FACULTATEA DE DREPT
UNIVERSITATEA DE VEST DIN TIMIŞOARA

CENTRUL EUROPEAN DE STUDII
ŞI CERCETĂRI JURIDICE

FACULTY OF LAW
WEST UNIVERSITY OF TIMIŞOARA

THE EUROPEAN CENTER
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CUVÂNT ÎNAINTE

Conferinţa internaţională a doctoranzilor în drept din ţările central şi est-europene constituie o manifestare ştiinţifică prin care Facultatea de Drept din cadrul Universităţii de Vest din Timişoara şi Centrul European de Studii şi Cercetări Juridice Timişoara urmăresc punerea în valoare a rezultatelor cercetării ştiinţifice obţinute de doctoranzii în domeniul ştiinţelor juridice în perioada studiilor doctorale.

Aflată, anul acesta, la cea de-a opta sa ediţie (20 mai 2016), conferinţa continuă să fie, în peisajul juridic universitar românesc, un eveniment singular. Tineri jurişti, proveniţi din mediul universitar românesc şi european, dar şi din cel profesional (magistraţi, avocaţi, notari publici, consilieri juridici), abordează interesante probleme de drept public şi de drept privat, în peste 60 de studii şi articole, fapt care ne întăreşte convingerea că demersul de organizare a acestei manifestări ştiinţifice este o reuşită.

Volumul de faţă adună în paginile sale lucrările prezentate în cadrul conferinţei, în dorinţa de a consolida dimensiunea europeană a învăţământului doctoral, asigurând circuitul de idei între participanţi şi cititori. Cel puţin la fel de importante sunt, însă, legăturile interumane facilitate de această manifestare, care reprezintă un bun prilej de realizare a mobilităţilor necesare uniformizării standardelor aplicabile programelor de studii doctorale în domeniul ştiinţelor juridice.

Adresăm mulţumiri, pe această cale, doctoranzilor participanţi la conferinţă, conducătorilor de doctorat sub îndrumarea cărora au fost elaborate lucrările, precum şi instituţiilor de învăţământ superior şi cercetare ştiinţifică din România şi din străinătate de la care provin doctoranzii şi care i-au încurajat pe aceştia în demersul lor.

Organizatorii conferinţei datorează mulţumiri, în egală măsură, editorului *Universul Juridic*, pentru profesionalismul cu care sprijină acest eveniment, precum şi pentru efortul constant pe care apariţia volumelor anuale ale conferinţei internaţionale a doctoranzilor îl presupune.

Contribuţiile sunt publicate în limba română sau într-o limbă de largă circulaţie internaţională, în ordinea alfabetică a autorilor, pe secţiuni. Ele valorifică legislaţia şi doctrina de până la 31 martie 2016, cu excepţia cazului în care se precizează altfel.

Ne exprimăm speranţa că următoarea ediţie a conferinţei, iniţiată de Şcoala Doctorală a Facultăţii de Drept din Timişoara şi de Centrul European de Studii şi Cercetări Juridice Timişoara, în care îşi desfăşoară activitatea de cercetare corpul academic al facultăţii, precum şi alte cadre didactice universitare şi cercetători ştiinţifici, va beneficia de o cel puţin la fel de largă prezenţă naţională şi internaţională şi lansăm, încă de pe acum, invitaţia de a ne reuni din nou, în 2017, la Timişoara.

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SECŢIUNEA
DREPT PRIVAT

THE CONVERSION OF THE CIVIL LEGAL ACT – THEORETICAL AND PRACTICAL PROBLEMS IN THE ROMANIAN LEGAL SYSTEM AND THE COMPARATIVE PRIVATE LAW

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Abstract

This paper reflects the result of a long and careful research of the national and international doctrines on the principle of the Conversion of the Legal Act. In developing this scientific article we propose a critical analysis of the institution, based both on the premise of rigor regarding the penalty of nullity as well as on the flexibility of the civil law legal and trade relations and on their impact on the social dimension of determining and modeling the legal will of the participants in the Romanian contract life. We also aim to contribute through this paper to a full understanding of the term concerned and we intend *de lege ferenda* that the institution of the Conversion of the Legal Act not to be regarded as a vector dependent and interdependent on nullity but as an alternative, independent and reforming the civil legal act. Also, we would like to propose *de lege ferenda* a complement to the current Article 1260 of the Civil Code by providing a clearer definition and a list containing uniform concrete conditions that must be fulfilled by contractual parties when choosing conversion.

Keywords: *private contract law, contract adaptation, the **favor contractus** principle, the autonomy of will, nullity of contract, romanian and International doctrine, modeling the legal will, effectivity of the contract*

Part I.
Contractual Principles in the Romanian Legal System Regarding Nullity and Contract Adaptation

1.1. Contractual principles

The Romanian legal system boasts with a modern view on contractual relations promoting the necessary amount of balance between freedom and sovereignty. **The Principle of Contractual Freedom**, that highlights that people have the right to legally bind contracts, is known as **Freedom of Contract**. This is a judicial concept which holds that contracts are based on mutual agreement and free choice. Therefore, contracts are not be hampered by external control such as governmental interference. This is the principle which supports that people are able to fashion their relations by private agreements, when opposed to the assigned roles of the system. Freedom of contract embraces two closely connected, but different concepts. Firstly, it indicates that contracts were based on mutual agreement. Secondly, it emphasizes that the creation of a contract was the result of free choice unhampered by external control, including the government or the legislature[1].

Concerning the above principles, the Romanian Legal system embraced contractual freedom along with the Dawn of the 19th Century and the French Revolution[2], being officially inserted in article 942 of the Old Civil Code. Freedom of contract is expressed in terms of form. According to the **Principle of Mutual Consent**, in order for a contract to meet the validity of an agreement, it is sufficient the simple agreement of the parties, except if it was a real or solemn contract and the obligations were undertaken *("pacta sunt servada")*[3]. The main conditions: capability, consent, object and cause are the main rules of contractual validity.

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[1] The freedom of contract presented widely on The Online United States Legal Dictionary, www.uslegal.com

[2] D. Firoiu, Istoria statului şi dreptului românesc, Editura Didactică şi Pedagogică, Bucureşti, 1976, p. 194.

[3] L. Dumitrescu, Aspecte privind libertatea contractuală apud I. Dogaru – Valenţele juridice ale voinţei, Ed. Ştiinţifică & Enciclopedică, 1986, p. 76.

When one of the parties disobeys one of the aforementioned rules or fulfills them in an incorrect manner, then they are in the precedent of contractual nullity. The Romanian Civil Code encompasses nullity in article 1246 that defines it as a sanction that prevents the legal act to produce its effects in accordance with the law. This being the case, and taking into consideration the will of the parties involved, a special form of contractual adaptation has been created and officially regulated by the Romanian Civil Code, called the Conversion of the Legal Act.

1.2. The Conversion of the Legal Act – Origins

The origins of the institution stem from a large variety of principles and indirect regulations that preexisted in The Romanian old Codes in articles such as 978, that states that a clause that receives one or several interpretations should be interpreted in the sense that would produce an effect[4], or the likely most general principle of maintaining contractual balance and stability.

In the Romanian legal doctrine, particularly in the Old Civil Code adopted in 1864 we can barely notice a formal regulation of the Conversion of the Legal Act, being mentioned only in general principles that indirectly hint references prior to the aforementioned institution. According to an opinion, "The Conversion of the Civil Legal Act represents a particular application of the more general **principle of maintaining the legal provisions** according to which the manifestation of will within the legal act must have the maximum possible effectiveness for achieving the aim established by the party or parties"[5].

The second point of view is that the Conversion of the Legal Act is based on the **rules of interpretation of the legal documents** enrolled in art. 978 of the Old Civil Code – now art. 1268 par. 3 form the New Civil Code – rules, that require interpretation of the legal contract clauses, welcoming several meanings to be made that would allow efficiency to the contract[6].

In the present Civil Code the Conversion of the Legal Act stage doctrine encompasses it into article 1260 (1) of the New Civil Code that states that "A contract null and void will still produce legal effects if the conditions of substance and form provided by the law are fulfilled".

As part of a greater regulation, the Conversion of the Legal Act has a unique façade and continues to impose paradox and controversy in the Romanian Doctrine in the sense that on one hand it is an exception from the principle *"quod nullum est, nullum producit effectum"*[7] and on the other it values the principle of the autonomy of will.

1.3. Conditions that have to be met

For a better understanding, we resort to presenting the main definition acted in article 1260 of the present Civil Code and the mechanisms and effects that it generates. The Conversion of the Legal Act is defined as the operation through which a contract that is void can produce the effects of another if all legal conditions are fulfilled[8]. The definition highlights the conditions as a result of a better analysis:

Firstly the **legal act should be declared null** meaning that it will not produce any effects anymore. Here the Romanian doctrine refers to the terms of absolute nullity[9], however some authors[10] disregard the potential existence of a voidable act, others on the other hand believe that conversion exists regardless of the absolute and relative nullity of the act, basing their opinion on the fact that in text of the Old Civil Code (art. 923) there

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[4] G. Beleiu, Drept civil român, ed. a X-a revăzută şi adăugită de M. Nicolae şi P. Truscă, Ed. Universul Juridic, Bucureşti, 2005 p: 241.

[5] D. Cosma, Teoria generală a actului juridic civil, Bucureşti: Editura Ştiinţifică, 1969, p. 339-340.

[6] I. Reghini, Conversiunea actului juridic civil, o posibilă consecinţă a nulităţii, Studia Universitatis Babes-Bolyai., No. 4, 2009, p. 15.

[7] That meticulously states that:´´ a contract that is void cannot ever produce the desired effects``.

[8] Article 1260 of The Romanian Civil Code, newly adopted by the Law 71/2011.

[9] The absolute nullity refers to the fact that it protects a general interest of society in opposed to the relative nullity that protects a private interest.

[10] For instance O. Ungureanu, F. Baias.

is no difference between absolute nullity and the relative dispositions regarding the legacy with a particular title[11].

The second condition requires **the existence of an element of difference between the previous and the subsequent act**[12]. This affirmation is correctly stated, because otherwise it would be useless. In theory, the element of difference can consist of any part of the legal act (type, nature, content, effects or at least in form)[13]. We would therefore like to stress that the key difference between the initial and subsequent act always consists in the effects that it produces, for they are those which generate the element of difference. The subsequent act should produce other effects than the one declared void (the primary one). All other differences between the initial and subsequent act and others are contingent ones. For instance, the nature of the act will be subsequently determined by the effects that it produces (if these effects consist of obligations that are reciprocal and interdependent, then the act will subsequently be a mutually binding contract etc.).

The third condition refers to the notion of **validity of the subsequent act**. This represents a key factor in the sense that it must reflect intrinsic and extrinsic the same elements of validity of the primary act. Due to common sense, we appreciate as well the element of agglutination, namely that the procedure in general is in conformity with the will of the parties.

This requirement appears in any doctrinal analysis regarding our institution. Therefore, if, it is demonstrated that the subsequent legal act is unable to satisfy the main purpose stipulated in the initial act, then the premises of conversion is shattered.

All the aforementioned conditions must be in accord with the will of the parties. The process of conversion can only be started by the express will of the parties involved. This seems to be the idea of the Romanian jurisprudence that explains in a decision the main grounds and importance of the will of the parties. In this sense we make reference to Decision 306 pronounced by The Salaj County Court published in Romanian Journal of Private Law no. 1/1973 p. 60 and we quote, ”The conversion of a valid legal act is in principle possible if its effects are equivalent. For this to be a valid argument, it is necessary that the new act, by means of which the practical purpose is pursued by the parties, is not against their will …”[14].

Lastly it is understandable that there should be an **equivalence regarding the parties involved in the process**. In the sense that the parties from the primary act should be the same as in the secondary one. Therefore the Romanian doctrine unanimously agrees to this condition and its application on a national scale. To believe otherwise would be to create two distinct expressions of will with no binding generator.

1.4. Civil Law Institutions similar to Conversion

The Conversion of the Legal Act, according to the Civil Code is an independent legal institution that should not be confused with other institutions such as partial nullity, confirmation of the civil act, restoring the civil act, the qualification of the legal act, novation, simulation and the adaptation of contract.

Thus, between conversion and partial nullity of the legal act is, dare we say a quantitative difference due to the fact that some clauses are void and others maintained by the same civil legal. Conversion therefore involves the birth of a new legal act which must contain the same terms as the previous annulled one. In the case of partial nullity we cannot say that a new manifestation of will is created but, the abolished act pre-exists the clauses that are valid and continue to produce effects. The Confirmation of the Legal Act can be defined as the operation in which a transaction that is null and void, may still produce effects if the affected party willfully gives its acceptance. The purpose of the operation is to strengthen the annulled legal act by acknowledging its nullity in accordance with art. 1248, paragraph (4) of the Civil Code. To be in the presence Confirmation, it is necessary to strictly observe the conditions imposed by the art. 1263-1264 of the Civil Code. The differentiating element is: that within the process of confirmation the initial legal relationship is maintained and validated, in opposite to the principle of Conversion where it ends.

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[11] G. Boroi, C.M. Anghelescu, Curs de drept civil.Partea generală, Ed. Hamangiu, 2011, p. 264.

[12] Ibidem.

[13] D. Cosma, Ibidem.

[14] C. Turianu, Repertoriu de practică judiciară civilă, vol. I, Drept Civil. Parte generală, Ed. C.H. Beck, Bucureşti, 2011, p. 69.

The Recovery of the Legal Act is the operation in which an initial null act is corrected so as to respect the necessary legal requirements. In comparison to this operation, when dealing with Conversion, we deal with the creation of a new manifestation of will and not with the correction of certain clauses that have been declared void (as part of the recovery process).

A similar point of view is to be discussed when talking about the Qualification of the Legal Act. We dare to say that there is no resemblance between the two institutions (The Conversion of the Legal Act and the Qualification of the Legal Act) due to the fact that the Qualification of the Legal Act presumes that a party attributes a certain significance to the contractual operation that does not respect the conditions of validity of the legal act. The definitions of the the two aforementioned institutions are therefore not similar.

When discussing Novation we can define it as the operation in which a legal contractual obligation is replaced by another one[15]. Thus, the extinction of an old obligation and the creation of a new one is a process that takes place simultaneously. In other words the old and obsolete obligation transforms itself into a new one[16]. As such, it is inappropriate to say that there is a transformation of the original legal act. As previously mentioned, the essential difference between Novation and Conversion is the existence of a valid legal relationship in the first and *per a contrario*, the inexistence of any legal relationship in the latter.

Probably the most interesting contractual institution still present in the Romanian Private Law sector is the one called: Simulation. We can define it as a legal operation that dissimulates the contractual will of the parties and conceals it by creating two manifestations of will and therefore two legal acts, two agreements: one apparent or public agreement, that creates a legal situation contrary to reality and another secret agreement giving birth to the real legal situation between the parties. The secret agreement highlights the real intention of the parties and establishes the true legal situation between them and the public agreement in opposite to the apparent one. Thus, the main difference between the Conversion of the Legal Act and Simulation is that, in the case of Conversion both contractual agreements are public. As a result, the interested third parties can acknowledge any changes within the two legal acts[17]. The effect of Simulation consists of the option given to the interested third parties of good faith to choose between the secret or the public legal act. The effect of Conversion is to allow the initial contractual parties to value their initial manifestation of will.

As regards to the adaptation of contract, in accordance with the Romanian legal system it can only be done under certain strict conditions imposed by art. 1271 paragraph (2) of the Civil Code which provides that: ”if performance of the contract has become excessively onerous due to an exceptional change of circumstances that is manifestly unjust for one of the parties (for the debtor) and obliges him to execute the contractual obligation …”, the court may order either the adaptation of the contract or the termination of the contract. Thus the Adaptation of the contract may be imposed only as an exceptional measure. Furthermore the Adaptation of contract is present as well within the vices of consent as an alternative solution to nullity. For instance when talking about fraud, violence, injury in accordance with article 1222 (3) from The Romanian Civil Code.

Part II.
The Conversion of the Legal Act and Contract adaptation in the International Law Systems. A reasonable parallel

2.1. Brief introduction

The International Law Systems have always pursued reaching contractual equilibrium. Taking into account the vast and rapid movement of information and society developing speed and abundance, the various European and International Legal Systems have meticulously harbored solutions to satisfy the

[15] C. Stătescu, C. Bîrsan, Teoria Generală a Obligaţiilor, Ed. Hamangiu, Bucureşti, 2008, p. 349.

[16] L.Pop, Tratat elementar de drept civil conform Noului Cod Civil, Ed. Universul Juridic, Bucureşti, 2012, p. 690.

[17] F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), Noul Cod Civil. Comentariu pe articole, Editura C.H. Beck, Bucureşti, 2012, p.184-186.

continuous need for more. Thus, different legal systems have created various contractual methods to remove and sometimes ´´ignore'' nullity in general. The flexibility of these procedures can only reflect an open society that understands not to limit a contractual procedure (in our case the Conversion of the Legal Act) to nullity but to assure that the parties involved, continue their initial manifestation of will and value it through other forms.

2.2. Main Comparative Law Systems

In the comparative law, for instance in The German Civil Law the institution similar to Conversion is called *Umdeutung* (reinterpretation) and is regulated in the BGB (Buergerliches Gesetzbuch – German Civil Code) in art. 140, which states that ``if an invalid legal act meets the conditions of another legal act, the latter is considered completed if it can be assumed that this would be desirable by the parties ". A particular example we find in the German Administrative Law[18] where, according to Sect. 47 of the Administrative Procedure a illegal administrative act, including a null and void act, may be converted into another administrative act by changing its meaning through reinterpretation, if the new act: 1. has the same object or purpose, 2. Could be taken by the authority in the prescribed form, 3. Fulfils the conditions for its taking. Such conversion is not possible if:

1. The administrative act into wich the act is to be converted conflicts with the discernible intention of the authority that it took or

2. The legal consequences of the converted act will be more unfavorable to the concerned persons than the original act.

Thus, conversion can be done either by the authority which took the administrative act or by the higher authority on an objection by the affected person or even by the court during the pendency of a suit. In comparison to the German Law in The Common Law system in regards to the Administrative Law Procedures there are well known techniques such as:

- weaver of legal remedy by the affected person
- non-challenge of the act within the prescribed time in the proper proceedings
- rejection of the challenges of the validity of the act[19].

The French Civil Code, related to our topic, does not include any general provision regarding Conversion in general. A lack of regulation can also be seen in The Civil Code of Luxembourg and in The Belgian Civil Code. However there is a special procedure in the French Civil code called *conversion par reduction.* Hardly unrecognized by the Swiss Civil Code of Obligations, we dare to say that it makes an indirect reference to conversion being presented as a principle of practice in courts. Thus, reference is made to *The Favor Contractus* Principle which states that: ''An invalid legal act may be replaced by a valid one if there is reason to believe that if the parties had known the causes of nullity, they would have taken part in such contractual relations''[20].

When talking about the Common Law system, one can say that there are no direct listings on the matter in hand, due to the fact that the English doctrine of equity admits the possibility to adapt, to modify invalid contract stipulations, so that the contract becomes a valid one In other words, common law, contractual obligations are created with the premise of continuing the foundation principle stated above. For instance, in the international jurisprudence, in The Gordon v. Selico judgment that dabbles the use of fraudulent representation and misleading. Regarding this matter The English Court states that: ´´ it is possible to make a misstatement, either by words or by conduct, although, not everything that was said or done is a distortion. Generally, statements of opinion are not statements of fact, done with intention, in the context of misrepresentation ... Misrepresentation means a statement of fact made by one party to the other and has the effect of misleading the part of the contract. For example, in certain circumstances, false declarations or promises made by a seller of goods in terms of quality or nature, may constitute misrepresentation ... A court

[18] M. Singh, German Administrative Law in Common Law Perspective, Ed. Springer Verlag – Heidelberg, 1985, p. 88.
[19] Ibidem.
[20] P. Engel, Traite des obligations en droit suisse, Staempfli Edition, Berne, 1997, p. 265.