interpreted as required by good faith, considering customary practice. It means that interpretation shall take into consideration the aim of the contract and the interests of the contractual parties.

As a general rule, interpretation is to ascertain the real intention of the parties. Nevertheless, there are cases when interpretation does not serve as a tool by which the parties' intention can be revealed, but as a way to complete the contract by default rules. The *supplementary interpretation (ergänzende Vertragsauslegung)* can only be applied, when the terms of the contract are incomplete. As *Kötz* emphasized, in case of supplementary interpretation, the judge shall *'provide or imply a term which the parties would have accepted as the economically efficient solution of the problem had their attention been drawn to it at the date of the conclusion of the contract'* (Kötz, 2013, p. 289). However, in the course of the supplementary interpretation of contracts, the examination of the parties' hypothetical intentions is also needed to fill the gaps in the incomplete contract (Köhler, 2021, p.137; Bitter – Röder, 2020, p. 88; Boemke – Ulrici, 2014, p. 152; Biehl, 2010, p. 195). It is noteworthy that this approach can be related to the doctrine of implied contract terms in English law.

The rules on the interpretation of the contract in different European contract law documents are also remarkable since they typically contain extensive regulation on this issue. (See for example Chapter 5 of the Principles of European Contract Law or Chapter 8 of the Draft Common Frames of Reference). It is particularly important, as these provisions can serve as a model for the future development of the national rules on the interpretation, for example in English law (McKendrick, 2012, p. 387).

In Hungarian private law, the Draft Private Law Code (*'Magánjogi Törvényjavaslat'*, hereinafter DPLC) of 1928 already contained rules on the interpretation of the contract. Article 995 DPLC stated that in the course of the interpretation of a contract not the words' literal meaning, but the contractual parties' intention is relevant. Nevertheless, in case of doubt, the parties' intention shall be determined concerning the circumstances of the case, the perception of life, and equity.

According to *Károly Szladits*, the explanation of the judicial act's content has a double meaning. On the one hand, it means the determination of the meaning of the statement. This is the interpretation of judicial acts (transactions) in a narrower sense. On the other hand, explanation serves as a tool for filling the gaps in the parties' statements. This is the interpretation in a wider sense (Szladits, 1938, p. 335). For the interpretation of a legal statement, the used words and their ordinary sense shall be the starting point, unless it is obvious that due to special circumstances another meaning must be attributed to them in the given case. However, Szladits and other scholars from this period, under Article 995 DPLC, emphasized that during the interpretation of legal statements, not the words' literal meaning, but the contractual parties' intention designate the proper direction (Szladits, 1942, p. 335; Fehérváry, 1942, p. 58; Nizsalovszky, 1949, p. 232). The intention of the parties can be deduced along the facts unrelated to the judicial act and along all the other circumstances surrounding the transaction (e.g. prior negotiations and bargaining, mailing, the characteristic of the transaction, etc.).

For the interpretation of the dubious legal intention, Szladits drafted three governing principles. These are a) the purposefulness, b) the perception of life with special regard for the usages and practices accepted in the transactions, and, c) the equity which enforces the requirement of good faith and fair dealing in the course of the interpretation (Szladits, 1938, p. 336). Nevertheless, trust in the contract is the most valuable of the contractual relationship, therefore the interpretation in a narrower sense must never lead to ignoring or to twists the words of the contract.

As was mentioned before, interpretation in a wider sense can be used as a gap-filler-tool, when the assumed *(hypothetical)* intention of the parties shall be revealed. However, as Szladits notes, this is not about the determination, but the substitution of the parties' intention (Szladits, 1938, p. 336).

The former Hungarian civil code, i.e. Act IV of 1959 (hereinafter referred as to HCC [1959]) contained a provision on the interpretation of the contractual statement. According to Article 207 (1), a statement shall be interpreted, in light of the presumed intent of the person issuing the legal statement and the circumstances of the case, by the generally accepted meaning of the words. Paragraph (2) of the referred article also stated that in the case of a contract concluded between a consumer and an economic organization, if the content of the contract is debated, the interpretation that is more favourable to the consumer shall be accepted. As it can be seen, HCC [1959] combined the theory of subjective intention and objective reliance and intend to explore, how the statement could be understood by the recipient party and what conclusions could be drawn.

The interpretation of a legal statement is also regulated by the HCC. It distinguishes between the interpretation of assigned, i.e. to a specific person addressed, and non-assigned statements. According to the relating article of the HCC, the parties shall, in light of the presumed intent of the person issuing the legal statement and the circumstances of the case, construe statements by the generally accepted meaning of the words. In the case of non-assigned statements, the parties shall, in light of the presumed intent of the person issuing the non-assigned legal statement and the circumstances of the case, construe statements by the generally accepted meaning of the words. [Article 6:8 (1) (2) HCC]

The method of interpretation is of particular importance in contract law, since the differences in the essential elements of the contractual statements' content, i.e. the lack of consonance of the statements (dissent), there is no contract. Regarding this, HCC also declares an interpretation rule within the

provisions of contracts. Article 6:86 (1) of the HCC states that contract terms and statements are to be interpreted by the contract as a whole. In such a case, when the meaning of a standard contract term or the contents of the contract term which has not been individually negotiated cannot be established by the application of the provisions set out in paragraph (1) for the interpretation of the legal statement, the interpretation that is more favourable to the party entering into a contract with the person imposing such contract term shall prevail. (Article 6:86 (2) HCC)

Within the rules on contracts, HCC also contains a provision on the so-called *merger clause.* In a case, where a contract in writing includes a term stating that the document contains all contract terms agreed upon by the parties, any prior agreements which are not contained in the document do not form part of the contract. [Article 6:87 (1) HCC] However, it is also important that prior statements of the parties may also be used for the interpretation of the contract. [Article 6:87 (2) HCC]

In contract law, the intention and its expression can also be examined from another point of view. Thus, both the defect of the contractual intention and its external appearance, i.e. the legal statement, can be the ground for the invalidity of the contract. Among the *defects of the contractual intention*, *mistake* of either of the parties or the parties' *same mistaken assumption*, *misrepresentation*, *fraud*, and *threat* give the possibility to the party to contest his or her statement [Article 6:90 (1) (2) and 6:91 (1) (2) HCC]. By contrast, a contract that is intended to disguise another contract *(sham contract)* is judged more severely; such a contract shall be null and void, and the rights and obligations of the parties are to be adjudged based on the disguised contract (Article 6:92 (2) HCC). The comprehensive elaboration of the defects of contractual intention as a ground for the invalidity of a contract was comprehensively elaborated in the Hungarian literature by Attila Menyhárd (Menyhárd, 2000).

Within the grounds for invalidity of the contract, error in the contractual statement is a separate category. Nevertheless, in this case, there is no defect in the contractual intention, but the expression of the intention does not conform with the legal provisions and this causes the invalidity of the contract. This kind of defect, i.e. the breach of formal requirements causes the nullity of the contract as a general rule. However, with certain exceptions, such deficiency can be remedied by the performance of the contract and the contract shall become valid by acceptance of performance, up to the extent performed *(convalidation)*. Thus, HCC does not recognize the remedial effect of the performance in those cases, when a legal act prescribes the contract to be executed in an authentic instrument or private deed representing conclusive evidence, or if the contract pertains to the transfer of a real estate property [Article 6:94 (1) HCC]. The same rule prevails in the case of an amendment to and termination or cancellation of a contract made in the absence of statutory formalities [Article 6:94 (2) HCC].

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

3. The partial invalidity of the contract

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

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

In 1978, Act IV of 1977 on the amendment and consolidated text of Act IV of 1959 on the Civil Code of the People's Republic of Hungary amended and renumbered the article of the HCC [1959] on partial invalidity and introduced new provisions on the partial invalidity of contracts concluded between commercial entities. The 'new' Article 239 (2) HCC [1959] stated that in all those cases when a contract concluded between commercial entities is partially invalid, the legal consequences of invalidity applied only to the invalid part. However, the court had the right to declare the invalidity of the entire contract. Article 239 (3) HCC [1959] also stated that in case of the partial or full invalidity of contracts between commercial entities, the court had the right to establish a contract between the parties and declare its content. Nevertheless, legal acts could provide otherwise.

According to *Gyula Eörsi*, with the drafting of the exemptions from the partial invalidity, Hungarian legislator aimed at maintaining, 'saving' the contract, which can fulfil its purpose, although certain elements are removed from it due to the (partial) invalidity (Eörsi, 1981, p. 125).

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

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

According to the explanatory memorandum of the amending act, the modified text and the reversing of the general rule and the exemption serves better the smooth flow of transactions and the prevailing of the contractual parties' autonomy. Hence, partial invalidity became the general rule and the entire contract failed only in those cases when the parties would not have concluded it in the lack of the invalid part. As the explanatory memorandum emphasized, in these cases, the legal effect relating to the invalid part is so important for the contractual parties that there is no interest to maintain their contract when this legal effect fails. This is the reason, why the entire contract shall be deemed invalid.

It should also be mentioned that HCC [1959] did not provide how to apply the legal consequences of the invalidity in the case of partial invalidity. Regarding this issue, the explanatory memorandum of

the amending act of 1993 declared that in case of partial invalidity, the legal consequences of invalidity shall be applied only to the invalid part.

HCC [1959] contained the above-mentioned rules on partial invalidity until the adoption of the new Hungarian civil code. The principle of partial invalidity is also maintained by the HCC. According to Article 6:114 (1) HCC, if the ground for invalidity concerns specific parts of the contract, legal effects of invalidity shall apply to those parts. In the event of partial invalidity of a contract, the entire contract shall fail if there is reason to believe that contractual parties presumably would not have concluded it without the invalid part. In the case of consumer contracts, paragraph (2) of the above-referred provision of the HCC contains a specific rule in line with EU law. According to this, invalidity concerning a certain part of a contract only leads to the invalidity of the entire consumer contract, if the contract cannot be performed without the invalid part [Article 6:114 (2) HCC]. When assessing whether a ground for invalidity concerning only a certain part of the contract would affect the entire agreement, the court shall answer the question, whether parties presumably would or would not have concluded their contract without the invalid part.

The phrase 'there is reason to believe' appears as a novelty in the text of the HCC. With the introduction of this term, the legislator makes it necessary to reveal the parties' intentions as completely as possible. However, the expression raises difficulties in the practical application, and therefore, requires further interpretation.

Regarding the legal nature of partial invalidity, two kinds of approaches evolved in private law practice. This is mainly justified by the fact that even though the HCC [1959] provided the contract's legal status, the rules on the legal consequences of invalidity had not been revised (Harmathy, 2002, p. 614).

According to the first approach, partial invalidity is an independent *(sui generis)* legal institution. It means that all parts which are not concerned by the ground for invalidity will continue to exist and the contract shall be deemed and be fulfilled, as it would originally have concluded without the 'excised' part. The other approach considers *partial invalidity as a type of invalidity* and accordingly the legal consequences of invalidity shall be applied to the invalid part of the contract.

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

Nevertheless, choosing the legal consequence to be applied raises further questions, since the court is not bound by the claims of the parties and may resolve the consequences of invalidity in a manner that differs from the party's request [Article 6:108 (3) HCC]. Accordingly, such a situation may arise, when the court remedies the invalidity of a certain part of the contract by the amendment of the contract. This is a drastic action form the part of the court, which may push the principle of freedom of contract into the background. It is also emphasized by *Tamáné*, in her relating work. (Tamáné, 2016, p. 311). It is indeed true, that HCC states that such a court decision may not prescribe a solution that is protested by all parties. However, this provision does not necessarily constitute a sufficient guarantee, whereas the 'undifferentiated and mass' application of judicial right, as *Tamás Török* warns, contains several dangers and conveys the wrong message to the civil law entities (Török, 2020, p. 19).

4. The role of revealing the contractual intention during the assessment of the partial or full invalidity of the contract

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

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

It is interesting to note that the application of *severability clauses* (*Salvatorische Klauzeln, separability clause, clause de divisibilité*, etc.) is particularly characteristic in the civil law practice of many European countries like Germany, the United Kingdom, Switzerland, and Luxembourg. Such a clause is a provision that keeps the remaining provisions of a contract in force if any part of the contract is judicially declared void, unenforceable, or unconstitutional. A severability clause can be helpful in individual agreements. With the inserting of such a clause into the contract, parties may provide the legal status of the contract in case of partial invalidity, and therefore, the uncertainties and interpretation problems relating to the reveal of the contracting parties' intention can be prevented. Thus, in some scenarios, a severability clause can save an otherwise invalid contract. (Cf. Beyer, 1988; Baur, 1995, pp. 31–42; Marchand, 2008, p. 246; Nordhues, 2011, pp. 213–214; Perez, 2019, pp. 280–281)

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

In German-speaking literature, the divisibility of a contract *(Teilbarkeit)* is examined from several aspects. *Objective divisibility* means that certain terms of a judicial act are invalid but other terms not concerned by the ground for invalidity remain in force. *Subjective divisibility* of a contract covers a situation, where a contract was concluded between more parties and the given ground for invalidity raised only in the relation of certain parties. In the case of *quantitative divisibility*, the contract can be divided either in time or in space or its extent (Zimmermann, 1979, p. 63; Petersen, 2010, p. 420).

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

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

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

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

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

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

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

interpretation rules does not lead to results, the application of *hypothetical contractual intention* of the parties would solve the problem.

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

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

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

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