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EXCESSIVE BENEFIT AND UNFAIR ADVANTAGE IN CONTRACTS[1]

Introductory remarks

In this article I consider some problems of the control of the disparity of the performances in contracts. The idea of intervention into the contractual relationships through rendering a contract invalid if there is a striking difference between the performances roots back to the law of the late Roman Empire. It seems that the doctrine of laesio enormis goes back to Diocletian and it is obvious; that the rule "was designed to meet a special crisis"[2] The idea of the equality of exchange seems to live its renaissance today. My point of view followed in this article is the objective and subjective features of the control of the equality of rights and obligations in contracts; with other words I try to analyze the problems of the procedural and the substantive fairness in contracts in general. My main aim is to find out, which basic alternatives we have in the course of drafting the Hungarian Civil Code to provide the substantive fairness in contracts. I think that the most complicated task is to find the underlying policy, which is inseparable from defining of the underlying economic model. First we should define our aim then we can find the best solution to achieve it.

[1] Ovaj rad je preuzet iz publikacije *ELTE Annales,* Sectio iuridica 39-40 (2001), 107-124, uz saglasnost izdavača i autora, na čemu im se zahvaljujemo

[2] Its direct aim was to prevent peasants to sell their lands on a low price to the urban capitalists, which would have deepened the crisis. Zimmermann attributes the origin of the doctrine to Iustinian. See: Reinhard Zimmermann: *The Law of Obligations - Roman Foundations of the Civilian Tradition* (JUTA, 1992) 261.O. and Dömötör László: *Szempontok a feléntúli sérelem doktrínájának jogösszehasonlító vizsgálatához* [Aspects to the comparative analysis of the doctrine of laesio enormis] (in Jogi tanulmányok, Budapest, 1996, 273-298.O.) 297.O.

1. Procedural and substantive fairness

In the course of the drafting of the German BOB the idea of a possible rule to control the equality in exchange has been abandoned. Originally the clause declaring the contracts infringing the good morals null and void was destined to provide the fairness in contractual relationships. Finally to this section 138 of the BOB a provision has been added, which rendered null and void also the contracts with a usurious character. According to the s. 138 (2) of the BOB the contract is void, if there is a striking disproportion between the performance and counter performance and the contract was concluded by the exploitation of the difficulties, inexperience, lack of judgment or serious indecisiveness of the other party.

The concept of usury is a combination of objective and subjective criteria. The objective element is the striking disparity of performance and counter performance, which presupposes that the contract is not a gift. The comparison is based on objective test, not on that value, which the party attributes to the subject of the contract. The striking character of the disparity is decided in the court practice in a really flexible way.[3] The courts construe the disparity of performance and counter performance in a wide sense, the disparity of performances is not the only criteria they take account. A contract that allocates the risks disproportionately and secures one of the parties in an unreasonable way can be treated as a usurious one.[4] The subjective element is the exploitation of a special, in the Code determined circumstance of the aggrieved party. The exploitation can appear only as a deliberate act, the negligent "exploitation" is irrelevant.

In the court practice there has been a tendency to emphasize the objective element, the striking disparity of performance and counter performance, but it is not connected to the usury, but to the s. 138 (1) of the BOB, which renders contracts that infringe good morals, void, and the s. 242 which provides the principle of fairness and good faith *(Treu und Glauben).* Both of these two provisions of the BOB - because they are quite flexible - could be a ground of the control of equality of exchange, but - even there were some attempts[5] - the court practice didn't create a doctrine, according to which striking disparity would be itself enough to declare a contract invalid.[6] Since the s. 138 (1) is the background rule of the prohibition of usury, it could be said that if the subjective element of the usury lacks in a case, it can be as infringing the good moral void. The jurisdiction consequently holds, that if in a case the preconditions of the usury partly fulfil, but one of the elements is lacking, the contract can be declared under the s. 138 (1) void, but only if there are some other circumstances, which are not demanded in the s. 138. (2) and give the contract an immoral character. The disparity of the performance and counter performance itself is not enough

[3] In a case, where the party was as an electricity company in a monopolistic situation, the disparity of 13,42% was treated striking, in an other case, which was about a sale, the 2/3 difference was not a striking one. In loans the court compares to the level of the interests on the market. Until 1978 there was a threshold at 28-30%, since that time this has been abandoned. See: Palandt Kurzkommentar zum BGB (47. bearb. Aufl., München, 1988) 120.0.

[4] Kohlhammer *Komentar zum BGB* (Band I., Verlag V. Kohlhammer 1987) 942.O.

[5] The OLG Stuttgart in 1979 brought a decision, in which declared a contract void on the base of 242 of the BGB because there were a disparity between performance and counterperformance in the contract more than 100%. Münchener Kommentar zum BGB (2. Aufl., ed. by Peter Ulmer, München, 1985) 1048.O.

[6] See also Hein Kötz: *Europäisches Vertragsrecht* I. (Tübingen, 1996) 206.O.

ground[7] to declare a contract as an immoral one, void. There is, however in general a strong tendency in German court practice focusing on the disparity of performances and pushing the subjective elements into background.

The common law also didn't accept a doctrine of the unenforceability of a contract on the sole ground of the disparity of the performance and counter performance. The doctrine of the consideration could have been construed this way, but it seems to be an established principle, that the adequacy of consideration is not a precondition of validity. In the English law, the categories of the *duress (economic duress),* the *undue influence* and the *unconscionable bargain* cover those cases, which the German court practice brings to the application of the s. 138 of the BGB. The doctrine of *unconscionable bargain* seems to stay the closest to the German usury, but it seems, that it is relatively rarely applied in the English case law.[8] The special category of duress, the economic duress has been accepted in the case law. The base of the duress is that the party brings the aggrieved party into a situation, in which he cannot create and express his own independent and whole contractual will. The base of the undue influence is that no one can rely on his own fraudulent act in order to get benefits. In the focus of the duress is the aggrieved party and the situation in which he has been brought to, in the focus of the undue influence is the fraudulent party.

There are decisions in the English case law, which seem to be a step toward the acceptance of the relevance of the disparity of the rights and obligations in the contract. One is the decision in the *Schroeder Music Publishing Co Ltd v. Macaulay*[9] case, the other the *Lloyds Bank v. Bundy*[10] Lord Denning has formulated a doctrine in the decision in the latter, which is called "the inequality of bargaining power". He expressed the essence of that as "the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other." It seems, that the literature agrees with this doctrine, which is very similar to the continental concept of usury,[11] but the House of Lords is reluctant to accept it as a general principle.[12]

The French Code Civil didn't accept the disparity of performances as a general ground for invalidity. The Code Civil however, contains three contexts, in which the disparity itself is relevant: the contracts concluded by minors, the agreement of heirs on the sharing of their heritage and the 1674 ff. provisions of the Code, which render that in a sale of an immoveable, if the price received by the seller is less than five-twelfths of the just price, the seller can claim a rescission of the contract. According to the court practice, if a contract is aleatory, the seller has no right for rescission, since in these cases the just price cannot be

[7] *Münchener Komm*. 1048.O.

[8] *Chitty On Contracts* (26th ed., London, 1989) 363.0. and G.H. Treitel: *The Law of Contract* (9th ed. London, 1995) 374.0.

[9] [1974] The All E.R. 616.-624.O.

[10] [1974] The All E.R. 757.-773.O.

[11] The basic difference is that the usury doesn't demand the role of the other party in causing the detrimental situation of the aggrieved party

[12] Kötz: *Europäisches Vertragsrecht,* 204.O.

calculated. The court practice doesn't extend the doctrine of lesion to other cases than sale of immoveable assets.[13] The Code Civil didn't adopt a doctrine like usury. The cases, in which the freedom of choice of one party is limited by the state of necessity or of economic dependence in which he finds himself is treated null for violence."[14]

The Austrian Civil Code, the ABGB has a rule of laesio enormis. According to the s. 934. of the ABGB renders a contract invalid, if there is a disparity between the two performances more than fifty percent. This rule is not applicable to gifts, if the party has declared his special wish (Vorliebe) to get the subject of the contract even on a very high price, if he knew the real value of the thing, when it is presumed, that there was a gift combined with a contract for counter performance, if it is impossible to establish the real value of the thing or when it was bought on an auction ordered by the court.

2. The present Hungarian solution

The Hungarian contract law provides control over the substantial and the procedural fairness of the contracts too. The two pillars of this twofold control of the synallagma of the contracts are the s. 201. (2) and the s. 202. of the Hungarian Civil Code[15] (further referred to as Ptk.). The s. 201. (2) of the Code is to provide the substantive justice in contracts. According to this provision, if, at the time of the concluding of the contract there is a striking difference between the value of the two performances, without one of the parties having the intention to give a gift, the aggrieved party is entitled to avoid the contract. S. 202. of the Code provides, that if a contracting party has Denning has formulated a doctrine in the decision in the latter, which is called "the inequality of bargaining power." He expressed the essence of that as "the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other." It seems, that the literature agrees with this doctrine, which is very similar to the continental concept of usury,[16] but the House of Lords is reluctant to accept it as a general principle.[17]

After the 2nd World War as the result of the influence of the Soviet Union the economic system changed in Hungary. The market economy was transformed to a planned one based on the state property. This transition took some years. Until the coming into force of the Ptk. in 1960, there was a special *ex lex* situation, where the rules of the earlier private law continuously

[13] Barry Nicholas: *The French Law of Contract* (Oxford, 1992) 137-138.O.

[14] Barry Nicholas: *The French Law of Contract* 109.0.

[15] See: Act no. 4. of 1959, about the Civil Code of the Hungarian Republic (Ptk.). The Code has come into force on 01.05.1960. This is - with a lot of modifications and amendments - the today effective Code.

[16] The basic difference is that the usury doesn't demand the role of the other party in causing the detrimental situation of the aggrieved party

[17] Kötz: *Europäisches* Vertragsrecht, 204.O.

ceased to be applicable and the Hungarian Supreme Court (further referred to as Supreme Court) tried to determine the principles of the law to be applied.

The problem of the consequences of the unequal bargain appeared very shortly after the 2nd World War. Immediately before and during the 2nd World War - as it is widely known - it became one of the political aims of the state to remove Jewish persons from the economy and the society. One measure of this harassment was creating statutes, which made it possible to take over the real property of these persons by the state without any compensation. These people had only one alternative to avoid the even worse: to sell their property quickly at any price. It doesn't need any explanation, that the price of these real estates was very low, because of the urgency of the sales and because deriving from the situation, in a short time emerged a great over-supply on the market. Those, who had to sale their property on a very low price, because they didn't want them to be taken over by the government without any compensation, sued the buyers avoiding these contracts. They referred to the Act no. 32 of 1932, which prohibited usury and the exploitation of the detrimental circumstances of the other party obtaining a striking benefit from the contract. The cases were decided by the time not yet institutionally transformed Supreme Court (still called Curia as before the 2nd World War). The Curia decided, that the buyers didn't abuse the detrimental situation of the sellers each, they mere exploited the situation, which developed from the oversupply on the market, causing very low price level in general. The exploiting of the possibilities provided by the market even if it was an unjust result of a social phenomenon didn't create usury or abuse of circumstances. To these contracts the prohibition of the Act no. 32 of 1932 was not applicable. The Curia, however, stated that these contracts are so unfair that they were not enforceable. The Court didn't find any ground for declaring the contract void and restoring the situation before the contracting (in integrum restitutio), but referring to the principle of equity the Court amended the contractual price.[18] This was not a consequence of invalidity, but a kind of compensation for the sellers also depriving the buyers of the excessive benefit and all of this on equitable ground.

In 1950 the Supreme Court issued the guidelines (Guidelines no. 9. of 1950.) on the equivalency of the performances in contractual relationships. The Supreme Court had set out from the concept of usury, but with these guidelines the subjective elements of usury (the condition of abusing the other party's detrimental situation) had been abolished. According to these guidelines, the usurious character of the contract should have been decided only on the sole ground of the adequacy of the counter performance: if there was a striking inadequacy in the value of subject of the contract and the contractual price (or other kind of counter-service), it had to be treated as a usurious contract and so declared null and void. The Guidelines didn't demand fulfilment of subjective criteria:[19] the inadequacy without the intention of donation itself was (as usury) the ground of invalidity.

[18] Weiss Emília: A *szerződés érvénytelensége a polgári jogban* [The Invalidity of the Contract in the Civil Law], (Budapest, 1969) 268.-269.O. The decisions are dated from 1948 and they were also supported by the

[19] Literature, however, tried to construe this concept of objective usury on a kind of subjective way. It was treated that this new concept abolished mere the detrimental situation as a precondition. The invalidity can stand only if the other party had the incentive to reach an excessive (inadequate) benefit, with other words if he knows that the price is strikingly beneficial for him. This can happen mostly if the party abuses some detrimental circumstances of the aggrieved party. So with this objective formula, the guidelines push the burden of proof to the benefited party: he has

The codification in 1959 in this question took as its starting point the Guidelines no. 9. of 1950.of the Supreme Court. It has become obvious, that it is pointless to speak of abusing of the other party's situation solely on the base of the incontestable presumption that the other party is always fraudulent, when there is a striking imbalance in the contract. The result of this was not simply the abandoning of the principle that the Guidelines reflected and turning back to the concept of abusing contracts of the earlier private law. Through the codification the objective usury concept of the Guidelines has been split up into two different norms and in this form taken up to the Code. On the one hand, the concept of the usurious and abusive contract from the earlier private law has been renewed and codified. This is the s. 202. of the Ptk, which was cited above. On the other hand, the striking difference of the value of the two performances also has been kept as a ground for invalidity. This is provided in the s. 201. (2) of the Ptk., as also cited above. The basic difference of the two norms is the subjective element (the abuse of the contractual circumstances) in the concept of the usury. The wording of the Ptk draws the barriers of the usury wider, since the ”striking disproportionate advantage” is not restricted to the disproportionateness of the service and the counter value, but this remains a theoretical difference. The legal practice applies to the notion of the striking disproportionate advantage the same test as the striking disproportionateness of the service and the counter-value in the s. 201. (2). There is a difference in the form of the invalidity, since the usury makes the contract null and void, while the objective inadequacy of the service and counter-service makes the contract void, but it makes no difference in the basic consequences of invalidity.[20]

to prove that there wasn't any abuse of the situation of the aggrieved party. According to this construction the guidelines make only a presumption, that from the inadequacy of the contractual services one can follow to the abusing of the other parties' circumstances: without abusing we have to speak of an intention of giving a gift. See: Nizsalovszky Endre: *Uzsora - tévedés - forgalmi jhiszem* [Usury - mistake - good faith in market relations] (in: Jogtudományi Közlöny, 1951/5. 246.-250.O.) 247.0. One couldn't, however derive this construction from the Guidelines, which hadn't left place for the proving of the lack of abusing the circumstances (the Guidelines in fact established an uncontestable presumption of the fraudulent activity of the other party). So this was only an experience of the literature to correct the Guidelines with the implication of subjective criteria.

[20] The difference appears mainly in the time limit of the avoidance, and the lack of the obligation for the court taking into account the ground of invalidity ex officio . The legal consequences in practice are the same. The fraudulent element makes a difference in the consequences, according to which in usurious contract the restitutive value should be awarded to the state, but this consequence in the practice is in fact not applied at all and surely must be revised, since this form of confiscation in private law has legal deficit from the point of view of the constitutional law. For both of null and successfully avoided contracts the main consequence is - according to the s. 237 of the Ptk. -restitution. If restitution cannot take place, the court shall declare the contract valid for the period up to the date of judgment. An invalid contract may be declared valid if the cause of invalidity can be abolished, in particular by eliminating the disproportionate advantage in the case of a usurious contract or the unreasonable disproportion between the services of the parties. In such cases, it shall be necessary to provide for the return of any services that might remain without consideration. With regard to usurious contracts, the court may cancel reimbursement in full or in part if, even in those cases in which by payments installments are permitted, the aggrieved party would find itself in dire straits. Nevertheless, the party who caused the injury shall be obliged to reimburse the aggrieved party for that part of the received services that is equivalent to the disproportionate advantage. Based on a motion filed by the public prosecutor, the court shall be entitled to award to the state the performance that is due to a party who has concluded a contract that is contrary to good morals, who has deceived or illegally threatened the other party, or who has otherwise proceeded fraudulently. In the case of a usurious contract, the performance to be returned to the party who caused the injury shall be awarded to the state. There isn't any difference e.g. from the point of view of the effect of the invalidity to the rights of third persons, who obtain the subject of the invalid contract.

2.1.2. Ideological background of the s. 201. (2) of the Ptk.

The Ptk. connects this right of avoidance to the principle of the necessity of counter-value. This has been formulated in the same section this way: unless the contract or the applicable circumstances explicitly indicate otherwise, a counter-value is due for performance set forth in the contract (Ptk. s. 201(1)). The expressed aim of the legislator was to prevent gambling, "speculation"), but - as it appears from the reasoning of the proposal of the original bill - the (relative) equality in exchange itself has been treated as a value that deserves protection. The underlying policy of the Ptk. was based on an economic system, which tries to solve the share of the socio-economic resources without market mechanisms. In such a system - also based on the relative equality of the assets - there is no room for the exploitation of competitive benefits. The equality of exchange can be treated even as a moral value, which should be protected, in an economy trying to avoid market it can be also natural.

From a practical point of view, however, the question had to be answered, that if we deny and try to avoid the market, what shall be treated as the value of a thing? Regarding the s. 201.(2) of the Ptk. the value of a thing at least in theory should have been decided according to the Marxian principle, that things have an intrinsic value, which equals the amount of the necessary work put into its production. The s. 201.(2) of the Ptk. can be treated as the legal expression the special form of circulating of the commodities and resources, which in the socialist socio-economic model prevails. With other words this *laesio enormis* like rule aimed to provide the working of the Marxian theory of value and fixes - from some aspects - its general boundaries.[21]

2.1.3. S. 201. (2) of the Ptk. in practice

2.1.3.1. Disparity between the two performances

As we mentioned above, the core of this ground for invalidity is the lack of equality in the exchange. One of the basic problems of the application of the s. 201(2) of the Ptk hides in the concept of value. To decide, whether one thing is worth more or is worth less than a certain sum, we have to express its value in money. Despite of the ideological background rooted in the Marxian economy, the court can determine the value of a thing according to its commercial value, and the Hungarian courts do this way also. In practice the court assigns an expert who states the commercial value of the subject of the contract: he simply finds out that on a given market how much certain things or services cost. There are things however, which do not have a commercial value (e.g. because of their specificity). Shall the court try to determine their values anyhow, or shall we come to the result, that it has no sense to speak of the value of a thing, which has no (comparable) commercial price?

There are very strong arguments in the literature that the lack of the commercial value precludes the applicability of the s. 201. (2) of the Ptk. It can be said that since the courts scrutinize the equality always through comparing the value stipulated in the contract with the

[21] Benedek Károly - Világhy Miklós: *A Polgári Törvénykönyv a gyakorlatban* [The Civil Code in Practice] (Budapest, 1965) 152.0.

commercial value of the thing (service), it is the precondition of the applicability of the s. 201. (2) that the thing has a commercial value. Without this it has no sense to speak about comparing and without comparability we cannot speak about difference between the agreed price and the value of the thing.

A discussion raised about this question in the literature in 1998 in civil judicial procedures in connection with the price of using two motorways built recently under concession from the state.[22] The court declared the contract invalid on the ground of the s. 201.(2) of the Ptk. According to the practice of the Supreme Court, even the base of the comparison is generally the commercial value, the lack of commercial value is not an obstacle of the application of the s. 201.(2). If a certain product in the country is obtainable only from one supplier, so its price is not established under commercial pricing, on the base of the supply and demand, the court takes in account the price of that service in abroad and the amount of the costs of the supplier.[23]

Some contracts, by their natures, has a character of uncertainty, the parties do not know how burdensome their obligation will be. Contracts containing special risk elements are excluded from the application of s. 201 (2), because of the impossibility of comparing the value of the performances in time of contracting. So the contracts of maintenance or life-annuity cannot be contested on the ground of the s. 201 (2).

2.1.3.2. Striking character of the disparity

As we -mentioned earlier, the disparity between the value of the promise and the promised counter-value itself is not enough ground for avoiding the contract: the disparity must be striking. The Code doesn't fix the boundary (unlike as it was in the Roman Empire and is in France by the lesion or by the s. 934. of the ABGB), above which the disparity must be held striking and doesn't give any guideline. It is the task of the courts to decide in each case, according to the circumstances of it, what disparity amounts striking. The aim of this solution is to keep the flexibility of the court practice: the legislator didn't want to tie the hands of the courts. The Supreme Court is consequent in denying the existence of a fixed boundary. It can be shown that the

[22] For the exposition of the arguments see: Vekás Lajos: *Autopálya-használati szerződések és a Ptk. 201.§(2) bekezdése* [Contracts for motorway-using and the s. 201. (2) of the Ptk.] (in Magyar Jog 1998/6. 322.-327.O.) 325.0. and Kovács Kázmér: *A Ptk. 201. §(2) bekezdése védelmében* [In defense of the s. 201 (2) of the Ptk.] (in: Magyar Jog 1998/8. 403.-407.0.) In the litigation the plaintiff asked the court to his contract concluded with the motorway company to use the Ml motorway avoid on the base of the s. 201.(2) of the Ptk. The plaintiff argued, that there was a striking disparity between the charge for use and its real value. He used international comparison of motorway charges in Europe and has made a scrutiny on the profitability of the motorway company to prove that the striking disparity exist so the charge is unfairly high. One of the main arguments of the defendant was that the motorway company is not in a monopoly situation, because there is a parallel, even though slower, less safer and less environment friendly, but free possibility to use another route. There existed no other parallel motorway to make a comparison of the fees. In this situation it is impossible to assess a commercial value of the possibility of using the motorway. At the same time it was the free and conscious decision of the drivers using the motorway for even a high charge instead of taking the worse route. The concession gave the charge some special feature. The concessor had obligation to the state to pay a fee for the concession and the method of the pricing was also laid down in the concession contract. The concessor didn't infringe this pricing method. The defendant argued, that the state itself influenced the charge of the use of the motorway through the concession contract so the court cannot supervise it. The plaintiff referred to the objective criteria of the s. 201.(2) of the Ptk.

[23] It was well established also in an earlier decision (BH no. 1989/ 450).

lower courts and also the Supreme Court use some thresholds, but these leave the courts the possibility of flexible assessment of cases.[24]

2.1.3.3. Application of subjective criteria

As we stated above, the right to avoid the contract depends on the fulfilment of objective criteria: the only conditions are the striking disparity at the time of concluding the contract without an intention of giving a gift. According to the Code there aren't any subjective element to be taken into account. The problem was that in some cases the buyers used the right of avoidance provided by the s. 201. (2) of the Ptk. in an abusive way and it was could be also connected to the practice of the courts regarding the consequences of the invalidity. As it was stated above, if it is possible, the court may chose, the abolition of the cause of invalidity instead of restitution and so to declare the contract valid (to cure the contract). They order to give a compensation of the aggrieved party (as an amendment of the contractual price) to an amount, where the disparity is not striking (not to the just price, which would be the commercial value). So in these cases by using the right of avoidance on an abusive way, the buyers promised a very high price in the bargain for the subject of the contract to be sure to get it and then they avoided the contract to recover at least partly the extra paid sum above commercial value.

To avoid these cases the Supreme Court moved to a direction to take account the subjective circumstances of the case. In the Guidelines no. PK 267. of the Supreme Court (published in 1985) it has been stated, that in case of avoiding the contract on the ground of the s. 201. (2) of the Ptk. in the course of deciding whether the disparity is striking or not, the court has to scrutinize the circumstances of the conclusion the contract, the whole content of the contract, the commercial (value-) conditions, the specialties of the given contract and the way of determining the performance and its counter-value. According to the reasoning of these guidelines the principle of certainty demands from the parties a prudent behaviour by the contracting, to consider their declaration of will in order to keep the mutual reliance in the working and remaining of the contract It must be avoided that a party could use his right of avoidance to get rid of a later regretted obligation. The court has to apply in these cases also the principle of obligation to cooperate and the proper exercising of rights.

Some decisions also prove the movement of the Supreme Court into subjective direction in the course of application of the s. 201. of the Ptk. It has been held in a case that if the buyer consequently adheres to obtaining a certain immoveable estate, taking into account the possibility, that its price can exceed its value, because of his increased concern in concluding the sale he can avoid the contract only if the disparity is extremely striking. The same principle is to apply, if the seller, who knows the real commercial value of the thing, accepts the offer of the buyer as a result of bargaining, taken off the price consciously.

The court practice excludes the right of avoidance, if the contract is a result of an auction, because the price resulting from auction itself is a competitive one, which has been created through the bids, taking into account the possibility of exceeding the commercial price.[25]

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[24] Under a disparity of 25% the courts generally don't invalidate the contract; from a difference of 30% the disparity is treated usually striking; in exceptional cases (see below the role of the subjective elements) the disparity is striking only above a difference of 50%. [24]BHno. 1994/187. [25]BHno. 1990/57.

[25] BHno. 1993/165.

2.1.3.4. Summary of court practice

If we try to summarize the development of the Hungarian court practice relating to s. 201 (2) of the Ptk., we can realize a movement in direction to taking into account subjective elements despite that the Code itself doesn't order it. The application of subjective criteria doesn't lead, however to general exclusion of the right of avoidance, but restrict its possibility: the courts in these cases declare these contracts invalid in case of a higher level of disparity. There are some types of contracts or some methods of contracting where the courts deny the right of avoidance. These are cases where - deriving from the nature of that contract - it is absolutely impossible to state the value of the performance (e.g. contracts with aleatory character), or where the pricing has been done through open competition (auction). Since the courts use the criteria of the PK. 267. in determining whether the disparity is striking or not, the text of the Code, which renders the contract invalid on the base of the striking disparity as objective criteria, ties the hands of the courts. There is only a narrow room to take into account the negligence of the parties, the speculative character of the contract, the share of bearing the risk or the knowledge of the parties about the commercial value.

2.2. Usury in the Hungarian private law

Our private law prohibits usury, the contracts in which one party gets striking disproportionate advantage by the abuse of the other party's circumstances. According to the s. 202. of the Ptk., if a contracting party has stipulated a striking disproportionate advantage at the conclusion of the contract by exploiting the other party's situation, the contract shall be null and void. The Hungarian contract law already before the 2nd World War accepted the prohibition of the abusive contracts. With the codification of the Ptk the objective usury concept of the Supreme Court - as I mentioned earlier - has been abandoned, because the legislator has found no sense in using an incontestable presumption of the fraudulent behaviour solely on the ground of striking disparity. A contract is null and void as a usurious one if the next conditions are met:

there is a one-sided striking disproportionate advantage in the contract, and this is the result of that
the aggrieved party was in a special situation, and
the advantaged party exploited this special situation.

2.2.1. Striking disproportionate advantage as the condition of usury

One of the conditions of the nullity of the contract on the ground of usury is that one of the parties stipulates in the contract a striking disproportionate advantage. The notion of disproportionate advantage seems wider than the disparity of the service and counter-value, since the advantage could be manifested not only in the disparity of the price, but in any other kind of imbalance of the contractual rights and obligations. Despite of the wider concept of advantage the court practice restricts the striking disproportionate advantage to the striking disparity of the two performances (the disparity of price and value) and applies the same test for the disparity as in application of the s.

201 (2)[26] of the Ptk (striking disproportionateness of the two performances). This way the usury is held a special, with a subjective element supplemented version of the s. 201. (2). The lowest disparity I have found in the decisions of the latest ten years enough to

base usury was 24%.[27] According to the court practice the usurious character is excluded in contracts, where the value of the two performances is not capable to comparison.[28] The providing of a striking disproportionate advantage is enough, the realization of that is not a precondition of the invalidity.

2.2.2. Abused situation of the aggrieved party

The concept of the usury in the Ptk is more flexible than the similar category of the BOB or as it was in the earlier private law in Hungary, since it doesn't concretize those circumstances, which ones' exploitation can give the contract a usurious character. From this follows, that theoretically any kind of situation, which induce the aggrieved party to conclude a contract detrimental for him and this way it is possible to exploit it in order to get a striking advantage can serve as a ground for usury. The court practice in this respect applies also restrictive approach: in the cases the courts usually seek a deprived situation or want to see the aggrieved party in a difficulty, when they decide whether the preconditions of the usury fulfilled are or not.[29]

Contracts concluded by enterprises are also not excluded from the applicability of the s. 202. of the Ptk., but the court practice treats it exceptional.[30] The inexperience of the manager of a company for instance cannot ground invalidity.[33] The usury is excluded in contracts with a speculative character: if the aggrieved party wanted to get an exceptional benefit from the contract, he cannot apply to its usurious character.[31] The usurious character of a loan is not excluded because the aggrieved party needs the money not to cover personal necessities but foran undertaking, In these cases the court will scrutinize, whether the money should have been available on some other way or not.[32]

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[26] *A Polgári Törvénykönyv magyarázata* [Commentary to the Civil Code] (ed. by Gellért György, Budapest, 1995., 3. ed.) 549.0.

[27] Legf. Bir. Pf.V. 23.015/1996. sz.

[28] e.g contracts of maintenance or life-annuity. Pf.VI.22 288/1993. sz., Pfv. IV. 20578/1995. sz., Pf. IV.20.468/1996. sz.

[29] Legf Bir. Pfv. V. 23.015/1996. sz. (Szabolcs-Szatmár-Bereg Megyei Bíróság l.Pf.20.896/1996. sz.) See also Gf.I. 32.685/1992. sz., Pfv. IV. 22.500/1995. sz., Gf.I.33.405/1996, BH 1996/326, BH 1998/275, BH 1999/176. The formulate of the relevant situation that way, so there needs "a situation, which influences the contractual will of the aggrieved party so strongly, that he is not able to consider the weight of the possible losses" (Pf.III.22.626/1993.), is also not a perfect one. The fact, that the party knows the weight of the possible detrimental consequences doesn't exclude the usury, since he might had not a better choice than to conclude this "bad" contract.

[30] BH 1996/326.

[31] Benedek Károly - Világhy Miklós: *A Polgári Törvénykönyv a gyakorlatban* [The Civil Code in Practice] 139-140.0. and Legf Bir. Pfv.II. 20.020/1996. sz.

[32] Ptk Commentary 551.O. and Legf. Bir.Pfv. V. 21.399/1996. sz. moreover Gf.I. 33.898/1993

2.2.3. Exploitation of the other party's situation

From the notion of exploitation (abuse) follows, that there must be a casual link between the striking disproportionate advantage and the activity of the party causing the wrong. According to the court practice one can speak of exploitation only when the other party knows the situation of the aggrieved party and provides a striking disproportionate advantage on the base of this information.[33] The exploitation presupposes a conscious act, so the courts find the sole knowledge of the situation not enough to create usury.[34] The problem is that in a lot of at first sight relevant case, in contracts for loan with a very high interest the debtors and the creditors don't even meet, so it cannot be said that the creditors would know anything about the situation of the debtor.[35] It would seem to be better for these cases to state the abuse (so the usury) if the creditor actually didn't know the situation of the aggrieved party, but from the circumstances he should have known it.[36]

2.2.4. Summary

The aim of the prohibition of usurious contracts in the s. 202. of the Ptk. is to protect the fairness of the bargaining process with trying to avoid contracts that are based on a situation, where the party had no real alternative than to accept a harsh bargain. The Hungarian courts follow a restrictive construction in applying the s. 202. of the Ptk. The court practice seems to be reluctant to take the subjective criteria (the abuse) loosely, the aggrieved party has to prove the actual exploitation and it succeeds only very rarely.

3. General assessment

If we try to decide, whether we need a doctrine rendering a contract invalid if there is a striking disparity between performance and counterperformance, we cannot avoid taking into account some phenomena.

The first is that the rule of laesio enormis in its clean, objective form had been established in the Roman Empire and also in France in order to avoid the market mechanisms in a special situation. Its aim was to deter people to sell their properties on a price, which was very low, because of the market mechanism (because of the oversupply there was a great decline in prices). Its wished effect was to restrain the working of the market principle. We have to consider, whether we need a legal instrument, which has been construed for such a purpose.[37]

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[33] Pf.IV.21.580/1996. sz.

[34] The courts before the 2nd World War followed the same principle.

[35] These debtors usually try to hide their desperate situation in order to get the money.

[36] Weiss E. *A szerződés érvénytelensége a polgári jogban* [The Invalidity of the Contract in the Civil Law] 280-282.0. and Világhy Miklós - Eörsi Gyula: *Magyar polgári jog* [Hungarian Civil Law] (Budapest, 1962) 373.O. es Commentary of Ptk. 552.o.

[37] See also: Kecskés László és munkaközössége (Kecskés László, Pokecz Kovács Attila és Rozman András): A *A szolgáltatás és ellenszolgaltatás értékaránytalansági problémai a szerződési jogban I. es II.* [The Problems

The second is that there is a demand in the society for distributive and commutative justice and one of the tasks of the modern welfare state is to provide social security and such a state must intervene, where the aims of that seem to be in danger.[38] We have to accept, that "the legal system therefore cannot simply stand by and enforce every contact regardless of its content (subject only to its not being in conflict with the law or public order) just because it was formed by the normal rules of offer and acceptance."[39] If we choose as underlying policy the providing of justice, we have to accept that there always will be a "teleological deficit," because the justice in contracts is not a concrete notion, we cannot use it as a legal concept.[40]

The third is that the price/value ratio has an important "signing function": if something costs more than it is worth, there will be entrepreneurs who try to get in that market and supply the same thing at a lower price. If we control directly the prices in general, we may lose this measure, which moves the market mechanisms.[41]

4. Consequences and possible solutions

Even if we accept the necessity of the control of the content of the contracts, we have to avoid too strong paternalism. As we could see, in a system of an objective control of the disparity of performances, such as the s. 201 (2) of the Hungarian Ptk., the courts try to take into account subjective elements. In a system based on the subjective control of the procedure, such as the English and the German system, the courts seems to be ready in some situation to base their decisions on objective criteria (the disparity of rights and obligations). The starting point can be different, but the court practice establishes a test of combination of the subjective and the objective elements.

As far as the drafting of the Hungarian Ptk. concerns, basically four solutions could be applied.

The first is an objective rule based on the disparity of the performances, as it is now formulated in the s. 201 (2) of the Ptk. There are arguments for the providing of equality of exchange[42] but in my opinion this rule would constrain the market mechanisms and would be a step against the court practice, which has brought the subjective test into the construction of the s. 201 (2) of the Ptk. So I think it wouldn't be a good solution.

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of the Disparity of the Performance and Counterperformance in the Contract Law] (in: Magyar Jog 1999/ 2. 6S.-74. o. es 1999/3. 130.- 142.O.) 66. es 138.0.

[38] Hein Kotz: *Europaisches* Vertragsrecht I. 197.O.

[39] Konrad Zweigert - Hein Kötz: *The Introduction to Comparative Law* (3rd ed. Oxford, 1998) 332.O.

[40] The consequences of the lack of correct definition of contractual justice for us are, that we give up the openness of evaluation, since the facts, that should be only the connections between the facts and the consequences, become norms (e.g. the disparity of the performance and non-performance or the principle of efficiency). This way we lose the aims behind and its evaluation; we give up the concrete aims and provide justice according to personal status (consumer protection) and with this we infringe the principle of formal justice, according to which we should the same situation the same to treat. See: Jürgen Oechsler: Gerechtigkeit in modernen Austauschvertrag (Tübingen, 1997) 145.-166.0.

[41] Kötz: *Europäisches* Vertragsrecht 207.o.

[42] See James Gordley: *Equality in exchange* (in California Law Review 1981 Dec. 1587-1655.O.) or P.S. Atiyah: *Contract and fair exchange* (in University of Toronto Law Journal (1985 Winter 1-24.O.)

The second is the accepting of the disparity of performances as a ground for avoidance of the contract, but rendering to take into account subjective elements. This would be combination of an objective and subjective test. If we accept this solution, we have to decide to fix a borderline expressed in numbers or in percentage, above which the disparity relevant, or to say merely that it is relevant if it is striking. I think, the latter would provide more flexibility, which is important and which is also a good point of the s. 201 (2) today.

The third is also accepting the disparity of performances as a ground for avoidance of the contract, but with specifying exemptions, where it is not applicable. We could exclude from the applicability the contracts relating to a thing which has no commercial value, or where the claim for avoiding is based on circumstances which are risks allocated by the contract or contract law (contracts with speculative elements) or contracts where it is impossible to compare the value of performances at time of conclusion. This would not bring subjective elements to the assessment, and wouldn't provide enough flexibility for the courts. There is a danger that fixing these factors without the possibility to take into account subjective elements for the courts would leave without control situations, which should be controlled according to the underlying policy.

The fourth is to provide control for procedural fairness amended with a laesio enormis like rule. It seems to be closer to the market mechanisms than the objective test and with flexible court practice can achieve the same results as a subjective approach. It is also easier to find the underlying policy in providing agreements concluded voluntarily or at least within the boundaries of by the legal system tolerated economical necessities. It differs from the second solution in that according to the second alternative the mere striking disparity can be a cause of avoidance, since here the subjective element - together with the striking disparity - is also a precondition of the avoidance.

The UNIDROIT Principles of International Commercial Contracts follow the second model. The Art. 3.10. of the UNIDROIT Principles is based on an objective test of performances, when it states that a party may avoid the contract or an individual term of it, if at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. So far they establish an objective test, but they also provide to take into account subjective criteria, when provide, that regard is to be had, among other factors, to the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and the nature and purpose of the contract (Art.3.10 (1)). From the text of the commentary appears that this provision is also a combination of the objective and the subjective assessment. The nature of the contract can make the contract avoidable also in a situation, where we cannot speak of abusing of bargaining position. This test is clearly objective, since "there are situations where an excessive advantage is unjustifiable even if the party who will benefit from it has not abused the other party's weak bargaining position."

The Principles of European Contract Law follow the fourth solution, when they provide, that a party may avoid a contract if, at the time of the conclusion it 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 the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly un-

fair or took an excessive benefit. The European Principles focus on the abusing of the weaker position of the other party rather than simply on the disparity of performances. This solution seems to be similar to the concept of usury with a difference that the German court practice focuses on the objective element of the usury, while the European Principles focus on the subjective ones.

Both seem to be enough flexible, equivalent solutions, which lead in concrete cases to the same results. If we are considering the Hungarian Ptk., the fourth solution would have the result that the control of fairness of contract were shifted to the prohibition of usury. With giving a bit more guideline to the courts this system could work properly. The second one seems to be easier to adapt, since this would be in substance the codification of the court practice led by the Guidelines of the PK. 267. We also have to consider, is it worth to keep also a subjective version of disparity of performances and the usury as different grounds for invalidity altogether or should we use only one rule which combines the two rules. The latter seems to be a better solution. For this we also have to answer, that do we want to attach differences in the consequences to void and avoidable contracts or not.