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The draft of the Hungarian contractual system

ABSTRACT

I have created such classification of contracts that is suitable for accommodating all contract types, reflects the increasingly complex reality and is flexible in terms of adapting to continuous change. In my opinion, we can meet these criteria if we do not group contracts according to a single contract classification aspect, but develop a complex, two-dimensional system of conditions taking into account several requirements, where horizontal (legal branch), vertical (legal area, legal institution), formation and regulation, naming, subject, direct and indirect material, formality, contractual process-related, content, termination, frequency viewpoints and synergies play a role.

Keywords: classification of contracts ■ typical and atypical contracts ■ mixed contract
■ de facto innominate contract ■ hybrid contracts

I. INTRODUCTION

The development and the phenomena of the market economy – both of which are deemed to have evoked the legal „creations” tracing back to the freedom of making contracts declared in the grand codexes of the XIXth century on natural law – split and have been splitting the regulatory framework of the Hungarian Civil Code (hereinafter as: „the HCC”):

- the business activities (the pursuit of regular production-, services-, commercial activities in order to gain profit), the mass volume of financial- and product connections, the vast-size investments and the legal transaction relations crossing the national borders have enabled the domestication as well as the application of newer and newer contracts, and also
- novel contractual techniques have emerged, overriding the traditionally institutionalized contract prototypes: agreements aiming at unification and standardization (see: lease and factor-

ing agreements), and agreements of over-detailing or self-regulatory nature (see: joint venture agreement).^{[1], [2]}

II. A BRIEF DESCRIPTION OF THE HUNGARIAN CONTRACT LAW REGIME^[3]

The schematic system of contracts in Hungary can be divided into public and private law contracts. Within the private law contracts, one can further distinguish the subcategories of contracts in obligational law and contracts out of obligational law (e.g. the contract of incorporation, being *sui generis*, organizational: creating a legal subject, and cooperative: business-governing contract).^[4] The contracts of obligational law can be broken down even further into named and unnamed agreements: the named contracts include typical and atypical contracts, and the unnamed contracts include mixed contracts and *de facto* innominate contracts.^[5]

The Hungarian Civil Code (HCC: Act V of 2013, Book Six, Part Three) includes the named typical contracts. Each contract type is grouped according to the mutually shared essence,^[6] the direct subject of the contracts: the grouping is exercised from the aspect of the demeanours to be executed on the basis of the agreement,^[7] i.e.: transmission of property, enterprise-type, commissioning-type, contract of using, of depositing, of trading and distribution and lease of right, loan- and account-, securities-, insurance-, maintenance and life annuity, and contracts of civil partnership.

The judgement of the atypical contracts is very different in Europe, there is no dominant approach:^[8] the atypical contracts are innominate contracts in France (*contrat atypique/inommé*, and within so, these *contrats spécifiquement autonomes* mean include the distribution, lease-, license and franchise contracts).^[9] Atypical agreements are also innominate but without regulation in Serbia,^[10] Turkey^[11] and

[1] Papp, 2009, 9.

[2] In regard of the changes in our contract law, see details in: Vékás, 1975, 706.; Harmathy, 2010, 705-719.; Grundmann, 2010, 1035-1037., 1043-1045.

[3] This subtitle is based on the synthesis of the Hungarian classifications of contracts, see in: Papp, 2019.

[4] Auer – Bakos – Buzasi – Farkas – Nótári – Papp, 2011, 54.

[5] Vörös, 2004.

[6] Vékás (szerk.), 2008.

[7] Vékás (szerk.), 2013.

[8] Papp, 2019b, 16-19., 28-29.

[9] Ferid, 1971, 403-405.; McKendrick (ed.), 2010, 155.; Rowan, 2017, 1-20.; Malinvaud – Fenouillet, 2010, 58.; Fréchette, 2010.

[10] Perovic, 2010, 98-99.; Antic, 2004, 79-115.; Dudás – Papp, 2013.

[11] Ozler, 2014.

Spain (los contratos atípicos).^[12] The contracts outside of the scope of Civil Code are atypical in Netherland; the contracts outside of the scope of Civil Code and therefore similarly in innominate under atypical contracts in Bohemia,^[13] Poland, Romania.^[14] In Italy^[15] the atypical contracts lie outside of purview of Civil Code, therefore innominate but remain sui generis contracts. The, whereas atypical contracts can be found in Switzerland within the innominate contracts as sui generis agreement.^[16] Atypical contracts are characterized as only sui generis contracts in Austria; typen-fremde Verträge^[17] are equal with atypical contracts in Germany with two subvarieties: atypical in narrow sense (for example timesharing contract)^[18] and typical in trade (as Factoring-, Franchising- and Lizenzverträge).^[19]

The main characteristics of the group of atypical contracts are the following in the concerning Hungarian legal literature:^[20]

- as usual, the atypical agreements do not have any Hungarian designations, but they bear names of foreign origins (e.g.: franchise-szerződés for 'franchise agreement', licenciaszerződés for 'license agreements');
 - - the section of 'Particular contracts' in the HCC (Book Six, Part Three) does not regulate the atypical contracts, these are not to be classified into those contract-types designated in here;^[21]
 - - foreign models of practice and law-making did both play a significant role in the course of the development and the establishment of the rules on the atypical contracts in Hungary;
 - - atypical contracts are exposed to a decisive volume of public law 'impulses': they are prone to being influenced by public law norms and atypical contracts are qualified as commercial transactions;^[22]

[12] Extrenado: La importancia de los contratos atípicos en el marco de un mundo globalizado, 2020.

[13] Ekonom: Leasingová smlouva versus smlouva o koupi najaté věci.

[14] Státescu – Birsan, 2008, 34.; Drept comercial completat cu notiunile fundamentale de drept civil - curs universitar.

[15] Diener, 2021.

[16] For example: Leasing, Factoring, Franchising, Lizenzvertrag, Fernunterrichtsvertrag, verwandte Absatzmittlungsvertrag, Kreditkartengeschäft, joint-venture-agreement, Management Consulting Vertrag etc.; Kramer, 2010, 22.; Honsell – Vogt – Wilfand, 1992; Guhl, 1972, 290.; Rwi.uzh.ch: 23. Innominatverträge - Allgemeiner Teil; Binder – Geiser – Roberto, 2008.

[17] Larenz – Canaris, 1994, 42., 60.

[18] BGB 481-487. §§, Reich – Schmitz, 2000, 178.; Stoffels, 2001, 15.

[19] Welser, 2005, 592.

[20] Papp, 2019a, 30-32.

[21] Nevertheless, it must well be noted that this conceptualization is relative: the recodification of the HCC has established a new foundation in this respect (see: in terms of the financial lease contract, the factoring-contract, and the franchise-contract).

[22] „Such type of a relationship creating inbetween the participants of economic life, which keeps evolving, broadening, due to the fast-pace transformation of the ongoing economic development and turnover”; „if any of the parties shall get involved in the legal transaction, possessing the expertise, or the professional knowledge in regard to the conduction of similar transactions, then as a manifestation of the higher demands and enhanced expectations these transactions are also considered as commercial” (See: Lamm – Peschka (eds.), 2000, 332.).

- - the practice has consistently 'broken swords' for the written format: not necessarily as an equipment of validity, rather as a safety tool, with its function as a means of proof;
- - it was the commitment to deliver a detailed and accurate written wording that has hence generated the application of the general contractual terms and conditions^[23] and also the utilization of blank contracts (for example in the cases of the licence-, lease-, factoring- and franchise- contracts);
- - as the atypical contracts are rendered to regulate long-term market relations, they are usually directed at permanent legal relationships;^[24]
- - with the exceptions of the syndicate agreement, the consortium contract, and the franchise-agreement, the atypical contracts are codified in acts (e.g.: the concession agreement, the medical treatment contract), on the level of government decrees (e.g.: timesharing-contracts) or with-in implemented international treaties (e.g.: in the cases of factoring and lease), whereas the licence-agreement, the merchandising contract and the PPP-contract appear sporadically, in a few statutes of law.

On the basis of the group features at present it is the syndicate agreement, the PPP-contract, the distant contract, the contracts in relation to e-commerce services, the contracts negotiated away from business premises, the timesharing-contract, the consortium contract, the concession agreement, the license agreement, the franchise-agreement, the merchandising contract, the lease-contract, the factoring-contract, and the medical care contract that are classified among atypical contracts in Hungary.

The category of 'mixed contracts' (*contractus mixtus*) have been worked out regarding the qualification of some of the modern contracts:^[25] several types of contracts, composed of typical ones.^[26] This non-named contractual class of obligation comprises those agreements which include the services of several named contracts in several ways:^[27] they can be type-unifying contracts (e.g.: a contract of sales mixed with gifting) where the elements of various contracts are blending, more precisely, it can neither be detected, nor separated which provision derives from which contract; or they can be type-combinatory contracts (e.g.: depositing contract mixed with transportation and undertaking)^[28] where the features of different contracts are not blending with one another, but they are mixing within a new contract in a way that they can still remain separable and identifiable; or they can be contracts directed entirely at one peculiar service

[23] See the details in: Leszkoven, 2014, 3-9.

[24] See also: Sándor (ed.), 2011, 192-193.

[25] Szladits, 1933, 174.; Eörsi, 1984, 6-8.; Novotni, 1977, 90.; Vékás, 1977, 90.

[26] Szladits, 1935, 175.

[27] Regional Court of Appeal of the Hungarian Capital 17. Pf. 20 615/2010/3.

[28] Regional Court of the Area of Budapest G.40.147/2010/38.

(e.g.: the agreement to be made on the fulfilling of the duties as a 'housekeeper'), yet carrying no special attributes in the rest of their features, and without diverting from the contracts covered by the HCC.

The *de facto* innominate contracts shall usually appear under the notion of 'Agreement', regulating non-permanent legal relations, yet covering an occasional (no regular occurrence) as well as special legal transaction. Unlike the atypical contracts, they have no denominations, they are not so widespread, whilst being individual, unique contracts, without any normative background.^[29] The rights and obligations deriving from the innominate contracts can be settled with the application of the common rules on obligation and contracts laid down in the HCC (see as one example in relation to an agreement considered close to servitude by nature, but not eligible to be qualified as a profit-loan,^[30] or a peculiar undertaking of an obligation not qualifying as a contract of surety).^[31]

Contracts called pseudo-atypical contracts have been emerging, „sweeping aside” and relativizing the sharp demarcation line in-between the atypical and the mixed contracts. Such contracts can be classified into the set of the „pseudo-atypical” contracts, which shall on the basis of their names and the wording of their content provoke the perception as if they were embodying some of the group-features of the atypical contracts, whereas they can indeed either be qualified as mixed contracts, or they can be identified as being one of the named contracts. For instance the distributorship agreement, or the dealership-, the outsourcing- and the investment contracts belongs here.

Moreover, we can also observe the mixing of the subtypes of the mixed contracts („hybrids”), with special regard to the type-combinatory subtypes, and those directed at peculiar services; the following variations could be „caught in the act” in the judicial practice:

- a contract of sub-rental mixed with a contract of commission signed for a limited term upon the placement of posters,^[32]
- a contract signed upon the implementation, the use and the operation of a parking system, as a mixed agreement carrying the elements of utilization and profit-loan, covering a complex legal relation similar to that of a franchise-agreement.^[33] Between the groups of the typical and atypical agreements, on the one hand, the mixture („hybrid”) of the following has emerged as an intermediate entity (as a mixed contract): such as the agreement to be signed upon the utilization of a computer programme (software), which can also entail elements of an enterprising, a rental, a profit rental, and a lease agreement;^[34] on the other hand, certain

[29] Szudoczky, 2000, 125.; Nizsalovszky, 1949, 225-226.

[30] LB Pfv. I/A. 20.446/2001. (Supreme Court).

[31] BH 1992. 239. (Court Order).

[32] LB Pfv. XI. 20.314/2006. (Supreme Court) (BH 2007. 332. Court Order).

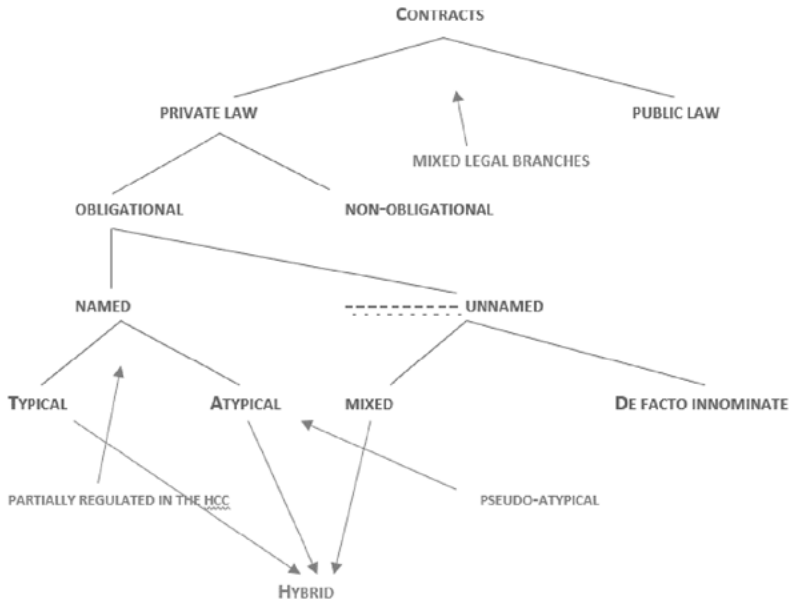
[33] SZIT-H-GJ-2008-89. (Decision of the High Court of Appeal Szeged).

[34] 5. Pf. 21. 373/2006/3. (Regional Court of Appeal of the Capital)

subtypes, or smaller segments of some atypical contracts have become partially regulated by within the HCC (franchise, factoring and financial lease contract).

In addition, a 'mixing' of the branches of law can also be observed over the terrain of the contracts: by the present days a good number of agreements have shaped up with mixed legal branches, for instance the contract of public services, the contract of public procurement, the contract of subvention.^[35] In these cases, it is not by virtue of the direct subject of the contract (the service) how the contracts are to be qualified as mixed, but on the basis of that it is the legal norms of several legal branches to be applicable to them, whereby setting the overall dynamics of the contract.

In my view, the evolvement of the economic and social circumstances, and the transformations on the terrain of the contracts, having been resulting from globalization, are generating the development process from the direction of the de facto innominate contracts heading towards the denominated typical contracts.



*Figure 1: Classification of Hungarian contracts
(Dimension I. = Base structures are highlighted in bold;
Dimension II. = Transitional structures are not highlighted)
(Source: Made by the Author)*

[35] Papp, 2012a, 12-14.; Papp, 2012b, 3- 6.

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