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NIŠTAVOST KAO PRETPOSTAVKA KONVERZIJE UGOVORA**

SAŽETAK: Iako recipirana davne 1978. godine, konverzija (lat. *conversio* – preobraćenje) ugovora je jedan od instituta kojima u domaćoj teoriji nije posvećena zaslužena pažnja. U udžbenicima koji obuhvataju materiju opšteg dijela građanskog prava, i onima koji služe za podučavanje obligacionog prava ovaj institut je, uz određene izuzetke, izložen nemušto – uglavnom, uz zakonsku definiciju, nalazimo još samo polje primjene i primjere konverzije. Monografska djela na temu konverzije nismo uspjeli pronaći. Sa druge strane, u stranoj literaturi, mahom njemačkoj i italijanskoj, nalazimo veći broj monografskih djela na temu konverzije. Ovaj rad za predmet ima jedan dio norme koja propisuje konverziju ugovora, a to je ništavost ugovora, koja je predviđena kao pretpostavka za primjenu instituta. Polje primjene konverzije djeluje precizno i jasno određeno, naročito imajući u vidu tekst norme i mjesto norme unutar Zakona o obligacionim odnosima, a u narednim redovima ćemo vidjeti da li je to zaista tako. U traganju za odgovorom, služili smo se i uporednopravnim metodom. Razmatrano je polje primjene konverzije – i nismo se ograničili na ništave ugovore, već je razmatrana mogućnost primjene na nepostojeće, ništave, rušljive ugovore, zatim na djelimično ništave i djelimično rušljive, ali i na

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punovažne ugovore. U okviru ništavih ugovora posebna pažnja je posvećena protivzakonitim i nemoralnim, a u okviru nepostojećih – simulovanom ugovoru.

Ključne reči: konverzija, ništavost, rušljivost, relativna simulacija, rekvalifikacija

POČETNE NAPOMENE SA PRIKAZOM UPOREDNOPRAVNOG RAZVOJA INSTITUTA

Za početak, daćemo sumaran prikaz razvoja instituta od stupanja na snagu Njemačkog građanskog zakonika (u daljem tekstu: NJGZ), dakle, od 1900. godine naovamo. NJGZ je sadržao opšte pravilo o konverziji u čl. 140, iz čije formulacije su proizišle diskusije i različita shvatanja pravne prirode instituta.[1] Po nekim njemačkim autorima konverzija je poseban slučaj tumačenja (čl. 133. i 157. NJGZ[2]). Ovo je manjinsko shvatanje. Zastupnici su Koing (Coing), Pavlovski (Pawlowski) i Broks (Brox)[3]. Prema Koingu, konverzija pomaže *stvarnoj volji* strana da postigne dejstvo. Mogućnost konverzije je zasnovana na slobodi kvalifikacije koju sudiji daju primjenjiva pravila tumačenja. Broks navodi da će do konverzije doći ukoliko to odgovara *volji* strana, koja se može utvrditi tumačenjem.[4] Nasuprot njima, većina njemačkih autora, kao i sudska praksa[5] Bundesgerihtshof (Bundesgerichtshof) i ranije Raihsgeriht (Reichsgericht) je stava da se konverzija razlikuje od tumačenja. Za razliku od čl. 133. NJGZ, konverzija zahtijeva ne stvarnu, izjavljenu volju, već *hipotetičku volju*.[6] Hipotetičku volju valja razlikovati od pretpostavljene (stvarne) volje. Predstavnik ovog shvatanja je Larenc (Larenz).[7] Zahtijeva da se utvrde „praktični ekonomski ciljevi kojim su strane težile i da se procijene

[1] Već je sam naziv člana Reinterpretacija – ponovno tumačenje (*Umdeutung*) problematičan, a sa danas vladajućeg stanovišta možemo reći i pogrešan. Kasniji zakonici nisu pravili ovu grešku.

[2] Prema čl. 133. NJGZ pri tumačenju izjave volje ne treba se čvrsto držati doslovnog značenja izraza, već treba utvrditi stvarnu volju. Prema čl. 157. NJGZ ugovor se tumači u skladu sa načelom savjesnosti i poštenja i vodeći računa o dobrim poslovnim običajima.

[3] Krampe, C. (1980). *Die Konversion des Rechtsgeschafts.* Frankfurt am Main: Vittorio Klostermann, 3.

[4] *Ibid*., 4.

[5] S ogradom da ni sudska praksa nije savim homogena. Za detaljnu analizu njemačke sudske prakse vidi: Krampe, C. (1980). *Die Konversion des Rechtsgeschafts.* Frankfurt am Main: Vittorio Klostermann, 142+.

[6] Krampe, C. (1980). *Ibid.*, 4–5.

[7] Navedeno prema: Krampe, C. (1980). *Ibid.*, 5.

interesi strana". Pošto je tumačenjem (čl. 133. i 157. NJGZ) prethodno utvrđeno da je ugovor ništav, što znači podoban za konverziju, i da su ispunjeni uslovi za valjanost drugog ugovora, valja postaviti pitanje da li je drugi ugovor pogodno sredstvo za postizanje ovih ciljeva i odgovara li njegova valjanost vrednovanju interesa strana. Ako bi konverzija bila samo jedan slučaj tumačenja, prema pristalicama ovog stava čl. 140. NJGZ bi, pored čl. 133. i 157. bio suvišan.[8] Zastupnik trećeg stava je Flume (Flume).[9] Prema njemu čl. 139. NJGZ. (djelimična ništavost) reguliše kvantitativnu djelimičnu ništavost, a čl. 140. (konverzija) kvalitativnu djelimičnu ništavost.[10] Bez obzira što shvatanja konverzije kao tumačenja i kao vida djelimične ništavosti imaju svoje pobornike u teoriji[11] i što u praksi postoje odluke sudova zasnovane na ovim shvatanjima, shvatanje o konverziji kao samostalnom institutu se nesporno uporednopravno nametnulo kao preovlađujuće.[12]

Sljedeće bitno zakonodavstvo koje je prihvatilo konverziju bilo je italijansko. Opšte pravilo o konverziji sadržano u čl. 1424. Italijanskog građanskog zakonika (u daljem tekstu: IGZ) nije manje sporno od onog u čl. 140. NJGZ, koje mu je bilo uzor. Prema aktuelnoj italijanskoj literaturi[13] institut konverzije je izgrađen na principu očuvanja posla,[14] sa jedne, i zaštite savjesnosti i pošte-

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[8] Navedeno prema: Krampe, C. (1980). *Die Konversion des Rechtsgeschafts.* Frankfurt am Main: Vittorio Klostermann, 6.

[9] *Ibid*., 6.

[10] Doktrina uvijek smješta konverziju u učenje o pravnim poslovima kao aktima privatne autonomije. U tom smislu jedino Ram (Ramm) primjećuje promjenu u funkciji instituta, koju on pripisuje prelasku države iz liberalne u socijalnu fazu. Konverzija je, pod pokroviteljstvom privatne autonomije, poslužila strankama da postignu svoj cilj na drugi način u slučaju nevaljanog pravnog posla. Danas se, s druge strane, konverzija koristi za „postizanje društveno željenog rezultata na temelju navodne volje stranaka". *Ibid*., 7.

[11] Utisak koji stičemo jeste da ova manjinska shvatanja zapravo i nisu shvatanja o prirodi instituta konverzije, već shvatanja koja suštinski negiraju ovaj institut (vrlo kontroverzan i teško prihvatljiv) njegovim utapanjem u druge institute.

[12] Osim što je preovlađujuće, ono odgovara i viđenju čovjeka koga mnogi smatraju tvorcem instituta – K. F. Harprehta (C. F. Harpprechta), te možemo reći da je i starije. Prema njemu „radi se o transformaciji, pravnom preoblikovanju – konverziji u pravom značenju te riječi, dok bi se u slučaju konverzije kao tumačenja radilo o otkrivanju skrivene strane ugovora koja je sadržana u njemu – otkrivanju ugovora onakvog kakav on zapravo jeste" (kao uostalom i u slučaju konverzije kao kvalitativne djelimične ništavosti). Zimmermann, R. (1996). *The Law of Obligations, Roman Foundations of the Civilian Tradition.* Oxford: Clarendon Press, 684.

[13] Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424.* Giuffrè. Milano: 5–15.

[14] Jedan od izraza ovog principa je čl. 1367. IGZ prema kome ugovor i ugovorne odredbe treba tumačiti u onom smislu u kojem mogu proizvesti neki učinak, a ne u smislu u kojem ne bi imao/imale učinak.

nja sa druge strane.[15] Austrijsko i švajcarsko zakonodavstvo ne sadrže opšte pravilo o konverziji. Međutim, sudskoj praksi i teoriji ovih zemalja institut uopšte nije stran, a u literaturi se obično poziva na njemačko pravo.[16] Savezni sud Švajcarske (njem. Bundesgericht) je formulisao pravilo za konverziju na sljedeći način:

> „Ukoliko ništav pravni posao odgovara zahtjevima drugog pravnog posla koji ima isti cilj i rezultat (Zweck und Erfolg), važiće drugi posao ako se može pretpostaviti da bi ga strane željele da su znale da je preduzeti posao ništav."[17]

U starijoj švajcarskoj literaturi iz 1937. imamo stav O. Kornac (O. Cornaz[18]*)* da je konverzija vid tumačenja. Vladajući stav u Švajcarskoj naglašava samostalnost instituta konverzije. Relevantna je hipotetička volja. Čak, prema Eli Vajl (Elly Weil), koncept konverzije koji bi zahtijevao stvarnu volju za zamjenskim poslom nije uopšte moguć – jer bi se tada radilo o tumačenju, a ne o konverziji.[19]

Godine 1978. SFRJ je dobila Zakon o obligacionim odnosima (u daljem tekstu: ZOO), i s njim, po prvi put, opšte pravilo o konverziji sadržano u čl. 106.

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[15] Dio teorije ne prihvata da je načelo očuvanja posla osnova za konverziju jer uslijed konverzije ugovor neće očuvati svoje dejstvo, već će se konvertovati u drugi ugovor – proizvodiće dejstva tog drugog ugovora. V.: Gabrielli, E. (2012). *Commentario del Codice civile,* Libro IV – Titolo II: Dei contratti in generale, artt. 1387–1424; Art. 1424 – Conversione del contratto nullo, Torino, commento di Maddalena Rabitti, 733. Prema K. Diez Soto (C. Diez Soto) prihvatljivost načela očuvanja u ovom slučaju direktno zavisi od toga koliko široko je konkretan autor spreman da tumači samo načelo. On, da bi se izbjegle zabune, govori o *principio de economia juridica*, terminu koji treba da podrazumijeva sve mehanizme koji za cilj imaju očuvanje poslovne inicijative strana (ostvarenje što većeg rezultata iz raspoloživog stanja). Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 93. F. Galgano (F. Galgano) vidi osnovu konverzije samo u načelu očuvanja. Galgano, F. (2010). *Trattato di diritto civile, Volume Secondo, Le obbligazioni in generale, Il contratto in generale, I singoli contratti,* seconda edizione accresciuta. Padova, 378. Prema M. Sank (M. Cinque) jedan dio doktrine vidi osnovu konverzije samo u savjesnosti i poštenju (u objektivnom smislu). Takođe, za jedan dio ta osnova je u zaštiti povjerenja strane ili strana. Cinque, M. (2003). *Conversione dell contratto nullo: rilevabilita ex officio e contratto contrario a norme imperative,* in Nuova giur. Civ. Comm. I, 841–852, 846). Prema G. Gandolfi (G. Gandolfi) načelo savjesnosti i poštenja zapravo djeluje u korelaciji sa načelom odgovornosti i načelom zaštite povjerenja. Gandolfi, G. (1988 reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea,* Milano, 400.

[16] Krampe C. (1980). *Die Konversion des Rechtsgeschafts.* Frankfurt am Main: Vittorio Klostermann, 19–23.

[17] BGE 93 II, 439 (452) Navedeno prema: Krampe C. (1980). *Op. cit.*, 21–22.

[18] Cornaz O. (1937). La conversion des actes juridiques (These Lausanne). Navedeno prema: Krampe C. (1980). *Op. cit.*, 23.

[19] Navedeno prema: Navedeno prema: Krampe C. (1980). *Op. cit.*, 22.

Norma je identična onoj iz Skice za Zakonik o obligacijama i ugovorima (u daljem tekstu Skica),[20] s jedinom razlikom što Skica govori o privrednom cilju strana, a ZOO samo o cilju i modelirana je po uzoru na njemačko pravo. Za kraj ovog pregleda, za koji vjerujemo da je bio neophodan i sumaran,[21] daćemo tabelarni prikaz opštih pravila o konverziji uporednopravno.

Tabela 1. **– Uporednopravni prikaz opštih pravila o konverziji ugovora**

Država	Opšte pravilo o konverziji – prevod	Opšte pravilo o konverziji na izvornom jeziku
Njemačka	NJGZ čl. 140. **Reinterpretacija (novo tumačenje)** Ako ništav pravni posao odgovara zahtjevima nekog drugog pravnog posla, tada će važiti potonji, ako je za pretpostaviti da bi se htjela njegova punovažnost da se znalo za ništavost.	BGB Para. 140. **Umdeutung** Entspricht ein nichtiges Rechtsgeschäft den Erfordernissen eines anderen Rechtsgeschäfts, so gilt das letztere, wenn anzunehmen ist, dass dessen Geltung bei Kenntnis der Nichtigkeit gewollt sein würde.
Italija	IGZ čl. 1424. **Konverzija ništavog ugovora** Ništav ugovor može proizvesti dejstva drugačijeg ugovora, čije sastojke sadržine i forme sadrži, kada se, imajući u vidu cilj kojem su strane težile, treba smatrati da bi ga one željele da su znale za ništavost.	CCI art. 1424. **Conversione del contratto nullo**. Il contratto nullo può produrre gli effetti di un contratto diverso, del quale contenga i requisiti di sostanza e di forma, qualora, avuto riguardo allo scopo perseguito dalle parti, debba ritenersi che esse lo avrebbero voluto se avessero conosciuto la nullità.

[20] Konstantinović, M. (1996). *Obligacije i ugovori. Skica za Zakonik o obligacijama i ugovorima.* Beograd: Službeni glasnik, čl. 83.

[21] Neophodan iz razloga što nam donekle osvjetljava institut u razvojnoj perspektivi; sumaran iz razloga što bi pregled morao zauzeti mnogo više prostora nego što ovaj rad dozvoljava i zato što se institut konverzije može pratiti unazad i u periodu prije 1900. godine – preko Drezdenskog i Bavarskog nacrta i Građanskog zakonika Saksonije do K. F. Harprehta i njegovog djela *Dissertatio juridica inauguralis, de eo, quod justum est, circa conversionem actuum negotiorumque juridicorum iamiam peractorum* iz 1747. godine i dalje u rimsko pravo. (U *Digesta* „postoji više situacija u kojima se nevažeći pravni posao održava na način koji bismo danas zvali konverzijom". Zimmermann, R. (1996). *The Law of Obligations, Roman Foundations of the Civilian Tradition.* Oxford: Clarendon Press, 684).

Portugalija	PGZ čl. 239. **Konverzija** Ništav ili poništen pravni posao može se konvertovati u posao različite vrste ili sadržaja, čije bitne sastojke sadržine i forme sadrži, kada cilj kojem su strane težile dozvoljava da pretpostavimo da bi ga one željele da su predvidjele nepunovažnost.	CCP ARTIGO 293º **(Conversão)** O negócio nulo ou anulado pode converter-se num negócio de tipo ou conteúdo diferente, do qual contenha os requisitos essenciais de substância e de forma, quando o fim prosseguido pelas partes permita supor que elas o teriam querido, se tivessem previsto a invalidade.
SFRJ	/	ZOO **Konverzija** Član 106. Kad ništav ugovor ispunjava uslove za punovažnost nekog drugog ugovora, onda će među ugovaračima važiti taj drugi ugovor, ako bi to bilo u saglasnosti sa ciljem koji su ugovarači imali u vidu kad su ugovor zaključili i ako se može uzeti da bi oni zaključili taj ugovor da su znali za ništavost svog ugovora.
Holandija	GZN čl. 3:42. Ako svrha ništavog pravnog posla odgovara svrsi drugog pravnog posla, koji bi mogao biti punovažan, u tolikoj mjeri da treba pretpostaviti da bi ovaj drugi pravni posao bio preduzet da to nije učinjeno sa prvim uslijed ništavosti, tada će on proizvoditi dejstva drugog posla, osim ukoliko bi to bilo nerazumno prema trećem zainteresovanom licu koje nije učestvovalo u pravnom poslu kao strana.	BW Artikel 42. Beantwoordt de strekking van een nietige rechtshandeling in een zodanige mate aan die van een andere, als geldig aan te merken rechtshandeling, dat aangenomen moet worden dat die andere rechtshandeling zou zijn verricht, indien van de eerstgenoemde wegens haar ongeldigheid was afgezien, dan komt haar de werking van die andere rechtshandeling toe, tenzij dit onredelijk zou zijn jegens een belanghebbende die niet tot de rechtshandeling als partij heeft medegewerkt.

Uslovi za konverziju.– Ugovor koji je zaključen mora biti definitivno nepodoban da proizvede dejstva. Ovo znači da nije dovoljno da se radi o

ništavom ugovoru, već sud u postupku mora utvrditi da je ugovor „zreo" za oglašavanje ništavim. Dakle, prethodno su bezuspješno iscrpljeni ili su neprimjenjivi svi instituti koji omogućavaju ugovoru da proizvede svoja dejstva.[22] Nije potrebno da je ugovor oglašen ništavim kako bi se konvertovao, ali ukoliko je prethodno oglašen ništavim, to nije ni prepreka za konverziju.[23] Mora se pronaći drugi ugovor čije uslove za punovažnost (poslovna sposobnost strana, dopuštenost sadržine, potrebna forma)[24] ispunjava zaključeni ugovor[25] a čija dejstva[26] bi bila podesna da stranama u potpunosti ili u bitnom ostvare cilj kojem su težile. Punovažnost ovog drugog ugovora se cijeni u trenutku zaključenja ništavog ugovora. Kako konverzija teretnih ugovora može kroz dejstva zamjenskog posla pogoditi (prvobitnu) ekvivalentnost davanja, to sud može izvršiti usklađivanje, kako bi održao balans uzajamne korisnosti. Sud mora zaključiti da „se može uzeti" da bi strane, da su u trenutku zaključenja posla znale za njegovu ništavost, zaključile ovaj drugi ugovor. Ovo je hipotetička volja[27] strana *u trenutku zaključenja ugovora*, i osnovni kriterijum za

[22] Dakle, tumačenje, djelimična ništavost, ali i konvalidacija ništavog ugovora – jer je konvalidiran ugovor više u skladu sa voljom strana nego konvertovan ugovor.

[23] F. Pirar (F. Peeraer) navodi da prema njemačkoj i većini nizozemske doktrine ugovor prvo mora biti oglašen ništavim, kako bi potom bio konvertovan, čime bi se izbjegle posljedice ništavosti. S druge strane, belgijska doktrina konverziju vidi kao alternativu za oglašavanje ugovora ništavim. On se priklanja prvonavedenom stavu. Peeraer, F. (2014). „Nietigverklaring vs. gerechtelijke conversie van een contract of van een contractueel beding" in S. Stijns en P. Wéry (eds.), *De rol van derechter in het contract, die Keure*. Brugge, 321–372, 19. U domaćoj praksi preovladava shvatanje o konverziji ugovora koji nije oglašen ništavim (npr. Presuda Vrhovnog suda Srbije, Gzz-96/88. od 13. 12. 1988. godine; Rešenje Višeg privrednog suda u Beogradu, 9766/96. od 12. 2. 1997. godine; Rešenje Vrhovnog kasacionog suda Rev 483/2015. od 16. 3. 2016. godine, itd.), ali nalazimo i konverziju ugovora koji je prethodno oglašen ništavim (Rešenje Vrhovnog suda Srbije, Rev. 1613/94. od 20. 4. 1994. godine iz kog je vidljiv stav da konverzija ugovora o zajedničkoj gradnji koji je prethodno oglašen ništavim u ugovor o dugogodišnjem zakupu ili sličan neimenovani ugovor sprječava restituciju).

[24] Stojanović, D. (1996). *Uvod u građansko pravo*, deveto izdanje. Beograd, 382.

[25] Čak se u njemačkoj teoriji dopušta i mogućnost da ovaj drugi ugovor ne bude valjan, već samo manje manljiv od zaključenog. (Demnach kann unter anderem auch von einem nichtigen zu einem schwebend unwirksamen Geschäft konvertiert werden.) Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des Para. 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition. Kindle Edition. Frankfurt am Main, 43.

[26] Međutim, ova dejstva ne smiju prevazići dejstva koja bi zaključeni ugovor imao da je punovažan.

[27] Ne smijemo je miješati sa pretpostavljenom voljom, jer se kod pretpostavljene volje radi o stvarnoj volji, koja nije sigurno utvrđena, ali se uzima da postoji, dok se u slučaju hipotetičke volje uopšte ne radi o stvarnoj volji (čak ni o implicitnoj, čak ni o svijesti da bi kroz konverziju zamjenski ugovor mogao spasiti cilj kome se težilo). U domaćoj literaturi

njeno utvrđivanje jeste upravo mogućnost ostvarenja cilja kojem se težilo kroz dejstvo zamjenskog ugovora. Dakle, ukoliko bi se kroz dejstvo zamjenskog ugovora cilj mogao ostvariti u potpunosti ili u bitnom – uslov hipotetičke volje je ispunjen. Ukoliko bi zbog određenih okolnosti poslije zaključenja ugovora stvarna volja jedne od strana bila izmijenjena tako da više ne želi dejstva ugovora, odnosno postizanje cilja, to uopšte nije relevantno za utvrđivanje ispunjenosti uslova hipotetičke volje. Ukoliko bi strane navele u ugovoru da ne žele nijedan drugi ugovor u slučaju ništavosti, tada nema mjesta utvrđivanju hipotetičke volje, i do konverzije neće doći. Strane ne smiju svjesno koristiti konverziju kao sredstvo za zaobilaženje zahtjeva pravnog sistema za valjanost ugovora. Premda domaći autori navode kao uslov obostranu savjesnost kod zaključenja ugovora, konverzija dolazi u obzir kada su obje strane savjesne ili kada je makar jedna strana savjesna. Sud će odvagati interes jedne i druge strane, interese trećih lica, ne isključujući ni opšti interes, prije nego što odluči o mogućnosti konverzije u konkretnom slučaju. Interesi nisu vezani za trenutak zaključenja ugovora, za razliku od hipotetičke volje. Kada su uslovi ispunjeni, institut konverzije djeluje na način što ništavom dodjeljuje dejstva drugog ugovora, čime se ostvaruje objektivni praktični ekonomski cilj kojem su strane težile prilikom zaključenja ugovora.[28] Stav o postupanju isključivo na zahtjev strana[29] u slučaju konverzije, sve više ustupa mjesto stavu da se konverzija vrši *ex officio* (pitanje konverzije se *ex officio* postavlja uvijek kada se postavi pita-

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stav da se radi o hipotetičkoj volji nalazimo kod Dragoljuba Stojanovića – Stojanović, D. (1996). *Uvod u građansko pravo*, deveto izdanje. Beograd, 381. Nije zgoreg naglasiti da u literaturi postoji i drugo subjektivno stanovište da se kod ovog elementa radi o stvarnoj volji, kao i objektivno stanovište da se kod ovog elementa primjenjuje načelo savjesnosti i poštenja.

[28] Čisto pravnotehničke razlike u ovom pitanju u tekstovima normi o konverziji različitih zakonika postoje. Tako: prema NJGZ i ZOO važiće drugi ugovor, ali u teoriji nije sporno da zaključeni ugovor proizvodi dejstva drugog ugovora, kako to predviđa npr. IGZ.

[29] Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* treće neizmenjeno izdanje. Beograd, 474. Sud se pitanjem konverzije nikad ne bavi *ex officio*, već samo na zahtev ili po prigovoru. Prema K. Diez Soto većina u doktrini je na tom stanovištu. (Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 135, fn. 403). Kritiku takvog stava izlaže Đaimo (Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 109–122) te zaključuje (121–122):

„Slijedom argumentacije može se dati odgovor na kritička zapažanja koja su tradicionalno upućena na mogućnost da sud otkrije uslove za konverziju, čak i bez izričitog zahtjeva strana. Strah da će kroz takvu operaciju biti moguće suzbiti volju strana, zapravo nema osnova, ako se samo uzme u obzir način na koji je konverzija usmjerena ka obezbjeđenju da sama volja može postići neke učinke, a ne ostati konačno suzbijena iz razloga ništavosti. Intervencija suda je, dakle, u potpunosti usmjerena na takav rezultat, pod uslovom, naravno, da strane ne pruže dokaze o suprotnom interesu."

Naša sudska praksa ponekad odbija da ispita da li su ispunjeni uslovi za konverziju *ex officio.* Primjer:

nje oglašavanja ugovora ništavim). Međutim, bez aktivnog učešća makar jedne strane, teško je zamisliti da bi sud sam mogao odrediti cilj kojem se težilo, adekvatan drugi ugovor i uopšte uspješno primijeniti institut. Premda i tekst čl. 106. ZOO govori izričito o ništavom ugovoru a norma je sistematizovana u zakonu u okviru cjeline „ništavi ugovori", te bi se iz navedenog moglo zaključiti da je polje primjene jasno definisano, vjerujemo da bi bilo ishitreno izvući takav zaključak. U stranoj teoriji nije sporno da ovu „ništavost" treba tumačiti široko. Umjesto ograničavanja na institut ništavosti, moramo razmotriti svaki slučaj njegove funkcionalne nedjelotvornosti (nemogućnosti ugovora shvaćenog kao instrument za postizanje određenog cilja da taj cilj i donese).

NEPOSTOJEĆI UGOVOR

Nepostojećim ugovorom naziva se onaj kome nedostaje ono što je elementarno potrebno za postojanje (ne za punovažnost) svakog ugovora. Dok nepostojeći poslovi niti imaju dejstvo, niti ga mogu dobiti, ništavi nemaju dejstvo, ali ga izuzetno mogu dobiti, rušljivi imaju dejstvo, ali ga mogu izgubiti.[30] Konkretno, u pogledu konverzije na nepostojeći posao:

> „...Nije primenjiva nijedna ustanova koja služi tome da se poslu uprkos nedostacima koji ima ipak dâ dejstvo: posao ne može (za razliku od ništavog posla) da se preobrati u drugi, važeći (nema konverzije) ... (nema konvalidacije)."[31]

„Da bi postojala konverzija ugovora, odnosno, da ništav ugovor o doživotnom izdržavanju zbog nedostatka u formi može proizvesti pravno dejstvo kao ugovor o poklonu, potrebno je da tužena strana istakne takav zahtjev. Kako tužena strana nije takav zahtjev postavila, a sud odlučuje u granicama zahtjeva koji su postavljeni u toku postupka, nije se moglo drugačije odlučiti već samo ugovor oglasiti ništavnim." (Presuda Vrhovnog suda Srbije, Gzz-96/88. od 13. 12. 1988. godine.)

Međutim, nalazimo i suprotne stavove. Tako Vrhovni sud Srbije, Rev. 2339/99. od 30. 12. 1999. godine, u vezi sa ništavošću ugovora o doživotnom izdržavanju gdje sudija prilikom zaključenja ugovora nije sačinio zapisnik, rješenjem upućuje niži sud: „...Ukoliko bi se utvrdilo da sudija nije u stvarnosti pročitao ugovor i upozorio ugovornike na posljedice zaključenja, bilo je nužno, u smislu čl. 106. ZOO, ispitivati uslove za konverziju ugovora..." Takođe, Rešenje Višeg privrednog suda u Beogradu, 9766/96. od 12. 2. 1997. godine. S tim u vezi, u ovom kontekstu moramo pohvaliti pravno shvatanje usvojeno na sjednici Građanskog odeljenja Vrhovnog kasacionog suda održanoj 2. aprila 2019. godine vezano za punovažnost valutne klauzule kod ugovora o kreditu u švajcarskim francima i konverziji (*Bilten,* 1/19), koje ohrabruje sudove da pristupe konverziji *ex officio.*

[30] Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* treće neizmenjeno izdanje. Beograd, 467.

[31] *Ibid*., 469.

Ovo shvatanje nalazimo i u konsultovanoj stranoj literaturi, odakle izdvajamo dva citata:

> „Generalno, čl. 140. NJGZ [konverzija] se ne primjenjuje na nepostojeće pravne poslove (Nicht-Rechtsgeschäfte), koji proizilaze, na primjer, iz nesporazuma. Prije, pravni posao koji vodi reinterpretaciji mora biti ništav...“[32]

za njemačko pravo i

> „...To je razlog zašto danas u Italiji treba precizirati pod kojim se uslovima neki posao može smatrati „ništavnim“ – i stoga takvim da može proizvesti učinke, iako iznimno – ili umjesto toga nepostojećim, i takvim da se ne može podvesti pod zakonodavnu odredbu, u prvom redu, čl. 1424.33...[konverzija]”

za italijansko pravo.

Ne čini se mogućim oduprijeti se argumentima koji se odnose na logičku nemogućnost da se zaliječi nešto što ne postoji. Međutim, granica između nepostojećih i ništavih ugovora je teško odredljiva. Kriterijum za razdvajanje je problem. U domaćoj literaturi možemo naći stav da je nepostojeći ugovor kojem nedostaje neki od bitnih sastojaka,[34] dok je nevaljan onaj ugovor koji ima sve bitne sastojke, ali u nekom od njih postoji nedostatak koji ga čini nevaljanim. Ne možemo prihvatiti ovaj stav. Primjera radi, bitna forma je bitan sastojak nekih ugovora. Ukoliko se zaključi bez bitne forme, ugovor može konvertovati. Dakle, ne radi se o nepostojećem ugovoru. Na ontološkom planu, nepostojanje izražava već na pojavnom nivou nemogućnost identifikovanja (u pravnom smislu) činjeničnog stanja, dok nevaljanost označava patologiju činjeničnog stanja koje je već (u pravnom smislu) identifikovano, premda je negativno ocijenjeno.[35] Prijemčiv nam djeluje stav F. Dimarcio (F. Di Marzio), prema kome je

> „...ništav ugovor sačinjen (makar) od onih bitnih sastojaka zbog kojih je on društveno prepoznatljiv kao ugovor (...), za razliku od nepostojećeg ugovora: *pravno beznačajnog i irelevantnog*.[36]”

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[32] Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften.* (German Edition) 1st Edition. Kindle Edition. Frankfurt am Main, 32.

[33] Gandolfi, G. (1988, reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea.* Milano, 237 fn. 13, takođe isti st. 94–95.

[34] Tako npr. Rašović, Z. (2006). *Građansko pravo, Uvod.* Podgorica: Pravni fakultet u Podgorici, 265–266: „Nepostojeći pravni poslovi su poslovi kojima nedostaje neki bitan uslov za postojanje (nastanak). Kao bitan uslov pravnog posla smatra se onaj bez koga je pravni posao nezamisliv. Ti se uslovi najčešće tiču saglasnosti volja, predmeta, kauze, poslovne sposobnosti, forme (kada je obavezna).”

[35] Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 38.

[36] Navedeno prema: Giaimo, G. (2012). *Op. cit.*, 38, fn. 43.

Mogli bismo prihvatiti stav da uslove za postojanje ugovora ispunjava onaj ugovor koji sadrži one bitne sastojke zbog kojih je on društveno prepoznatljiv kao ugovor.[37]

Simulovani ugovor[38] posebno je interesantan sa stanovišta konverzije slučaj relativne simulacije. Mada je u ZOO regulisana u dijelu koji reguliše mane volje,[39] njena suština je u izigravanju zakona.[40] U domaćoj teoriji nalazimo stanovište gdje se relativna simulacija i konverzija poistovjećuju, što vodi pogrešnom stavu da simulovani ugovor može konvertirati. Čak se koristi terminologija relativne simulacije za ugovore u konverziji nazivajući ih simulovanim (ugovor koji se konvertuje) i disimulovanim (zamjenski ugovor).[41] Vidjećemo kasnije, ovo poistovjećivanje nije strano ni sudskoj praksi. Takva shvatanja nalazimo i u starijoj inostranoj teoriji.[42] Razloge za to možemo tražiti u sličnosti formulacije ova dva instituta i činjenici da kod oba instituta

[37] U literaturi nalazimo da se nepostojećim ugovorima smatraju ugovor zaključen uslijed nesporazuma, ugovor zaključen u šali, ugovor potpuno poslovno nesposobnog lica, simulovani ugovor, fiktivni ugovor. Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* treće neizmenjeno izdanje. Beograd, 468. Bez pretenzija da se upustimo u detaljnije izučavanje nepostojećeg ugovora i utvrđivanje kriterijuma za njegovo razdvajanje od ništavog, a čemu smo se kroz prethodne redove unekoliko približili, zadržaćemo se nakratko na simulovanom ugovoru.

[38] Najčešće se simulovani ugovor svrstava u zabranjene ugovore. Tako npr. Simonović, I. (2012). Restitucija u građanskom pravu – Domašaj primene, doktorska disertacija. Niš: Pravni fakultet Univerziteta u Nišu, 120–121. Sa druge strane shvatanje prividnih ugovora kao nepostojećih, po shvatanju autora, podrazumijeva sljedeće: simulovani ugovor je privid ugovora, koji kao takav ima privid kauze, vidljiv spoljnom svijetu i iz perspektive spoljnog svijeta, a naročito ugovornika u simulovanom ugovoru nema i ne smije biti ništa fraudolozno. Fraudoloznost nalazimo u simulacijskom sporazumu između strana koji nije sadržan niti u simulovanom niti u disimulovanom ugovoru, već postoji izvan njih, povezuje ih i daje im teleološko jedinstvo. Za razliku od simulovanog ugovora, strane ovaj simulacijski sporazum, baš kao i disimulovani ugovor, nastoje sakriti od spoljnog svijeta.

[39] Što nije bez potpunog opravdanja pošto izjava ne odgovara stvarnoj volji. Međutim, ovdje se ne radi o mani volje nego o apsolutnom odsustvu volje za ugovorom i njegovim dejstvom.

[40] Već sama simulacija je čin izigravanja zakona, a u simulaciju se ulazi radi izigravanja zakona ili trećeg lica.

[41] Morait, B. (2010). *Obligaciono pravo, Knjiga prva – Obligacije i ugovori*. Banja Luka: Komesgrafika, 201: „...Zakon načelno dozvoljava konverziju, tj. disimulovanje simulovanog posla... Pod ovim uslovima konverzija je moguća jer ona inače pojmovno znači preobraćenje jednog ništavog ugovora (simulovani ugovor) u drugi punovažan (disimulovan) ugovor."

[42] K. Diez Soto navodi primjere tih shvatanja (Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, fn. 107): Satta, G. (1903). *La conversione dei negozi giuridici*. Milano, 10. Longo, C. (1930). Padova: Istituzioni di diritto privato, 60–61.

slovom zakona imamo u *inputu* jedan a u *outputu* drugi ugovor. Navešćemo neke posebnosti instituta relativne simulacije.

U slučaju relativne simulacije uspostavlja se odnos koji su strane istinski željele. Posebnoj prirodi relativne simulacije odgovara činjenica da je simulovani posao naslonjen na stvarno željeni posao, neraskidivo povezan sa njim zahvaljujući simulacijskom sporazumu koji operaciji daje teleološko jedinstvo.[43] Za razliku od konverzije, koja ima za svoju pretpostavku savjesnost bar jedne od ugovornih strana, kod relativne simulacije strane imaju zajednički fraudolozni cilj, obje su nesavjesne. Volja subjekata nije usmjerena samo na postizanje učinaka koji proizlaze iz prerušenog (disimulovanog) ugovora već i na *stvaranje privida pravnog posla za spoljni svijet*. Ovdje poredak *ne pokušava pomoći stranama*, već samo pruža način da se takav privid ukloni, istovremeno čuvajući interese trećih lica.[44] Intervencija pravnog poretka, u slučaju relativne simulacije, ne ide naruku stranama da postignu rezultat kojem teže, uz određena „prilagođavanja" ugovora. Umjesto toga, *radi se o isticanju stvarnosti* izvedene operacije, uništavanju izgleda simulovanog posla, kojeg takođe žele stranke,[45] ali ne radi njegovog redovnog dejstva. Jasno je dakle, da simulovani ugovor ne predstavlja ugovor već samo jedan *privid* ugovora, jedno „*pretvorno prikazivanje"*,[46] *koje nije usmjereno na redovna dejstva ugovora (njegovo redovno dejstvo strane nisu ni htjele).*

U slučaju relativne simulacije, postupićemo tako što ćemo izvršiti disimulaciju – otkrićemo posao koji se prikriva (disimulovani posao). U slučaju da ovako otkriveni posao ispunjava uslove punovažnosti, biće punovažan.[47] Međutim, u slučaju da je takav posao nevaljan, *ostaje otvorena mogućnost njegovog spasavanja putem konverzije.*[48]

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[43] K. Diez Soto navodi primjere tih shvatanja (Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, fn. 107): Satta, G. (1903). *La conversione dei negozi giuridici*. Milano, 10. Longo, C. (1930). Padova: Istituzioni di diritto privato, 60–61, fn. 444.

[44] *Ibid*., 166.

[45] *Ibid*., 166.

[46] Opšti imovinski zakonik, čl. 913.

[47] ZOO, čl. 66, st. 2.

[48] Možda ne bi bilo sasvim bez osnova tvrditi da nesavjesnost i fraudolozna namjera strana nije dovoljno sankcionisana oduzimanjem prigovora prema čl. 66, st. 3, već da im treba oduzeti i mogućnost spasavanja disimulovanog ugovora konverzijom, ali ipak smo stava da mogućnost konverzije disimulovanog ugovora treba prihvatiti. Ipak je nesavjesnost okrenuta prema stvaranju privida ugovora (simulovanom ugovoru), a ne prema disimulovanom ugovoru.

Pogledajmo sada jedan predmet iz domaće sudske prakse iz 2017. godine:[49]

> „Otac tužilaca sada pok. DD je kao primalac izdržavanja zaključio ugovor o doživotnom izdržavanju koji je overen kod Opštinskog suda u Ubu u predmetu 3R br. (...), dana 19. 1. 2006. godine sa ovde tuženim maloletnim VV kao davaocem izdržavanja, koji je u to vreme imao dve godine (...) Maloletni ugovarač je bio zastupan od strane svog oca kao zakonskog zastupnika u smislu čl. 72. st. 1. Porodičnog zakona, pa nisu ispunjeni uslovi za poništaj ugovora u smislu čl. 111. ZOO. Imajući u vidu sve izloženo i da je bila ispunjena pismena forma ugovora o doživotnom izdržavanju potvrđena u sudijskoj overi u vanparničnom postupku u smislu čl. 195. Zakona o nasleđivanju, to ugovor proizvodi pravno dejstvo (...). Čak i pod uslovom da teretni ugovor u ime i za račun maloletnika do 14. godine života nije mogao da zaključi zakonski zastupnik, ugovor bi proizvodio pravno dejstvo po čl. 66. st. 2. Zakona o obligacionim odnosima (konverzija) kao ugovor o poklonu jer su ispunjeni uslovi za njegovu valjanost: overen je, a iz utvrđenog činjeničnog stanja proizlazi namera darežljivosti sada pok. DD prema maloletnom VV, kao unuku svog brata EE, čija se porodica od 1994. godine (pre zaključenja ugovora) starala o njemu kao članu svoje porodice sve do njegove smrti.“

Kao što vidimo, u ovoj presudi postavljen je znak jednakosti između konverzije i relativne simulacije. Strane su bile savjesne pri zaključenju ugovora, ponašale su se u skladu sa ugovorom, ispunile svoje obaveze (za maloljetnog davaoca izvršenja zakonski zastupnik je i zaključio ugovor i ispunjavao obaveze iz ugovora), *te nikakve simulacije nema,* a u slučaju ništavosti, ugovor o poklonu bi odgovarao hipotetičkoj volji strana. Jasno je da se radi o čl. 106. ZOO – konverziji, a ne o čl. 66, st. 2. ZOO – relativnoj simulaciji. Sigurni smo da je nerazlikovanje ova dva instituta široko rasprostranjeno. Primjera radi, uvidom u materijal sa Seminara Centra za edukaciju sudija i javnih tužilaca u Republici Srpskoj, Banja Luka, od 18. 6. 2019. godine, vidimo kako su od tri primjera sudske prakse koja je trebalo da posluže kao primjeri za konverziju, dva primjeri disimulovanja (relativne simulacije).[50]

S druge strane, imamo u domaćoj praksi i primjere pravilnog razlikovanja ova dva instituta. Proučićemo na ovom mjestu još jednu, nešto stariju

[49] Vrhovni kasacioni sud br. Rev 1663/2016. od 24. 5. 2017. godine (radi poništaja ugovora o doživotnom izdržavanju, odlučujući o reviziji).

[50] Strana 20, izvor: http://www.rs.cest.gov.ba/index.php/seminari-2019/69-186banja-luka-forma-obligacionih-ugovora-i-pravne-posljedice-povrede-bitne-forme-ugovora/2643-materijal-j-pusac/file

presudu, sada Apelacionog suda u Beogradu iz 2013. godine.[51] Navodimo dijelove iz obrazloženja:

> „...da je zaključeni ugovor o zajmu u stvari prikriveni kupoprodajni ugovor akcija, zaključen u cilju izigravanja propisa u trgovini hartijama od vrednosti (...) odredbom čl. 106. istog Zakona, propisano je da kada ništav ugovor ispunjava uslove za punovažnost nekog drugog ugovora, onda će među ugovaračima važiti taj drugi ugovor, ako bi to bilo u saglasnosti sa ciljem koji su ugovarači imali u vidu kada su ugovor zaključili i ako se može uzeti da bi oni zaključili taj ugovor da su znali za ništavost svog ugovora (...) Kako je citiranom odredbom čl. 52. Zakona o tržištu hartija od vrednosti i drugih finansijskih elemenata jasno propisano pod kojim uslovima i na koji način se može trgovati hartijama od vrednosti, tužilac je, u cilju izbegavanja ovih normi, sa tuženim zaključio ugovor o zajmu (...) sud je utvrdio da je predmetni ugovor o zajmu u stvari simulovani ugovor, koji prikriva ugovor o kupoprodaji, a koji za predmet ima akcije preduzeća AA.“

Iz činjenice da je cilj ugovora bila prodaja akcija pomenutog preduzeća, proizilazi da je predmet obaveze objektivno nemoguć, te da je osnovni ugovor protivan prirodnim propisima i ništav po čl. 103. ZOO, budući da je zaključen suprotno odredbi čl. 52. Zakona o tržištu hartija od vrednosti i drugih finansijskih instrumenata, važećeg u vreme zaključenja. Isti ugovor ne ispunjava uslove za punovažnost nekog drugog ugovora bliže određenim čl. 106. Zakona o obligacionim odnosima, te se u tom smislu i ne može izvršiti njegova konverzija u neki drugi ugovor.

Iz posljednjeg pasusa je jasno, disimulovani, a ne simulovani ugovor, ne ispunjava uslove za konverziju. Dakle, sud je po pravilima relativne simulacije – disimulovanjem otkrio disimulovani posao, za koji je potom utvrdio da je ništav, a zatim zaključio da se u konkretnom slučaju disimulovani ugovor ne može spasiti primjenom konverzije. Iz obrazloženja je, dakle, vidljivo da se nije radilo o konverziji simulovanog posla, već su pravilno primjenjena pravila oba instituta. U zaključku, poistovjećivanje relativne simulacije i konverzije treba smatrati reliktom prošlih vremena.

[51] Iz presude Apelacionog suda u Beogradu, Gž 878/2010. od 24. septembra 2013. godine.

NIŠTAV UGOVOR

Zahvaljujući konvalidaciji i konverziji, za razliku od nepostojećeg ugovora koji to nikada ne može, ništav ugovor je u stanju da se izuzetno – uprkos svojim nedostacima – preobrati u drugi, važeći ugovor (konverzijom),[52] a takođe izuzetno – uprkos svojim nedostacima – da se osnaži, da proizvede dejstvo (konvalidacijom).[53] Međutim, na prvi pogled sasvim suprotno ranije iznesenom stanovištu, prema većinskom stavu u domaćoj doktrini, konverzija je namijenjena nepostojećim, a neprikladna je za ništave poslove u užem smislu.[54] Ovdje smo dužni jedno pojašnjenje. Ovaj dio naše teorije ne poznaje

[52] K. Krampe (C. Krampe) navodi mnoge primjere konverzije ništavog ugovora iz prakse njemačkih sudova: Konverzija pravno nemogućih ugovora (*Konversion eines rechtlich unmöglichen Vertrages)* 1. ako strane ugovore uspostavljanje ili prenos stvarnog prava, ali ugovor nije pravno valjan, on se još uvijek može konvertovati u ugovor sa obligaciono-pravnim dejstvom; 2. nedopušten prenos akcija privrednog društva u dopušten prenos prava iz akcija; 3. konverzija ništavog osnivačkog akta pravnog lica u valjan osnivački akt drugog pravnog lica, itd.; konverzija ugovora koji su ništavi zbog povrede forme (*Konversion eines formwidrigen Vertrages*): ovdje je, prema K. Krampe, osnovno polje primjene konverzije – konverzija ugovora koji su ništavi zbog povrede bitne forme u ugovore kod kojih se takva forma ne traži; konverzija protivzakonitih ugovora (*Konversion eines verbotswidrigen Vertrages*): 1. Ugovor koji ima cijenu koja je veća od zakonom dozvoljene konvertuje se u ugovor sa dozvoljenom cijenom, itd.; konverzija nemoralnih ugovora (*Konversion eines sittenwidrigen Vertrages*): ugovor o snabdijevanju pivom sa višedecenijskim trajanjem ili bez ograničenja trajanja, vremenski prekomjerno vezuje gostionicu, te je zbog toga nemoralan i može se konvertovati u ugovor o isporuci piva sa razumnim trajanjem. Krampe, C. (1980). *Die Konversion des Rechtsgeschäfts.* Frankfurt am Main: Vittorio Klostermann, 213–246.

[53] Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* treće neizmenjeno izdanje. Beograd, 470. Naravno, svjesni smo da pojedini autori izraz konvalidacija rezervišu isključivo za rušljive ugovore, kao i razlika između konvalidacije ništavog ugovora i konvalidacije rušljivog ugovora.

[54] U teoriji je široko prihvaćen stav da bi konverziju trebalo dovoditi isključivo u vezu s nepostojećim ugovorima. Prva potvrda upravo navedenog jeste u shvatanju apsolutno ništavih ugovora kao zabranjenih, bilo pravom, bilo moralom, pa kada je nešto u tom smislu zabranjeno ne može nikako preći u polje punovažnog. Drugu potvrdu nalazimo u onome što vremenski prethodi konverziji, a naime: „stranke zbog svoje neobaveštenosti (...) ili neveštosti (...) sačine ugovor tako da ne obezbede sve bitne uslove za njegovo zaključenje". Dolović, K. (2011). „Nepostojeći ugovor", *Anali Pravnog fakulteta Univerziteta u Beogradu,* godina LIX broj 2/2011, 263–278, 277.

Što se tiče konverzije može se još reći da ona najčešće nastupa usled toga što su stranke nevešte u zaključenju ugovora ili su neobaveštene o potrebnim uslovima koje zakon zahteva za njegovu punovažnost, pa ugovor tako manljivo sačine da on, prema samom zakonu, u stvari nije ni nastao, ali ono što su sačinile može predstavljati neki drugi ugovor, ukoliko se njime postiže isti cilj i ukoliko je to izraz volje stranaka... Iz ovoga proizilazi da se konverzija uglavnom javlja kod apsolutne ništavosti (u stvari kod nepostojećih ugovora ukoliko se ova kategorija ugovora prihvati) jer kod nje nisu ispunjeni uslovi za punovažnost ugovora. Perović, S. (1975). *Zabranjeni ugovori.* Beograd, 230.

nepostojeće ugovore kao kategoriju različitu od ništavih (te se stoga ovim stavovima nismo bavili u prethodnom dijelu), već pod uticajem starije francuske teorije dijeli ništave ugovore na nepostojeće i ništave *stricto sensu*. Ovi autori pod nepostojećim ugovorima ne smatraju one kojima nedostaje neki bitan sastojak bez koga ugovor nije društveno prepoznatljiv kao takav, već sve one ugovore koji ne ispunjavaju uslove za punovažnost ugovora (odsustvo bitnog sastojka bez razlikovanja da li o njemu ovisi društeno prepoznavanje ugovora kao takvog ili neki nedostatak u vezi sa bitnim sastojcima ugovora zbog kojih poredak oduzima dejstvo ugovoru i sankcioniše ga ništavošću).

Kako smo prethodno u radu izdvojili ugovore koji ne sadrže makar one bitne sastojke bez kojih se ugovor ne može društveno prepoznati kao takav, ovdje govorimo o ugovorima koji *ispunjavaju uslove za postojanje ugovora (dakle, postojeći ugovori)*, ali *ne ispunjavaju one uslove za punovažnost ugovora, zbog kojih poredak oduzima dejstvo ugovoru i sankcioniše ga ništavošću* (odsustvo bitnog sastojka o kom ne ovisi društvena prepoznatljivost ugovora kao takvog ili neki nedostatak u vezi sa bitnim sastojcima ugovora). Na ove ugovore se konverzija može primijeniti. Zatim, govorimo o zabranjenim ugovorima. Naime, ništav je ugovor koji je protivan imperativnoj normi (protivzakonit),[55] javnom poretku i dobrim običajima (nemoralan), i samim tim protivan javnim interesima koje oni štite. Zajednički naziv za ugovore iz prethodne rečenice je *zabranjeni ugovori.*[56]

Konverzija zabranjenih[57] **ugovora**.– Vidjeli smo prethodno da mnogi domaći autori odriču mogućnost konverzije zabranjenih, dakle protivzakonitih i nemoralnih ugovora. Ovdje se radi o situaciji kada ugovor ne može proizvesti dejstvo iz razloga njegove *suprotstavljenosti zabrani* koja ne dopušta pozitivno vrednovanje napora ugovornih strana, i, samim tim, čini problema-

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U ovom slučaju se ne radi o pravnim poslovima zaključenim mimo zakonskih zabrana, nego o pravnim poslovima kojima nedostaje neki od elemenata za njegovu punovažnost (nepostojeći pravni posao). Na primer, nedostatak zakonom propisane forme. Popov, D. (2016). *Građansko pravo* (opšti deo), trinaesto izmenjeno i dopunjeno izdanje. Novi Sad, 287.

„Samo nepostojeći ugovor može da bude predmet konvalidacije. Povreda javnih interesa kod ništavih ugovora isključuje mogućnost konvalidacije... Konverzija bi bila moguća samo u vezi sa nepostojećim ugovorima, a isključena kod ništavih ugovora." Pajtić, B., Radovanović, S., Dudaš, A. (2018). *Obligaciono pravo*. Novi Sad, 386 i fn. 1726 i fn. 1727.

[55] Pod uslovom da zakon ne propisuje drugu sankciju, ili ako cilj norme ne upućuje na drugu sankciju.

[56] Tako u Skici, čl. 79.

[57] Kao i u Skici, i u italijanskoj doktrini se koristi izraz zabranjeni ugovor (*contratto illecito*) koji obuhvata ugovore protivne imperativnoj normi, javnom poretku i dobrim običajima.

tičnom mogućnost spasavanja takvog ugovora konverzijom. Prema M. Sank, ne možemo isključiti primjenu konverzije na zabranjene ugovore.[58] Različita stanovišta italijanske doktrine kada zabranjen ugovor može biti konvertovan navodi K. Diez Soto,[59] koji zatim zaključuje da je u traženju odgovora neophodno ispitati *ratio* norme koja reguliše institut konverzije u svjetlu sistema kontrole privatne autonomije u koji se norma integriše, a naročito u vezi sa *ratiom* norme koja je prekršena. Prema njemu, konverzija zabranjenog ugovora se ne može apriori isključiti.

Navešćemo jedan značajan predmet iz italijanske sudske prakse (kupoprodaja nafte koja je ugovorena suprotno imperativnoj normi koja nalaže skladištenje robe od strane kupca).[60] Kasacioni sud je u ovom predmetu, razmatrajući generalno mogućnost konverzije, napravio razgraničenje između dvije različite situacije: između *zabranjenosti cilja* koji su ugovornici postavili i *zabranjenosti ugovora kao instrumenta* za postizanje tog cilja. Ovo razlikovanje dobija naročitu važnost kada se ukrsti sa idejom da poredak nastoji putem instituta konverzije zaštititi skup interesa koji strane namjeravaju postići ugovorom.[61] Ukoliko se postavljeni cilj ocijeni kao dostojan zaštite, a zabranjenost ugovora proizilazi iz objektivnog nedostatka u njemu (kao instrumentu), sasvim je opravdano tražiti zamjenski ugovor kroz koji će se ovaj cilj ostvariti. U suprotnom, kada je zabranjenost svojstvena cilju koji se želi postići, ne bi bilo mjesta takvom spasavanju jer bi i zamjenski ugovor djelovao zbog istog zabranjenog cilja. Vidimo da se radi o stavu koji afirmiše institut konverzije. Međutim, sam Kasacioni sud nije slijedio ovaj svoj stav. Tako istog dana (!) u drugom predmetu imamo stav[62] da je konverzija neprimjenjiva ako ništavost ugovora ima uzrok u povredi imperativne norme, javnog poretka ili morala. Prihvatanje ovakvog rigidnog stava u tolikoj mjeri bi *suzilo polje primjene* instituta da bismo mogli govoriti o beskorisnosti tako omeđenog instituta konverzije u pravnom sistemu. Ovo stanovište, koje u pot-

[58] Cinque, M. (2003). *Conversione dell contratto nullo: rilevabilita ex officio e contratto contrario a norme imperative,* in Nuova giur. Civ. Comm. I, 841–852, 843.

[59] Kada se zabrana ne odnosi na cilj kojem su strane težile; kada zabranjenost pogađa sadržaj jedne prestacije, koja može biti zamijenjena bez žrtvovanja interesa strana; kada se ne radi o zabrani koju nameće javni poredak i dobri običaji; kada nije protivno cilju prekršene norme da dođe do konverzije u zamjenski ugovor, koji je „kompatibilan" sa zaključenim ugovorom sa stanovišta cilja kome se težilo. Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 148.

[60] Cass. n. 1036 del 18 aprile 1953 in Riv. dir. comm., 1954, II, p. 253 Ovu presudu citira kao *leading case* Đaimo str. 21, Sank, 851 i Gandolfi na većem broju mjesta.

[61] Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 21.

[62] Cass. n. 1039 del 18 aprile 1953 in Giur. compl. cass. civ., 1953, 206, u: Giaimo, G. (2012). *Op. cit.*, 23.

punosti afirmiše ništavost, međutim, stavlja znak jednakosti između različitih razloga ništavosti, stavljajući ih sve u istu ravan. Moramo navesti da postoji i stanovište u literaturi (G. Gandolfi)[63] prema kome postoji mogućnost konverzije ugovora koji je ništav radi zabranjenog cilja.

U njemačkoj literaturi nalazimo drastično pozitivniji odnos prema konverziji protivzakonitih (čl. 134. NJGZ) i nemoralnih poslova (čl. 138. NJGZ). Prema D. Bernait (D. Berneith), ne postoji razlog zbog kog protivzakonit ugovor ne bi mogao biti konvertovan na takav način da zakonska zabrana više ne predstavlja smetnju.[64] Pošto je ugovor protivan moralu u skladu sa čl. 138. NJGZ ništav, to je mogućnost konverzije u ovom slučaju u osnovi otvorena. Prema preovlađujućem mišljenju u njemačkoj literaturi, konverzija se mora isključiti makar kada su namjere strana nemoralne, kao što je slučaj npr. sa zelenaškim ugovorom (čl. 138. st. 2, NJGZ), dok je, sa druge strane, primjenjiva kada je nemoralan način (instrument) koji su strane odabrale.[65] Primjeri konverzije protivzakonitih i nemoralnih ugovora su poznati u njemačkoj sudskoj praksi (prethodno su navedeni neki od primjera kojima se detaljno bavi K. Krampe).

Vrhovni sud Republike Hrvatske u jednom predmetu[66], čini se, zauzeo je stav da je moguća *konverzija* nemoralnog ugovora, preciznije, *ugovora sa nemoralnim ciljem*.[67] Konverzija je (između ostalog) korektiv konceptu ništa-

[63] Ovdje bi sud izmijenio cilj njegovim sužavanjem, kojim bi odstranio njegovu suprotstavljenost zabrani, a zatim bi konverzijom spasio tako sužen cilj. Postavlja se kao problem ovakvog stanovišta pitanje, da li bi ovako sužen cilj i u kojoj mjeri odgovarao izvornom cilju i namjerama strana, i da li bi se moglo zaključiti da bi strane u ovoj situaciji zaključile takav drugi ugovor da su znale za ništavost. Nav. prema Giaimo, G. (2012). *Ibid.*, 28–29.

[64] Već iz mogućnosti da se protivzakonita odredba ugovora izostavi, a ostatak ugovora spasi pomoću instituta djelimične ništavosti, vidimo da nezakonitost nije apsolutna prepreka – zašto bi bila prepreka konverziji, ako već nije djelimičnoj ništavosti? Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition. Kindle Edition. Frankfurt am Main, 53. Prema čl. 134 NJGZ pravni posao koji krši imperativnu zabranu je ništav.

[65] Navedeno prema: Berneith, D. (2016). *Op. cit.*, 54. Čl. 138. NJGZ predviđa ništavost nemoralnih poslova u stavu 1.

[66] Vrhovni sud Hrvatske Rev 3144/1995. od 28. lipnja 1999. godine.

[67] „Tuženici su zaključili ugovor o darovanju 13. 12. 1976. kojim je drugotuženik darovao stan i to jednosobnu garsonjeru u Z. prvotuženiku (...) Tuženici su 28. 5. 1991. zaključili sporni ugovor o konverziji prema kojem su naveli da cilj spomenutog darovanja nije bio prijenos prava vlasništva na garsonjeri nego prijenos prava upravljanja garsonjerom na prvotuženika sve dok obitelj drugotuženika koristi po prvotuženiku dodijeljeni stan od 76 m^2 (...) Tužiteljica smatra da je spomenuti darovni ugovor pravno valjan te da ne postoji nikakav osnov po kojem bi u smislu odredbe čl. 103. st. 1. Zakona o obveznim odnosima (u daljnjem tekstu: ZOO) spomenuti ugovor bio ništav, a u takvom slučaju nema mjesta

vosti koji stavlja znak jednakosti između raznovrsnih situacija, što predstavlja nedostatak ovog koncepta. Zar ne bi predstavljalo činjenje iste takve greške, samo u manjem obimu, uklanjanje (apriori) iz polja primjene konverzije jednog razloga ništavosti (npr. nemoralnost ugovora, ili uže nemoralnost cilja ugovora) koji također podrazumijeva niz raznovrsnih situacija između kojih se ne može staviti znak jednakosti? Da zaključimo, konverzija se kod ništavih ugovora ne smije apriori isključiti ni kod jednog razloga ništavosti.[68]

Konverzija i konvalidacija.– Ranije smo naveli da ništavost mora biti konačna kako bismo mogli konvertovati ugovor. Potvrdu nalazimo i u sudskoj praksi:

> „Može se konvertovati samo ništav pravni posao koji ne može postati punovažan, ukoliko iz volje strana proizlazi da su ispunjeni uslovi za nastanak i punovažnost drugog pravnog posla."[69]

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ni konverziji takvog ugovora pozivom na čl. 106. ZOO jer je postojanje ništavog ugovora pretpostavka – ako su za to ispunjeni i ostali propisani uvjeti iz čl. 106. ZOO za konverziju takovog ništavog ugovora u neki drugi valjani ugovor među istim strankama... Cijeneći takove tvrdnje tužiteljice niži sudovi su našli, da spomenuti darovni ugovor zaključen među tuženicima 13. 12. 1976. nije ništav jer ima sve potrebne bitne sastojke, te stoga predstavlja dopušteni pravni posao, pa nema pretpostavki za konverziju takvog valjanog pravnog posla zbog čega utvrđuju, da je upravo ugovor o konverziji ništav pravni posao... [Za razliku od nižih sudova, koji su to propustili, Vrhovni sud uočava sljedeće:] Ukoliko bi bile utvrđene kao točne takve tvrdnje tuženika odnosno ako je istinita tvrdnja revidenta da je drugotuženik darovao spomenutu garsonjeru prvotuženiku u ispunjenju postavljenog uvjeta da se njegovoj supruzi dade na korištenje veći stan koji je prema suglasnim navodima stranaka i dodijeljen supruzi drugotuženika – tada bi takav darovni ugovor prema shvaćanju ovog revizijskog suda u najmanju ruku bio protivan moralu društva i kao takav ništav (čl. 103. ZOO)... Naime, kako je već navedeno ovaj sud smatra, da (ne)valjanost odnosno ništavost ugovora o darovanju – što je od prejudicijelnog značenja glede ništavosti spornog ugovora o konverziji – treba ispitati u pravcu, da li to darovanje u suštini predstavlja nedopušteno bespovratno učešće zaposlenika u dodjeli stana."

Ovim ne prejudiciramo da li bi u slučaju ovakve ništavosti ugovora o poklonu bili ispunjeni uslovi za konverziju, kao što ni VSH nije prejudicirao, ali je dozvolio mogućnost da ti uslovi možda mogu biti ispunjeni u slučaju kada je ugovor ništav zbog nemoralnog cilja.

[68] Ako sumiramo prethodna dva dijela rada, vidimo da je konverzija isključena kod nepostojećih ugovora, dok se primjenjuje kod ništavih ugovora, te je sa aspekta konverzije podjela koju smo odabrali relevantna. Sa druge strane, podjela ništavih poslova na nepostojeće i ništave *stricto sensu* koja je zastupljena u domaćoj teoriji a kojoj se nismo priklonili, pokazalo se, nije od koristi za utvrđivanje polja primjene konverzije, i to dvostruko: prvo, poslovi ništavi *stricto sensu* mogu konvertovati, i drugo, nepostojeći i po ovom shvatanju nesumnjivo obuhvataju slučaj šale, potpunu poslovnu nesposobnost i nesporazum, koji, znamo, ne konvertuju.

[69] Rešenje Višeg trgovinskog suda, Pž. 9915/2006. od 11. 5. 2007. godine – Sudska praksa trgovinskih sudova – *Bilten* br. 4/2007.

Kako ništav ugovor izuzetno može konvalidirati, to smo dužni razmotriti i odnos između konvalidacije i konverzije.[70] Za odnos konverzije i konvalidacije važe sljedeća pravila: A) Ništav ugovor koji je konvalidirao ne može se konvertovati, niti za konverzijom ima potrebe. B) Ništav ugovor koji nije konvalidirao, ali još uvijek može konvalidirati ne može konvertovati. Kako je konvalidiran posao više u saglasnosti sa izjavljenom voljom ugovarača, to je u redu primjene konvalidacija ispred konverzije. C) Ništav ugovor koji nije konvalidirao, a mogućnost njegove konvalidacije je otpala, može biti konvertovan.

DJELIMIČNO NIŠTAV UGOVOR

Ovdje postavljamo pitanje može li se vršiti konverzija *nevaljanog dijela* djelimično ništavog ugovora. Većina autora[71] odbija primjenu konverzije u ovom slučaju. Primjena instituta djelimične ništavosti prethodi primjeni konverzije. I ukoliko se njome spasi valjani dio ugovora, nema potrebe za konverzijom, niti mjesta njenoj primjeni. Ukoliko se primjenom ovog instituta ne može spasiti ugovor, tada je on ništav u cjelini, i kao takav podložan konverziji. Međutim, prema jednom dijelu njemačke teorije,[72] čija je argumentacija teleološka, primjena konverzije (NJGZ, čl. 140. i ZOO, čl. 106) na nevaljani dio ugovora je moguća i ona mora prethoditi primjeni instituta djelimične ništavosti (NJGZ, čl. 139. i ZOO, čl. 105). Tek ukoliko primjena instituta konverzije ne urodi rezultatom, postaviće se pitanje spasavanja valjanog dijela ugovora primjenom instituta djelimične ništavosti. Dakle, ideja je jasna: prvo pribjeći „popravci" nevaljanog dijela, a tek potom, u slučaju neuspjeha, njegovom

[70] Ništav ugovor konvalidira uravnoteženjem vrijednosti (čl. 141. ZOO – zelenaški ugovor); izvršenjem ukoliko je zabrana bila manjeg značaja (čl. 107, st. 2. ZOO) ili je povrijeđena bitna forma, ali ne u opštem interesu (čl. 73. ZOO); ratihabicijom – naknadnom dozvolom (npr. čl. 87. i 88. ZOO). Detaljnije Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* treće neizmenjeno izdanje. Beograd, 475–476.

[71] D. Bernait – (Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des para. 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition. Kindle Edition. Frankfurt am Main, 35, fn. 192) – navodi zastupnike ovog stava koji ga, međutim, ne obrazlažu: Martin Arens (Martin Ahrens), Herbert Rot (Herbert Roth), Vent Nasal (Wendt Nassall), Piter Ulmer (Peter Ulmer). Sljedeći autori (D. Bernait, 35, fn. 193) daju argumentaciju za ovaj stav: Arnd Arnold, Michael Beurskens.

[72] D. Bernait (Berneith, D. (2016). *Ibid.,* 35, fn. 191) navodi zastupnike ovog stava: Florian Faust (Florian Faust), Herman Ebel (Hermann Ebel), Hajnrih Pirer fon Eš.

odstranjivanju.[73] Ovdje moramo navesti da jedan od projekata ujednačavanja evropskog građanskog prava, prednacrt Evropskog zakonika o ugovorima (Gandolfijev zakonik), koji u čl. 145. reguliše konverziju originalno i detaljnije nego što to čine nacionalni građanski zakonici, a prema st. 2. ovog člana konverzija je primjenjiva na pojedinačne odredbe ugovora.[74] Zaključićemo da je djelimična konverzija ugovora izuzetno problematična, ali da svakako zavrjeđuje da bude predmet posebnog rada.

RUŠLJIV UGOVOR

Pitanje mogućnosti konverzije postavlja se kada se jedna od strana odluči na poništenje ugovora. Portugalski građanski zakonik (u daljem tekstu PGZ)

[73] U tom kontekstu moramo pomenuti na ovom mjestu pravno shvatanje usvojeno na sjednici Građanskog odeljenja Vrhovnog kasacionog suda održanoj 2. aprila 2019. godine povodom problema vezanog za punovažnost kredita indeksiranih u švajcarskim francima koje ćemo zbog sažetosti rada izložiti u najkraćem (*Bilten* 1/19). Postavilo se pitanje punovažnosti valutne klauzule (sud je u shvatanju odredio uslove za njenu nepunovažnost, u što nećemo ulaziti) i punovažnosti ugovora o kreditu (sud ugovor naziva djelimično ništavim, ali institut djelimične ništavosti ne primjenjuje). Vrhovni sud je riješio problem ciljnim i širim tumačenjem pravila o konverziji. (Trifunović, P. (2019). Konverzija ugovora sa posebnim osvrtom na „švajcarce", *Pravna riječ, časopis za pravnu teoriju i praksu,* 59/2019, 253–266, 264.) Na taj način je očigledno red primjene instituta izmijenjen na način da konverzija prethodi djelimičnoj ništavosti, te se ugovor naziva djelimično ništavim. Odredba o valutnoj klauzuli je ništava i vrši se konverzija te odredbe, koja, međutim mora zahvatiti i druge odredbe, jer je nemoguće samo mehanički izvršiti njenu zamjenu, a ostaviti ostatak ugovora neizmjenjenim. Zaključujemo da se ovdje radi o nekonvencionalnoj primjeni instituta konverzije, te da se sud priklonio stanovištu o ulozi konverzije koje zastupa Ram, prema kome konverzija služi za postizanje društveno željenog rezultata na temelju navodne volje stranaka. Odmah po usvajanju ovog stava zakonodavac je donio Zakon o konverziji stambenih kredita indeksiranih u švajcarskim francima (*Službeni glasnik RS* br. 31/19) – koji, međutim, uprkos nazivu, nema nikakvu vezu sa institutom kojim se mi bavimo u ovom radu. Dakle, ne radi se ni o sudskoj ni o zakonskoj konverziji ugovora. Ne možemo prihvatiti ni stav da ovaj zakon svoj naziv crpi iz konverzije jedne valute (CHF) u drugu (evro) – Dolović Bojić, K. (2020), „O konverziji ugovora u srpskom pravu sa posebnim osvrtom na sudsku konverziju*", Anali Pravnog fakulteta Univerziteta u Beogradu*, godina LXVIII 1/2020, 146–163, 164. Pravna enciklopedija 1, Beograd, 1985, definiše i jedan drugi vid konverzije, različit od ove koja je predmet rada, a stava smo da je upravo o toj konverziji riječ u pomenutom zakonu: „...Konverzija predstavlja izmenu uslova pod kojima je prvobitno bio zaključen neki ugovor (najčešće ugovor o zajmu)... Kod ugovora o zajmu, konverzija se sastoji u izmeni uslova pod kojima je taj ugovor bio zaključen (npr. roka i načina vraćanja zajma, visine kamatne stope i sl.). Na taj način, konverzija predstavlja izmenu ugovora; između poverioca i dužnika se stvaraju izvesna nova prava i obaveze, pa se za konverziju po pravilu zahteva pristanak poverioca. U praksi može doći i do tzv. prinudne konverzije, kada se ne zahteva saglasnost poverioca."

[74] European Code of Contracts (english version) http://www.eurcontrats.eu/site2/docs/EuropeanContr.pdf.

izričito predviđa konverziju poništenih rušljivih ugovora (por. *anulado*).[75] Uporednopravno, ovo je jedno od spornijih pitanja u vezi sa institutom konverzije. U domaćoj literaturi gotovo nema disonantnih tonova: konverzija u slučaju rušljivih ugovora je isključena (ili se uopšte ne pominje ili izričito isključuje – bez ili sa šturim obrazloženjem).[76]

Prema čl. 111. ZOO ugovor je rušljiv kad ga je zaključila *strana ograničeno poslovno sposobna*, kad je pri njegovom zaključenju bilo *mana u pogledu volje* strana, kao i kad je to Zakonom o obligacionim odnosima ili posebnim propisom određeno. No, razlozi rušljivosti nisu ono što suštinski razdvaja mogućnost konverzije rušljivog posla od mogućnosti konverzije ništavog posla.[77] Razlozi za osporavanje konverzije rušljivih poslova mogu se naći u specifičnostima samog instituta rušljivosti, tj. u samom *poništavanju.* Činjenica je da za razliku od ništavog rušljivi ugovor proizvodi dejstvo, a to dejstvo mu može oduzeti upravo strana u ugovornom odnosu – poništavanjem. Rušljiv ugovor, za razliku od ništavog, ne može se konvertovati prije poništavanja.[78] Na ovom mjestu moramo naglasiti da je pravo poništenja rušljivog ugovora preobražajno pravo koje se vrši putem suda kod nas i u Italiji, dok se u Njemačkoj vrši vansudski.[79] *Potrebno je utvrditi da li korištenje ovog preobražajnog prava onemogućava primjenu konverzije*.[80] Dakle, može li se rušljiv ugovor konvertovati poslije poništavanja.

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[75] Dok je njegov prednacrt predviđao konverziju rušljivih ugovora (por. *anulavel*). Gandolfijev zakonik takođe predviđa konverziju poništenog rušljivog ugovora (čl. 145. st. 5).

[76] Izuzeci u tom smislu: Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* treće neizmenjeno izdanje. Beograd, 472 i Gavella, N. (2019). *Privatno pravo*. Zagreb: Narodne novine, 330, fn. 168.

[77] Na kraju krajeva, posao starijeg maloljetnika je u nekim zakonodavstvima rušljiv, dok u nekim ne proizvodi dejstvo do odobrenja (što se može klasifikovati kao ništavost ili kao viseća nedjelotvornost – *Schwebende Unwirksamkeit*). Takođe, zaključenje ugovora od strane zastupnika koji djeluje u sukobu interesa je u nekim zakonodavstvima razlog rušljivosti (IGZ, čl. 1394. i PGZ, čl. 261), dok u drugim zakonodavstvima nije, već ga možemo klasifikovati kao razlog za ništavost ili za viseću nedjelotvornost – *Schwebende Unwirksamkeit* (čl. 181. NJGZ).

[78] Suprotno stanovište: „Konverzija može nastupiti jedino u pogledu onih nevaljanih pravnih poslova koji su ništetni, odnosno onih pobojnih poslova koji bi na nečiji zahtjev bili poništeni. Konverzija ne nastupa u pogledu pobojnih pravnih poslova kojima ne prijeti poništenje." (Rušljivi ugovori se u hrvatskom pravu nazivaju pobojnim). Gavella, N. (2019). *Privatno pravo.* Zagreb: *Narodne novine*, 330, fn. 168.

[79] Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* treće neizmenjeno izdanje. Beograd, 479.

[80] Prema V. Vodinelić: „...rušljiv ugovor koji je poništen: A) Smatraće se da ne može da konvertira ako se važnijim smatra pravo strane na poništaj rušljivog posla, jer bi se konverzijom poslu priznalo dejstvo [drugog ugovora] uprkos pravu strane da dejstva ne bude. B) Smatraće se da može da konvertira ako se više drži do toga što razlog rušljivosti poništenog ugovora nije smetnja za punovažnost ugovora u koji se pretvara zaključeni poništeni

U italijanskoj teoriji, više nego u njemačkoj, pitanje konverzije poništenog rušljivog ugovora je sporno.[81] G. Gandolfi piše da je u pogledu konvertibilnosti preovlađujući stav u italijanskoj doktrini, kao i u njemačkoj, da je poništeni rušljivi ugovor u istoj pravnoj poziciji kao i ništavi.[82] G. Đaimo navodi da jedan dio italijanske doktrine odobrava konverziju u ovom slučaju,[83] a on isključuje ovu mogućnost.[84]

Dok se većina u njemačkoj pravnoj teoriji danas izjašnjava u prilog mogućnosti konverzije poništenog rušljivog ugovora,[85] Reichsgericht je 1912.

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ugovor, a čije pravno dejstvo je ono koje su strane htele poništenim ugovorom." Vodinelić, V. (2017). *Ibid.*, 472.

[81] K. Diez Soto isključuje ovu mogućnost i navodi razloge protiv, koji se pominju u literaturi. Prenijećemo neke od njih: A) sam tekst čl. 1424. IGZ koji govori samo o ništavim ugovorima (što je slučaj i sa čl. 106. ZOO). B) Iako se norma koja predviđa konverziju mora u svojoj osnovi povezati sa zaštitom načela privatne autonomije, nije opravdano smatrati izrazom ovog opšteg načela analognu primjenu izvan granica izričite zakonske odredbe. Stoga normu treba restriktivno tumačiti. C) Nespojivost razloga rušljivosti, naročito mana volje, sa konverzijom. Kod drugih uzroka: dakle, ograničena poslovna sposobnost jedne od ugovornih strana ili sukob interesa između zastupnika i zastupane stranke (čl. 1394. IGZ), moguće je zamisliti zamjenske poslove kojima je razlog poništenja više ne bi bio relevantan. D) Konverzija može dovesti do nepravednih posljedica po jednu ili drugu stranu. E) Konverzija je namijenjena pružanju izuzetnog rješenja za održavanje poslovne inicijative, koja se smatra dostojnom zaštite, a koja ne proizvodi dejstvo iz razloga tehničke prirode koji su svojstveni sistemu kontrole nad privatnom autonomijom. Čini se da takav izuzetan tretman nije opravdan u prisutnosti posla koje se može izliječiti na drugi način. Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 141–144.

[82] Gandolfi, G. (1988, reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea.* Milano, 239–240.

[83] To su Cfr. L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano*. Napoli, s.d., 376; A. Fedele, (1943). *La invalidità del negozio giuridico di diritto privato*. Torino, 39, nota I; Mirabelli, G. (1967). *Dei contratti in generale*. Torino, 455; Carresi, F. (1987). *Il contratto*. Milano, 591. Nav. prema Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 33 fn. 32.

[84] Obrazloženje je da rušljiv ugovor proizvodi dejstvo te, pošto njegovo poništenje proizilazi iz volje strane u ugovoru, nije jasno zašto bi strana prvo djelovala u pravcu poništenja ugovora, a zatim njegovog spasavanja konverzijom, kako bi dobila isto ili čak umanjeno dejstvo, znajući da naspram toga stoje druge mogućnosti: strana se može odreći prava na poništenje (konvalidacija odricanjem), sačekati istek prekluzivnog roka za vršenje tog prava (zakonska konvalidacija) itd. Međutim, sa aspekta domaćeg prava, stava smo da je krug lica koja imaju pravo na poništavanje ugovora širi od strana u ugovoru, zbog čega, vjerujemo, otpada prethodna argumentacija. Svako treće lice koje ima neposredni pravni interes ima pravo na poništavanje, čime se krug lica koja mogu tražiti poništavanje rušljivog ugovora približava krugu lica koji mogu tražiti oglašavanje ugovora ništavim. Pajtić, B., Radovanović, S., Dudaš, A. (2018). *Obligaciono pravo*. Novi Sad, 402.

[85] D. Bernait navodi pristalice i protivnike mogućnosti konverzije poništenog rušljivog ugovora iz čega je jasno vidljivo opredjeljenje njemačke doktrine:

Saglasni su: Beurskens (Beurskens), Elenberger (Ellenberger), Faust, (Faust), Hefermel (Hefermehl), Mansel (Mansel), H. Rot, (H. Roth), Ventland (Wendtland), Bork (Bork),

godine odbio ovo stanovište, izjasnivši se u *obiter dictum* da „konverzija nije kompatibilna sa preobražajnim pravom poništenja."[86] Posljedično, postoji u teoriji i manjinsko mišljenje koje odbija konverziju u ovom slučaju.[87]

Prema protivnicima konverzije, poništenje rušljivog ugovora od jedne strane poništava izjavu volje, te poslije poništenja nemamo osnovu za konverziju. Volja za poništenjem je takođe stvarna volja kojom je okončano dejstvo ugovora, te ne može protivno toj stvarnoj volji doći do konverzije, već strana svoj interes treba da zadovolji zaključenjem novog ugovora. Posljedično, konverzija neće uspjeti. Ali, po D. Bernaitu, konverzija neće uspjeti, ne zbog toga što je stvarna volja za ugovorom poništena konzumacijom prava poništenja, već zbog neispunjenosti uslova za konverziju, konkretno – hipotetičke volje koja se neće moći utvrditi zbog poništenja. Kada je u izuzetnim slučajevima hipotetička volja postojeća, uprkos činjenici da je izražena stvarna volja za poništenjem, konverzija će biti moguća.[88] D. Bernait zaključuje da ne treba isključiti mogućnost konverzije kod poništenih rušljivih ugovora, mada će ta mogućnost u konkretnim slučajevima uglavnom otpasti, najčešće zbog nemogućnosti da se utvrdi hipotetička volja.[89] Konačno, vjerujemo da ne treba apriori isključiti mogućnost konverzije. U pogledu djelimično rušljivih ugovora,[90] važi ono što smo prethodno naveli kod djelimično ništavih. Primjena konverzije je izuzetno problematična.

Enekcerus i Niperdaj (Enneccerus/Nipperdey), Keler (Köhler), Volf i Nojner (Wolf/Neuner), O. Fišer (O. Fischer), Lenen (Leenen), Braš (Brasch), Šenveter (Schönwetter), Glajm (Gleim). (Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des Para. 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition. Kindle Edition. Frankfurt am Main, 36, fn. 195).

[86] RGZ 79, 306, 310. čime se na određeni način protvriječilo ranijem stavu u drugom predmetu (RGZ 62, 184, 186) da je zbog čl. 142. st. 1. NJGZ čl. 139. NJGZ (djelimična ništavost) primjenjiv na rušljive poslove – djelimična rušljivost. Berneith, D. (2016). *Op. cit.,* 36 f. 196.

[87] Protiv su: Flume, Dorn, Krampe, Finger (H-J. Finger), Siler (Siller), Špis (Spieß). (Berneith, D. (2016). *Op. cit.*, 37, fn. 197).

[88] *Ibid*., 38–40.

[89] *Ibid*., 42.

[90] ZOO ne predviđa djelimičnu rušljivost, dok je OIZ u čl. 918. izričito predviđao ovaj institut koji je poznat i uporednopravno. Znajući da je primjena pravila „predratnih" propisa (među njima OIZ) jedini kod nas zakonom uređen način popunjavanja pravnih praznina, u slučaju da se pred sudom pojavi pitanje djelimične rušljivosti ugovora vjerujemo da je otvorena mogućnost primjene pravila iz OIZ-a. Jednostavnije, način za primjenu ovog instituta je i analogija sa institutom djelimične ništavosti. Takav stav nalazimo i u domaćoj teoriji: „...u doktrini se s pravom ističe da nema načelnih prepreka da se pravila o djelimičnoj ništavosti analogno ne primjene i na rušljivost". Pajtić, B.; Radovanović, S.; Dudaš, A. (2018). *Obligaciono pravo.* Novi Sad, 405.

PUNOVAŽAN UGOVOR

Shvatanje konverzije kao rekvalifikacije, i to rekvalifikacije *punovažnog* ugovora, nalazimo i u domaćoj sudskoj praksi iz 2002. godine: Ugovarači su zaključili punovažan ugovor o poklonu stana bez tereta, ovjeren pred sudom, koji je izvršen. Međutim, strane su se usmeno sporazumjele da poklonoprimac doživotno izdržava poklonodavca, što je on i izvršio, ali nije dobio stan po ugovoru o doživotnom izdržavanju, već ranije po ugovoru o poklonu. Po ocjeni Vrhovnog suda došlo je do konverzije ugovora o poklonu u dvostrano teretni ugovor kojim se jedan ugovarač obavezuje da doživotno izdržava drugog ugovarača – koji mu za to još za života ustupa u vlasništvo svoju imovinu (za koji ugovor je u pogledu forme također dovoljno da su potpisi ugovarača na takvom ugovoru ovjereni pred sudom). Zato se po ocjeni Vrhovnog suda ne radi o poklonu, već o ovom teretnom poslu (zbog čega nema povrede nužnog dijela tužilaca, koje bi bilo da se radi o poklonu).[91] Vidimo, radi se o konverziji kao rekvalifikaciji punovažnog ugovora, što je neprihvatljivo. Punovažan ugovor ne može konvertirati. Dok rekvalifikacija dovodi do stvarno traženih pravnih dejstava, konverzija ugovoru daje dejstva koja kao takva strane nisu predvidjele.[92]

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[91] Vrhovni sud Srbije, Rev. 1424/02. od 3. 10. 2002.

[92] Peeraer, F. (2014). "Nietigverklaring vs. gerechtelijke conversie van een contract of van een contractueel beding" in S. Stijns en P. Wéry (eds.). *De rol van derechter in het contract, die Keure*. Brugge, 321–372, 11.

Prethodno smo vidjeli, po nekim njemačkim autorima konverzija je poseban slučaj tumačenja (čl. 133. i 157. NJGZ). U francuskoj teoriji postoji stav o mogućnosti rekvalifikacije ništavog u neki drugi ugovor ukoliko su ispunjeni uslovi za njegovu punovažnost, što bi trebalo da predstavlja konverziju. (Chantepie Gaël, Latina Mathias, 2016. La réforme du droit des obligations, Commentarie théorique et pratique dans l'ordre du Code civil, Paris, 481, nav. prema: Dolović Bojić, K. (2020), „O konverziji ugovora u srpskom pravu sa posebnim osvrtom na sudsku konverziju*", Anali Pravnog fakulteta Univerziteta u Beogradu*, godina LXVIII 1/2020, 146–163, 151). O neprihvatljivosti konverzije kao rekvalifikacije možda najbolje govori jedan primjer iz francuske pravne istorije. Iako je francuski pravni sistem i danas bastion otpora širenju instituta konverzije u evropskom kontinentalnom pravnom krugu, bili su preduzeti (neuspješni) napori da i Francuski građanski zakonik dobije opšte pravilo o konverziji. Godine 1945. osnovana je komisija za izmjenu FGZ. Potkomisija za Opšti dio je razmatrala više prijedloga opšteg pravila za konverziju. „Kada ništav pravni posao zadovoljava uslove za drugi pravni posao, ovaj drugi će važiti, ako se može smatrati da bi ga strane zaključile da su znale za ništavost." Ovaj prijedlog pisan po uzoru na čl. 140. NJGZ zatim je redigovan kako bi se ipak ostalo na planu tumačenja. „Ništavost posla ne sprječava volju strana da proizvede dejstvo kada se ova volja može protumačiti primjenjivom na drugi pravni posao čiji su uslovi za valjanost ispunjeni." Zatim je i ovaj drugi prijedlog ocijenjen takvim da sudu daje previše mogućnosti za redigovanje ugovora, te je uslijedio prijedlog konverzije kao rekvalifikacije: „Kada je pravni posao ništav, on može dobiti kvalifikaciju valjanog pravnog posla, ukoliko je takva kvalifikacija u

ZAKLJUČCI

Opšti zaključak bismo mogli „pozajmiti" od jednog italijanskog autora koji je o konverziji ugovora napisao „Sve je problematično u ovom institutu."[93]. Međutim, vjerujemo da smo došli do određenih novih saznanja u vezi sa poljem primjene konverzije, te ćemo u ovom dijelu u najkraćem sumirati kroz sljedeće posebne zaključke: 1) Konverzija se primjenjuje na ništave ugovore, i neopravdano je apriori isključiti primjenu kod nemoralnih i protivzakonitih ugovora. 2) Za primjenu ovog instituta nije dovoljna početna ništavost, već prethodno moraju biti neuspješno iscrpljeni svi ostali raspoloživi instituti za opstanak ugovora na snazi. I izuzetna mogućnost konvalidacije ništavog ugovora prethodi primjeni konverzije. 3) Nekonvencionalna primjena konverzije na nevaljani dio djelimično ništavog ugovora – djelimična konverzija ugovora – izuzetno je problematična. 4) Kod nepostojećih ugovora logično je pitanje kako zaliječiti nešto što ne postoji, te je za ovu kategoriju ugovora konverzija isključena (vjerujemo da rad predstavlja i, makar u tragovima, prilog domaćoj teoriji u pitanju razgraničenja ništavih i nepostojećih ugovora). Simulovani ugovor se nikada ne konvertuje i relativna simulacija je institut različit od konverzije. 5) Ništavost ugovora u čl. 106. ZOO moramo tumačiti široko, kao nemogućnost ugovora da proizvede dejstva. 6) U materiji rušljivosti zauzeli smo afirmativan stav u pogledu primjenjivosti konverzije. 7) Punovažan ugovor se ne konvertuje i konverzija je institut različit od rekvalifikacije.

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saglasnosti sa izraženom namjerom strana." Ovakav prijedlog pravila o konverziji – koji je trebalo da se nađe u opštem dijelu FGZ, usvojen od potkomisije 5. decembra 1946. godine, razmatran je, ocijenjen kao pogrešan i beskoristan (fra. *erronée et inutile*) i odbačen 12. februara 1948. godine – ocijenjen je pogrešnim jer pravni posao koji se može rekvalifikovati nije ništav, već pogrešno kvalifikovan, i beskorisnim jer ovakva odredba ne bi bila ništa drugo do vid tumačenja. (V.: Gandolfi, G. (1988, reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea.* Milano, 136–142.)

[93] Franko Karezi (Franco Carresi). Navedeno prema: Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 10.

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NULLITY AS A PREREQUISITE OF CONTRACT CONVERSION*

ABSTRACT: Although it has been legally recognized since 1978, the conversion (lat. Conversio – conversion) of contracts is one of the institutes to which no deserved attention has been paid in domestic theory. In textbooks that cover the general part of civil law, and those used for teaching the law of obligations, this institute is, with certain exceptions, presented rather briefly – usually, beside the legal definition, we find only the field of application and examples of conversion. We were unable to find monographs on the subject of conversion. On the other hand, in foreign literature, mostly German and Italian, we find a large number of monographs on the topic of conversion. The suject of this paper is one part of the norm that prescribes the conversion of a contract, and that is the nullity of a contract, which is provided as a precondition for the application of the institute. The scope of application of conversion seems to be precisely and clearly defined, especially having in mind the text and the place of the norm within the Law Contracts and Torts, and in this paper we will see if that is actually the case. In the search for the answer, we also used the comparative legal method.

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The area of application of conversion was considered – and we did not limit ourselves only to null and void contracts, but we considered the possibility of its application to non-existent, null and void, voidable contracts, then to partially null and void contracts, but also to valid contracts. Within null and void contracts, special attention is paid to those illegal and immoral, and within non-existent ones - to a simulated contract.

Keywords: conversion, nullity, voidability, relative simulation, requalification

INITIAL NOTES AND THE OVERVIEW OF THE COMPARATIVE DEVELOPMENT OF THE INSTITUTE

To begin with, a summary of the development of the institute since its entry into force of in the German Civil Code (hereinafter: GCC), i.e. from 1900 onwards is given. The GCC contained a general rule on conversion in Article 140, the wording of which led to discussions and different understandings of the legal nature of the institute.[1] According to some German authors, conversion is a special case of interpretation (Articles 133 and 157 of the GCC[2]). This is a minority view (the representatives of this view are Coing, Pawlowski and Brox)[3]. According to Coing, conversion helps the actual will of the parties to achieve action. The possibility of conversion is based on the freedom of qualification given to judges by the applicable rules of interpretation. *Brox states that the conversion will take place if it corresponds to the will of the parties, which can be determined by interpretation*.[4] In contrast, most German authors, supported by case law[5] (*Bundesgerichtshof* and formerly *Reichsgericht*), are of the opinion that conversion differs from interpretation. Unlike Article 133 of the GCC, conversion requires not a real, declared will,

[1] The very name of the provision Reinterpretation (Umdeutung) is problematic, and from today's dominant point of view we can say wrong. This mistake was not repeated in later Codes.

[2] According to Article 133 of the GCC, when interpreting a declaration of will, the literal meaning of the expression should not be firmly adhered to, but the actual will should be determined. According to Article 157 of the GCC, the contract is interpreted in accordance with the principle of conscientiousness and honesty and taking into account good business practices.

[3] Krampe, C. (1980). *Die Konversion des Rechtsgeschafts,* Vittorio Klostermann, Frankfurt am Main, 3.

[4] *Ibid*., 4.

[5] With the caveat that case law is not entirely homogenous. For a detailed analysis of German case law, see: *Ibid*., 142+.

but a hypothetical will.[6] A hypothetical will must be distinguished from an assumed (real) will. A representative of this point of view is Larenz.[7] It is required to establish *the practical economic objectives pursued by the parties and to assess the interests of the parties.* Since the interpretation (Articles 133 and 157 of the GCC) previously established that the contract was null and void, which means eligible for conversion, and the conditions for the validity of another contract were met, the question should be asked whether another contract is a suitable means to achieve these goals, and whether it corresponds to the evaluation of the interests of the parties. If the conversion was just one case of interpretation, according to the supporters of this point of view, Article 140 of the GCC would, in addition to Articles 133 and 157, be superfluous.[8] The representative of the third point of view is Flume.[9] According to him, Article 139 of the GCC (partial nullity) regulates quantitative partial nullity, and Article 140 (conversion) regulates qualitative partial nullity.[10] Regardless of the fact that the conceptions of conversion as interpretations and as a kind of partial nullity have their supporters in theory,[11] and that in practice there are court decisions based on these conceptions, the conception of conversion as an independent institution has indisputably imposed itself as predominant.[12]

Italian legislation was the next important one to accept conversion. The general rule of conversion contained in Article 1424 of the Italian Civil Code (hereinafter: ICC) is no less controversial than that in Article 140 of the GCC,

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[6] Krampe, C. (1980). *Die Konversion des Rechtsgeschafts,* Vittorio Klostermann. Frankfurt am Main, 4–5.

[7] Cited according to: *Ibid*., 5.

[8] *Ibid*., 6.

[9] *Ibid*., 6.

[10] Doctrine always places conversion into the teaching of legal affairs as acts of private autonomy. In this sense, only *Ramm* notices a change in the function of the institute, which he attributes to the transition of the state from a liberal to a social phase. The conversion, under the auspices of private autonomy, served the parties to achieve their goal in another way in the event of an invalid legal transaction. Today, on the other hand, conversion is used to "achieve a socially desired result based on the alleged will of the parties." *Ibid*., 7.

[11] The impression we get is that these minority perceptions are not really perceptions about the nature of the institute of conversion, but perceptions that essentially deny this institute (very controversial and difficult to accept) by making it a part of other institutes.

[12] Apart from being predominant, it also corresponds to the view of the man who is considered by many to be the creator of the institute – C. F. Harpprecht, thus we can say that it is also older. *According to him, it is a matter of legal transformation – conversion in the true sense of the word, while in the case of conversion as an interpretation it would be a matter of revealing the hidden side of the contract contained in it - revealing the contract as it really is* [as in the case of conversion as qualitative partial nullity]. Zimmermann, R. (1996). *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Clarendon Press, Oxford, 684.

which served as the model. According to current Italian literature[13] the institute of conversion is built on the principle of preserving work,[14] on the one hand, and protecting conscientiousness and honesty on the other.[15] Austrian and Swiss legislation does not contain a general rule on conversion. However, the institute is not at all foreign to the case law and jurisprudence of these countries, and in the literature it usually refers to German law.[16] The Swiss Federal Court (Bundesgericht) has formulated the rule on conversion in the following way: "If a null legal transaction meets the requirements of another legal transaction that has the same goal and result (Zweck und Erfolg), the second transaction will be valid if it can be assumed that the parties would have wished it if they had known that the undertaken transaction was null and void".[17] In older Swiss literature from 1937, we find the view (O. Cornaz[18]) that

[13] Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè, Milano, 5–15.

[14] One of the manifestations of this principle is Article 1367 of the ICC, according to which the contract and contractual provisions should be interpreted in the sense in which they can produce some effect, and not in the sense in which it would not have effect.

[15] Part of the theory does not accept that the principle of preserving the job is the basis for conversion because due to the conversion the contract will not preserve its effect, but will be converted into another contract - it will produce the effects of that other contract. See: Gabrielli E. (2012). *Commentario del Codice civile,* Libro IV – Titolo II: Dei contratti in generale, artt. 1387–1424; Art. 1424 – Conversione del contratto nullo, Torino, commento di Maddalena Rabitti, 733. According to C. Diez Soto, the acceptability of the principle of preservation in this case directly depends on how broadly a particular author is willing to interpret the principle itself. He, in order to avoid confusion, speaks of the *principio de economia juridica*, a term that should include all mechanisms aimed at preserving the business initiative of the parties (getting the best possible result in the available situation). Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 93. F. Galgano sees the basis of conversion only in the principle of conservation, Galgano F. (2010). *Trattato di diritto civile, Volume Secondo, Le obbligazioni in generale, Il contratto in generale, I singoli contratti,* seconda edizione accresciuta, Padova, 378. According to M. Cinque one part of the doctrine sees the basis of conversion only in conscientiousness and honesty (in an objective sense). Also, for one part, that basis is in protecting the trust of the party or parties (Cinque M. (2003). *Conversione dell contratto nullo: rilevabilita ex officio e contratto contrario a norme imperative,* in Nuova giur. Civ. Comm. 2003 I, 841–852, 846). According to Mr. Gandolfi, the principle of conscientiousness and honesty actually works in correlation with the principle of responsibility and the principle of protection of trust. Gandolfi G. (1988, reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea,* Milano, 400.

[16] Krampe C. (1980). *Die Konversion des Rechtsgeschafts,* Vittorio Klostermann, Frankfurt am Main, 19–23.

[17] BGE 93 II, 439 (452). *Ibid*., 21–22.

[18] Cornaz O. (1937). La conversion des actes juridiques (These Lausanne), cited according to Krampe C. (1980). *Die Konversion des Rechtsgeschafts,* Vittorio Klostermann, Frankfurt am Main, 23.

conversion is a form of interpretation. The dominant position in Switzerland emphasizes the independence of the institute of conversion. What is relevant is the hypothetical will. What is more, according to Elly Weil, a concept of conversion that would require a real will for a replacement transaction is not possible at all – because then it would be an interpretation, not a conversion.[19]

In 1978, the SFRY got the Law of Contract and Torts (hereinafter: LCT), and with it, for the first time, the general rule on conversion contained in Art. 106. The standard is identical to the one from the Sketch of the Law of Obligations and Contracts (hereinafter Sketch),[20] with the only difference being that the Sketch speaks about the economic goal of the parties, and the LCT only about the goal, and is modelled on German law. At the end of this review, which we believe was necessary and summarized[21] we will provide a tabular overview of the general conversion rules in parallel.

***Table 1.* – A comparative overview of the general rules of contract conversion**

Country	General rule on conversion – translation	General rule on conversion in the original language
Germany	GCC Art140 **Reinterpretation (new interpretation)** If a null and void legal transaction meets the requirements of another legal transaction, then the latter will apply, if it is to be assumed that its validity would have been desired if the nullity had been known.	BGB Para. 140 **Umdeutung** Entspricht ein nichtiges Rechtsgeschäft den Erfordernissen eines anderen Rechtsgeschäfts, so gilt das letztere, wenn anzunehmen ist, dass dessen Geltung bei Kenntnis der Nichtigkeit gewollt sein würde.

[19] Cited according to: Krampe C. (1980). *Die Konversion des Rechtsgeschafts,* Vittorio Klostermann, Frankfurt am Main, 22.

[20] Konstantinović, M. (1996). *Obligations and contracts, Sketch of the Law of Obligations and Contracts,* Official Gazette, Belgrade, Art 83.

[21] Necessary since it somewhat explains the institute in its development perspective; Summarized because the review should take up much more space than this paper allows, and because the institute of conversion can be traced back to the period before 1900 – through the Dresden and Bavarian drafts and the Saxon Civil Code to *Christian Ferdinand Harpprecht* and his *Dissertatio juridica inauguralis, de eo, quod justum est, circa conversionem actuum negotiorumque juridicorum iamiam peractorum* from 1747 and further to Roman Law (*(In Digest, there are several situations in which an invalid legal transaction is treated in a way we would call a conversion today*.) Zimmermann R. (1996), *The Law of Obligations, Roman Foundations of the Civilian Tradition,* Clarendon Press, Oxford, 684).

Italy	ICC Art 1424 **Conversion of a null and void contract** A null and void contract may produce the effects of a different contract, the content and form of which it contains, when, having regard to the aim pursued by the parties, it should be considered that they would have wished had they known of the nullity.	CCI Art. 1424 **Conversione del contratto nullo**. Il contratto nullo può produrre gli effetti di un contratto diverso, del quale contenga i requisiti di sostanza e di forma, qualora, avuto riguardo allo scopo perseguito dalle parti, debba ritenersi che esse lo avrebbero voluto se avessero conosciuto la nullità.
Portugal	PCC Art 239 **Conversion** A null and void legal transaction may be converted into a transaction of various kinds or contents, the essential components of which it contains in content and form, when the aim pursued by the parties allows us to assume that they would have wished it had they foreseen invalidity.	CCP ARTIGO 293º **(Conversão)** O negócio nulo ou anulado pode converter-se num negócio de tipo ou conteúdo diferente, do qual contenha os requisitos essenciais de substância e de forma, quando o fim prosseguido pelas partes permita supor que elas o teriam querido, se tivessem previsto a invalidade.
SFRY	LCT **Conversion** Art 106 When a void contract fulfils the conditions for the validity of another contract, then that other contract will be valid among the contractors, if it would be in accordance with the goal that the contractors had in mind when they concluded the contract and if it can be taken that they would conclude that contract had they known of the nullity of their contract.	ZOO **Konverzija** Art 106 Kada ništav ugovor ispunjava uslove za važenje drugog ugovora, tada će taj drugi ugovor važiti među izvođačima, ako bi to bilo u skladu sa ciljem koji su izvođači imali na umu prilikom zaključivanja ugovora i ako to može biti uzeli da će zaključiti taj ugovor da znaju za ništavost svog ugovora.

The Netherlands	DCC Art 3:42 If the purpose of a null legal transaction corresponds to the purpose of another legal transaction, which could be valid, to such an extent that it should be assumed that this second legal transaction would have been undertaken if it had not been done with the first due to nullity, then it will produce the effects of the other transaction, unless it would be unreasonable towards a third interested person who did not participate in the legal transaction as a party.	BW Artikel 42 Beantwoordt de strekking van een nietige rechtshandeling in een zodanige mate aan die van een andere, als geldig aan te merken rechtshandeling, dat aangenomen moet worden dat die andere rechtshandeling zou zijn verricht, indien van de eerstgenoemde wegens haar ongeldigheid was afgezien, dan komt haar de werking van die andere rechtshandeling toe, tenzij dit onredelijk zou zijn jegens een belanghebbende die niet tot de rechtshandeling als partij heeft medegewerkt.

Conditions necessary for conversion.– A contract that is concluded must be definitively unsuitable to produce its effects. This means that it is not enough for a contract to be null and void, but the court in the procedure must determine that the contract is "ripe" for declaring it null and void. This means that all the institutes that allow the contract to produce its effects have previously been unsuccessfully exhausted or are inapplicable[22]. The contract does not need to be declared null and void in order to be converted, but if it has previously been declared null and void, this is not an obstacle to conversion.[23] Another contract must be found whose conditions for validity (legal

[22] So, interpretation, partial nullity, but also convalidation of a null and void contract – because a validated contract is more in accordance with the will of the parties than a converted contract.

[23] F. Peeraer states that according to German and most of Dutch doctrine, the contract must first be declared null and void, and then converted, in order to avoid the consequences of nullity. On the other hand, the Belgian doctrine sees conversion as an alternative to declaring contracts null and void. He adheres to the first point of view. Peeraer, F. (2014). "Nietigverklaring vs. gerechtelijke conversie van een contract of van een contractueel beding" in S. Stijns en P. Wéry (eds.), De rol van derechter in het contract, die Keure. Brugge, 321–372., 19.

In domestic practice, the prevailing view is the one of conversion of a contract that has not been declared null and void (eg. Judgment of the Supreme Court of Serbia, Gzz-96/88 of 13 December 1988, Decision of the Higher Commercial Court in Belgrade, 9766/96 of 12 February 1997, Decision Of the Supreme Court of Cassation Rev 483/2015 of 16 March 2016, etc.), but we also find the conversion of a contract that was previously declared null and void (Decision of the Supreme Court of Serbia, Rev. 1613/94 of 20 April 1994, from which the position that the conversion of a joint construction contract previ-

capacity of the parties, admissibility of content, required form)[24] are met by the concluded contract[25] and whose effects[26] would be appropriate for the parties to fully or substantially achieve the goal they aspired to. The validity of this second contract is assessed at the time of concluding the void contract. As the conversion of contracts for pecuniary interest can reach the (original) equivalence of benefits through the effects of the replacement transaction, the court can make adjustments in order to maintain a balance of mutual benefit. The court must conclude that "it can be considered" that the parties, if they had known about the nullity at the time of concluding the deal, would have concluded this second contract. This is the hypothetical will[27] of the parties *at the time of concluding the contract*, and the basic criterion for its determination is precisely the possibility of achieving the goal pursued through the effect of the replacement contract. Therefore, if through the effect of the replacement contract the goal could be achieved in full or in essence – the condition of hypothetical will is fulfilled. If, due to certain circumstances, after the conclusion of the contract, the actual will of one of the parties would be changed so that he or she no longer wants the effects of the contract, i.e. achieving the goal, it is not relevant at all for determining the fulfilment of the hypothetical will. If the parties state in the contract that they do not want any other contract in case of nullity, then the hypothetical will is not to be determined at all, and the conversion will not occur. The parties must not knowingly use conversion as a means of circumventing the legal system's requirements for the validity

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ously declared null and void into a long-term lease or similar unnamed contract prevents restitution).

[24] Stojanović D. (1996). *Uvod u građansko prav*o, 9th edition. Belgrade, 382.

[25] In German theory, the possibility that even this second contract not be valid is not prohibited, but only less lacking than the concluded one. (*Demnach kann unter anderem auch von einem nichtigen zu einem schwebend unwirksamen Geschäft konvertiert werden.*) Berneith D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition, Kindle Edition. Frankfurt am Main, 43.

[26] However, these effects must not exceed the effects that the concluded contract would have if it were valid.

[27] We must not confuse it with a presumed will, because a presumed will is a real will, which is not certain, but is assumed to exist, while in the case of a hypothetical will it is not a real will at all (not even implicit, not even awareness that through conversion a replacement contract could save the goal being pursued). Within domestic literature, we find the attitude that this is a hypothetical will in Dragoljub Stojanović – Stojanović, D. (1996). *Uvod u građansko pravo*, 9th edition. Belgrade, 381. It would be good to emphasize that in the literature there is another subjective view that this element is a matter of real will, as well as an objective view that the principle of conscientiousness and honesty is applied to this element.

of the contract. Although domestic authors cite mutual conscientiousness as a condition in concluding a contract, conversion is considered when both parties are conscientious or when at least one party is conscientious. The court will consider the interests of both parties, the interests of third parties, not excluding the general interest, before deciding on the possibility of conversion in a particular case. Interests are not related to the moment of concluding the contract, unlike the hypothetical will. When the conditions are met, the institute of conversion acts in a way that invalidates the effects of another contract, thus achieving an objective practical economic goal to which the parties aspired to when concluding the contract.[28] The position on acting exclusively at the request of the parties[29] in cases of conversion increasingly gives way to

[28] There are purely legal technical differences on this issue in the texts of the norms on the conversion of different codes: according to the German Civil Code and the LCT, another contract will be valid, but in theory it is not disputable that the concluded contract produces the effects of another contract, as provided by, for example, the Italian Civil Code.

[29] Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava,* third non-revised edition, Belgrade, 474 The court never deals with the issue of conversion *ex officio*, but only upon request or upon objection. According to C. Diez Soto the majority jurisprudence supports this point of view. (Diez Soto C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 135, fn. 403). Giaimo criticizes this position (Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 109–122) and concludes (121–122):

Following the argument, a response can be made to critical observations that have traditionally been made about the possibility for the court to identify the conditions for conversion, even without the explicit request of the parties. The fear that it will be possible to suppress the will of the parties through such an operation is in fact baseless, if only one considers the way in which the conversion is aimed at ensuring that the will itself can achieve some effects and not remain finally suppressed for reasons of nullity. The intervention of the court is, therefore, entirely focused on such a result, provided, of course, that the parties do not provide evidence to the contrary interest.

Our case law sometimes refuses to examine *ex officio* whether the conditions for conversion are met. For example:

In order for there to be a conversion of the contract, that is, that a void lifetime care contract due to a defect in form may produce legal effect as a gift contract, it is necessary for the defendant to make such a request. As the defendant did not make such a request, and the court decides within the limits of the requests made during the proceedings, no other decision could have been made, but for the contract to be declared null and void. (Judgement of the Supreme Court of Serbia, Gzz-96/88 from 13 December 1988.)

However, we also find opposing views. For example, the Supreme Court of Serbia, Rev. 2339/99 from 30 December 1999, regarding the nullity of the contract on lifelong care where the judge at the conclusion of the contract did not make a record, the instructions are given to the lower court by a decision: *... If it were determined that the judge did not actually read the contract and warn the contractors of the consequences of the conclusion, it was necessary, in terms of Art. 106 of the LCT, to examine the conditions for the conversion of the contract...* Also, Decision of the Higher Commercial Court in Belgrade,

the position that the conversion is done *ex officio* (the question of conversion is raised *ex officio* whenever the question of declaring the contract null and void arises). However, without the active participation of at least one party, it is difficult to imagine that the court itself could determine the goal pursued, an adequate second contract and apply the institute successfully in general. Although the text of Article 106 of the LCT explicitly speaks of a null contract and the norm is systematized in law within the notion of a "null contract", and it could be concluded from the above that the field of application is clearly defined, we believe it would be hasty to draw such a conclusion. In foreign theory, it is not disputable that this "nullity" should be interpreted broadly. Instead of limiting ourselves to the institute of nullity, we must consider each case of its functional ineffectiveness (the impossibility of a contract understood as an instrument for achieving a certain goal to bring that goal).

NON-EXISTENT CONTRACTS

A non-existent contract is one that lacks what is elementary necessary for the existence (not for the validity) of any contract. While non-existent transactions have no effect, nor can they get it, null and void ones have no effect, but they can get it exceptionally, voidable ones have an effect, but they can lose it.[30] Specifically, in terms of conversion:

> *[Regarding a non-existent transaction]... "No institution is applicable that serves to make a transaction, despite its shortcomings, have affect: a transaction cannot (unlike a null transaction) be converted into another, valid one (no conversion) ... (no convalidation)."*[31]

We also find this understanding in the considered foreign literature, from which we point out two quotes:

> „In general, Article 140 of the GCC [conversion] does not apply to non-existent legal transactions (Nicht-Rechtsgeschäfte), arising, for example,

9766/96 from 12 February 1997. In this regard, in this context we must commend the legal understanding adopted at the session of the Civil Division of the Supreme Court of Cassation held on April 2, 2019 regarding the validity of the currency clause in Swiss franc loans and conversion agreements (Bulletin 1/19), which encourages courts to approach the conversion *ex officio.*

[30] Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* third non-revised edition, Belgrade, 467.

[31] *Ibid*., 469.

from misunderstandings. First, a legal transaction leading to reinterpretation must be null and void..."[32] in terms of German law and

„...This is why in Italy today it is necessary to specify under what conditions a business can be considered 'void' – and therefore such that it can produce effects, albeit exceptionally – or instead non-existent, and such that it cannot be classified under the legislative provision, of Article 1424, line one."[33]... *[conversion]* in terms of Italian law.

It does not seem possible to resist arguments relating to the logical impossibility of fixing something that does not exist. However, the boundary between non-existent and void contracts is a difficult one to determine. The criterion for the differentiation is a problem. In the domestic literature we can find the position that a non-existent contract is the one that lacks some of the essential elements,[34] while a contract that has all the essential elements is null and void, but in some of them there is a defect that makes it void. We cannot accept this position. For example, form *ad solemnitatem* is an essential element of some contracts. If concluded without a form *ad solemnitatem*, the contract may be converted. So this is not a non-existent contract. On the ontological level, non-existence expresses the impossibility of identifying (in the legal sense) the factual state already at the existing level, while nullity refers to the pathology of the factual state which has already (in the legal sense) been identified, although negatively assessed.[35] F. Di Marzio's position seems reasonable, according to which *a null and void contract consists of (at least) those essential elements due to which it is socially recognizable as a contract (...), as opposed to a non-existent contract: legally insignificant and irrelevant.*[36] We could accept the view that the conditions for the existence of a

[32] Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Berueckksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition, Kindle Edition. Frankfurt am Main, 32.

[33] Gandolfi, G. (1988, reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea,* Milano, 237 fn. 13; also, same provision 94, 95.

[34] For example, Rašović Z. (2006). *Građansko pravo, Uvod,* Faculty of Law in Podgorica, Podgorica, 265–266: *Non-existent legal transactions are transactions that lack some important condition for existence (emergence). An important condition of a legal transaction is considered to be the one without which the legal transaction is inconceivable. These conditions most often concern the consent of wills, objects, causes, business abilities, form (when it is obligatory).*

[35] Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè, Milano, 38.

[36] Cited according to: *Ibid*., 38 fn. 43.

contract are met by a contract that contains those essential elements that make it socially recognizable as a contract.[37]

Simulated contract[38] the case of relative simulation is especially interesting from the point of view of conversion. Although it is regulated in the LCT in the part that regulates the shortcomings of will,[39] its essence lays in circumventing the law.[40] In domestic theory, we find the view that relative simulation and conversion are equated, leading to the misconception that a simulated contract can be converted. Relative simulation terminology is even used for contracts in conversion, calling them simulated (contract being converted) and dissimulated (replacement contract).[41] We will later see that this practice is not foreign to case law either. We also find such understandings in older foreign theory.[42] We can look for reasons for this in the similarity of the

[37] In the literature, we find that a contract concluded due to a misunderstanding, a contract concluded in jest, a contract concluded by a person who is completely incapable work-wise, a simulated contract, a fictitious contract are considered to be non-existent contracts.

Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava,* third non-revised edition. Belgrade, 468. Without any intent to engage in a more detailed study of a non-existent contract and determining the criteria for differentiating between it and a void one, and what we have come somewhat closer to in the previous lines, we will dwell briefly on the simulated contract.

[38] Most often, a simulated contract is classified as a prohibited contract. For example, Simonović, I. (2012). *Restitucija u građanskom pravu – Domašaj primene,* Ph.D. dissertation, Faculty of Law of the University in Niš. Niš 120–121. On the other hand, the understanding of apparent contracts as non-existent, according to the author, implies the following: a simulated contract is an illusion of a contract, which as such has the illusion of a cause, visible to the outside world and from the perspective of the outside world, and especially the contractor in the simulated contract, must not be nor contain anything fraudulent. We find fraudulence in a simulation agreement between the parties which is not contained in either a simulated or a dissimulated contract, but exists outside them, connects them and gives them teleological unity. Unlike in the case of a simulated contract, the parties try to hide this simulation agreement, just like the dissimulated contract, from the outside world.

[39] Which is not completely unjustified, since the statement does not correspond to the real will. However, this is not about the will being faulty, but about an absolute absence of will regarding the contract and its effect.

[40] The simulation itself is an act of circumventing the law, and the simulation is used in order to circumvent the law or a third party.

[41] Morait B. (2010). *Obligaciono pravo, Knjiga prva* – O*bligacije i ugovori*, Komesgrafika. Banja Luka, 201: ... The law in principle allows conversion, i.e. dissimulating a simulated transaction ... Under these conditions, the conversion is possible because it otherwise conceptually means the conversion of a void contract (simulated contract) into another valid (dissimulated) contract.

[42] C. Diez Soto lists examples of these positions (Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad*

wording of these two institutes and the fact that in both institutes we have one contract in the *input* and another contract in the *output*. We will list some features specific for the institute of relative simulation.

In the case of a relative simulation, the relationship that the parties truly wanted is established. The special nature of the relative simulation corresponds to the fact that the simulated transaction founded on one that is actually desired, inextricably linked to it thanks to a simulation agreement that gives the operation a teleological unity.[43] Unlike conversion, which presupposes the conscientiousness of at least one of the contracting parties, in the case of a relative simulation the parties have a common fraudulent goal, both are unconscientious. The will of the subjects is not only focused on achieving the effects arising from the disguised (dissimulated) contract, but also on *creating the illusion of a legal deal for the outside world*. Here, the law *does not try to help the parties*, but only provides a way to remove such an illusion, while preserving the interests of third parties.[44] The intervention of law, in the case of a relative simulation, does not help the parties to achieve the result they aspire to with certain "adjustments" to the contract. Instead, *it is about emphasizing the reality of the performed operation*, destroying the appearance of the simulated transaction, which is also desired by the parties[45] but not because of its regular effect. It is clear, therefore, that the simulated contract does not represent a contract, but only an illusion of a contract, a "*feigned representation*",[46] *which is not focused on the regular effects of the contract (the parties did not even want its regular effect).*

In the case of a relative simulation, we will perform a dissimulation - we will discover a transaction that is being disguised (dissimulated transaction). In case the transaction discovered in this way meets the conditions of validity, it will be valid.[47] However, in case such a transaction is invalid, *the possibility of saving it through conversion remains open.* [48]

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en el Derecho español, fn. 107): SATTA, G.: La conversione dei negozi giuridici, Milano, 1903. 10, LONGO, C.: Istituzioni di diritto privato. Padova, 1930. 60–61.

[43] *Ibid*., fn. 444.

[44] C. Diez Soto lists examples of these positions (Diez Soto C.M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, fn. 107): SATTA, G.: La conversione dei negozi giuridici. Milano, 1903. 10, LONGO, C.: Istituzioni di diritto privato. Padova, 1930, 166.

[45] *Ibid*., 166.

[46] General Property Code, Article 913.

[47] LCT, Article 66, par 2.

[48] It may not be completely unfounded to claim that the negligence and fraudulent intent of the parties is not sufficiently sanctioned by deprivation of objections according to Article 66, paragraph 3, but that they should be deprived of the possibility of saving the

Let us now consider one case from domestic case law from 2017:[49]

> "The plaintiffs' father, now deceased D.D., as the recipient of support, concluded a contract on lifetime care, which was verified by the Municipal Court in Ub in the case 3R No ...., on the 19th of January 2006, with the underaged V.V. sued here as the provider of the support, who was two years old at the time ... The underaged contractor was represented by his father as a legal representative in terms of Article 72, paragraph 1 of the Family Law, so the conditions for annulment of the contract in terms of Article 111 of the LCT were not met. Having in mind all of the above and that the written form of the contract on lifetime care was met, confirmed in the judge's verification in a non-litigious procedure in the sense of Article 195 of the Law on Inheritance, that contract produces legal effect ... Even under the condition that the contract for pecuniary interest in the name and on behalf of the minor up to the age of 14 could not be concluded by the legal representative, the contract would produce legal effect under Article 66, paragraph 2 of the LCT (conversion) as a gift contract because the conditions for its validity were met: it has been verified, and from the established factual situation the intention of generosity of the now deceased D.D. to the underaged V.V, as the granddaughter of his brother E.E, whose family took care of him as a member of their family until 1994 (before the conclusion of the contract) until his death."

As we can see, in this verdict, a sign of equality is placed between conversion and relative simulation. The parties were conscientious in concluding the contract, acted in accordance with the contract, fulfilled their obligations (for a minor enforcement agent, the legal representative concluded the contract and fulfilled the obligations under the contract), and there is no simulation, *and in case of nullity*, the contract on the gift would correspond to the hypothetical will of the parties. It is clear that this is Article 106 of the LCT – conversion, and not Article 66, paragraph 2 of the LCT – relative simulation. We are sure that the indistinguishability of these two institutes is widespread. For example, by looking at the material from the Conference of the Center for Education of Judges and Public Prosecutors in the Republic of Srpska, Banja Luka, from June 18, 2019, we see that among the three examples of case law that were to serve as examples for conversion, two are examples of dissimulation (relative simulation).[50]

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dissolved contract by conversion, but we are still of the opinion that the possibility of conversion should be accepted. After all, the unconsciousness is directed towards creating the illusion of a contract (simulated contract), and not towards a dissimulated contract.

[49] Supreme Court of Cassation number Rev 1663/2016 from 24 May 2017 (for the purpose of annulling the contract on lifelong support, deciding on the revision).

[50] Page 20, Available at: http://www.rs.cest.gov.ba/index.php/seminari-2019/69-186 banja-luka-forma-obligacionih-ugovora-i-pravne-posljedice-povrede-bitne-forme-ugovora/ 2643-materijal-j-pusac/file

On the other hand, we have examples in domestic case law of the correct distinction between these two institutes. We are now going to consider another, somewhat older verdict, of the Court of Appeals in Belgrade from 2013.[51] Here are the from the explanation:

> "...that the concluded loan agreement is in fact a disguised purchase and sale agreement of shares, concluded for the purpose of circumventing regulations in securities trading ..... The provision from Art. 106 of the same Law, stipulates that when a void contract meets the conditions for the validity of another contract, then the other contract will be valid for the contractors, if that would be in accordance with the goal that the contractors had in mind when concluding the contract and if it would be possible to consider that they would have concluded that contract if they had known about the nullity of their contract ... As the cited provision of Article 52 of the Law on the Market of Securities and Other Financial Instruments clearly prescribes under what conditions and in what way securities can be traded, the plaintiff, in order to avoid these norms, concluded a contract with the defendant on a loan ... the court found that the loan agreement in question was in fact a simulated agreement, which concealed the sale and purchase agreement, and which had the shares of the company "AA" as its subject.
>
> ...From the fact that the goal of the contract was the sale of shares of the mentioned company, it follows that the subject of the obligation is objectively impossible, and that the basic contract is contrary to natural regulations and null and void under Art. 103 of the LCT, since it was concluded contrary to the provisions of Art. 52 of the Law on the Market of Securities and Other Financial instruments, in force at the time of conclusion. The same contract does not meet the conditions for the validity of another contract determined in Art. 106 of the LCT, and in that sense, its conversion into another contract cannot be performed."

From the last paragraph it is clear that a dissimulated contract, and not a simulated contract, does not meet the conditions for conversion. Therefore, according to the rules of relative simulation – by the means of dissimulation, the court discovered the dissimulated job, which it then determined to be null and void, and then concluded that in the specific case the dissimulated contract cannot be saved by conversion. It is clear from the explanation, therefore, that this was not a conversion of a simulated job, but that the rules of both institutes were correctly applied. To conclude, relative simulation and conversion should not be considered to be the same within contemporary law.

[51] From the verdict of the Court of Appeals in Belgrade, Gž 878/2010 from 24 September 2013.

NULL CONTRACTS

Thanks to convalidation and conversion, unlike in the case of a non-existent contract to which this cannot be applied, a null contract can exceptionally – despite its shortcomings – be transformed into another, valid contract (by conversion)[52], and also exceptionally – despite its shortcomings – it can be strengthened so as to produce an effect (by convalidation).[53] However, at first glance, quite contrary to the previously stated position, according to the majority position in domestic doctrine, the conversion is intended for non-existent contracts, and is unsuitable for null and void transactions in the narrow sense.[54] This should be additionally explained. This part of domestic

[52] C. Krampe cites many examples of the conversion of a null contract from German case law: Conversion of legally impossible contracts (*Konversion eines rechtlich unmöglichen Vertrages*): 1. If the parties deal with the establishment or transfer of a real right, but the contract is not legally valid, it can still be converted into a contract with a legal and obligatory effect, 2. Unauthorized transfer of company shares to permissible transfer of rights from shares, 3. Conversion of a null and void founding act of a legal entity into a valid founding act of another legal entity, etc; Conversion of contracts that are void due to form violation (*Konversion eines formwidrigen Vertrages*): Here, according to C. Krampe, the basic field of application of conversion is the conversion of contracts that are void due to breach of form *ad solemnitatem* into contracts where such a form is not required; Conversion of illegal contracts (*Konversion eines verbotswidrigen Vertrages*): 1. A contract that has a price that is higher than the legally allowed price is converted into a contract with an allowed price, etc; Conversion of immoral contracts (*Konversion eines sittenwidrigen Vertrages*): a contract for the supply of beer with a decades-long expiration limit or no expiration limit, binds the inn excessively in terms of the duration, and is therefore immoral, and can be converted into a contract for the supply of beer with a reasonable duration. Krampe C. (1980). *Die Konversion des Rechtsgeschafts,* Vittorio Klostermann. Frankfurt am Main, 213–246.

[53] Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* third non-revised edition, Belgrade, 470. Of course, we are aware that some authors reserve the term convalidation exclusively for volatile contracts, as well as of the differences between the convalidation of a void contract and the convalidation of a volatile contract.

[54] *In jurisprudence, it is widely accepted that conversion should be linked exclusively to non-existent contracts. The first confirmation of the above is in the understanding of absolutely null and void contracts as forbidden, either by law or morality, so when something in that sense is forbidden, it cannot in any way pass into the field of validity. We find another confirmation in what precedes the conversion, namely: "the parties, due to their ignorance ... or incompetence ... make the contract so as not to provide all the essential conditions for its conclusion."* Dolović, K. (2011). Nepostojeći ugovor. *Annals of the Faculty of Law of the University of Belgarde,* year LIX no. 2/2011, 263–278, 277.

As for the conversion, it can be said that it usually occurs due to the fact that the parties are incompetent in concluding the contract or are not informed about the necessary conditions required by law for its validity, so the contract is so poorly made that, according to the law itself, it did not actually come into being, but what they made can be another contract, if it achieves the same goal and if it is an expression of the will of the parties...

theory does not recognise non-existent contracts as a category different from null ones (and therefore we did not deal with these positions in the previous part), but under the influence of older French theory divides null contracts into non-existent and null *stricto sensu*. These authors do not consider non-existent contracts to be those that lack an essential element without which a contract is not socially recognizable as such, but all those contracts that do not meet the conditions for validity of a contract (absence of an essential element, regardless of whether the social recognition of a contract as such depends on it or some defect in relation to the essential elements of the contract due to which the contract loses its effect and is sanctioned by nullity).

As we have previously noted contracts that do not contain at least those essential elements without which a contract cannot be socially recognized as such, here we are talking about contracts *that meet the conditions for the existence of the contract (i.e. existing contracts)*, but *do not meet the conditions for the validity of a contract, due to which the contract legally loses the effect and is sanctioned by nullity* (absence of an essential element on which the social recognisability of the contract as such does not depend or some defect in relation to the essential elements of the contract). Conversion can be applied to these contracts. Next, we talk about prohibited contracts. Namely, a contract that is contrary to the imperative norm (illegal)[55], public order and good customs (immoral) is null and void, and thus contrary to the public interests they protect. The common name for the contracts from the previous sentence *is prohibited contracts.*[56]

It follows that the conversion mainly occurs in the case of absolute nullity (in fact in the case of non-existent contracts if this category of contract is accepted) because it does not meet the conditions for the validity of a contract. Perović S. (1975). *Zabranjeni ugovori.* Belgrade, 230.

In this case, it is not about legal transactions concluded outside the legal prohibitions, but about legal transactions that lack some of the elements for its validity (non-existent legal transaction). For example, the lack of a legally prescribed form. Popov, D. (2016). *Građansko pravo (opšti deo), thirteenth amended and revised edition.* Novi Sad, 2016, 287.

Only a non-existent contract can be subject to convalidation. Violation of public interests in void contracts excludes the possibility of convalidation... Conversion would be possible only in connection with non-existent contracts, and excluded in the case of void contracts. Pajtić, B., Radovanović, S., Dudaš, A. (2018). *Obligaciono pravo*. Novi Sad, 386 and no. 1726 and no. 1727.

[55] Provided that the law does not prescribe another sanction, or if the goal of the norm does not refer to another sanction.

[56] In the Sketch, Art. 79.

Conversion of prohibited[57] **contracts**.– we have seen before that many domestic authors deny the possibility of converting prohibited, that is, illegal and immoral contracts. This is a situation where the contract cannot produce effect due to its *opposition to the prohibition*, which does not allow a positive evaluation of the efforts of the contracting parties, and, therefore, makes the possibility of saving such a contract by conversion problematic. According to M. Cinque, the application of conversion to forbidden contracts cannot be ruled out.[58] Within Italian doctrine*,* C. Diez Soto states different points of view on when a prohibited contract can be converted[59] and concludes that in seeking answers it is necessary to examine the *ratio* of the norm governing the institute of conversion in the light of the private autonomy control system into which the norm is integrated, and especially in terms of the norm that has been violated. According to him, the conversion of a prohibited contract cannot be ruled out a priori.

We will cite one important case from Italian case law (purchase and sale of oil that is contracted contrary to the imperative norm that requires storage of goods by the buyer).[60] In this case, the Court of Cassation, considering the possibility of conversion in general, drew a distinction between two different situations: between *the prohibition of the goal* set by the contracting parties and *the prohibition of the contract as an instrument* for achieving that goal. This distinction becomes especially important when it intersects with the idea that law seeks to protect the set of interests that the parties intend to achieve by contract through the institute of conversion.[61] If the set goal is assessed as worthy of protection, and the prohibition of the contract arises from an objective defect in it (as an instrument), it is quite justified to seek a replacement contract through which this goal will be achieved. Otherwise, if the goal to be

[57] As in the Sketch, the Italian doctrine uses the term prohibited contract *(contratto illecito),* which includes contracts contrary to the imperative norm, public order and good customs.

[58] Cinque M. (2003). *Conversione dell contratto nullo: rilevabilita ex officio e contratto contrario a norme imperative,* in Nuova giur. Civ. Comm. 2003 I, 841–852, 843.

[59] When the prohibition does not refer to the goal to which the parties aspired; when the prohibition affects the content of a prestation, which can be replaced without sacrificing the interests of the parties; when it is not a prohibition imposed by public order and good customs; when it is not contrary to the goal of the violated norm to be converted into a replacement contract, which is "compatible" with the concluded contract from the point of view of the goal to which it was sought. Diez Soto C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 148.

[60] Cass. n. 1036 del 18 aprile 1953 in Riv. dir. comm., 1954, II, p. 253 This verdict is cited as a *leading case* by *Giaimo* p. 21, *Cinque* 851 and *Gandolfi* in multiple places.

[61] Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 21.

achieved is inherently forbidden, there is no room for such salvation because the substitute contract would also operate for the same prohibited purpose. We see that this is a position that affirms the institute of conversion. However, the Court of Cassation itself did not follow this position. To be specific, on the same day (!), in another case, we come across the position[62] that conversion is inapplicable if the nullity of the contract has a cause in violation of an imperative norm, public order or morality. Accepting such a rigid attitude would *narrow the scope of the application of the institute* to such an extent that we could talk about the uselessness of such a limited institute of conversion within a legal system. This point of view, which fully affirms nullity, however, puts a sign of equality between different causes of nullity, placing all of them all on the same level. We must state that there is a position in the literature (G. Gandolfi)[63], according to which there is a possibility of conversion of a contract that is null and void because of a prohibited goal.

In German literature, we find a significantly more positive attitude towards the conversion of illegal (Art. 134 of the GCC) and immoral transactions (Art.138 of the GCC). According to D. Benreith, there is no reason why an illegal contract could not be converted in such a way that the legal prohibition no longer constitutes an obstacle.[64] Since the contract contrary to morality in accordance with Art. 138 of the GCC is null and void, the possibility of conversion in this case is basically open. According to the prevailing opinion in German literature, conversion must be excluded at least in those cases when the intentions of the parties are immoral, as is the case of, for example, a loan shark contract, (Art. 138, paragraph 2 of the GCC), while, on the other hand, it is applicable when the manner (instrument) chosen by the parties is immoral.[65]

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[62] Cass. n. 1039 del 18 aprile 1953 in Giur. compl. cass. civ., 1953, p. 206 in: Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 23.

[63] Here the court would change the goal by narrowing it, which would make it non-prohibited, and then by conversion it would save such a narrowed goal. The problem of this point of view is whether such a narrowed goal would, and to what extent, correspond to the original goal and intentions of the parties, and whether it could be concluded that the parties in this situation would have concluded such a second contract if they had known about the nullity. According to Giaimo, G. (2012). *Ibid.*, 28–29.

[64] From the possibility of omitting the illegal provision of the contract and saving the rest of the contract through the institute of partial nullity, we see that illegality is not an absolute obstacle – why would it be an obstacle to conversion, if it is not an obstacle to partial nullity? Berneith D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition, Kindle Edition. Frankfurt am Main, 53. According to Art. 134 of the GCC, a legal action that violates the imperative prohibition is null and void.

[65] According to: Berneith, D. (2016). *Ibid.*, 54. Art. 138 of the GCC provides for the nullity of immoral acts in paragraph 1.

Examples of the conversion of illegal and immoral contracts are known in German case law (some of the examples dealt with in detail by C. Krampe are given above). Top of Form

In one case, the Supreme Court of the Republic of Croatia[66], seems to have taken the position that the *conversion* of an immoral contract, more precisely, *a contract with an immoral goal*, is possible.[67] Conversion is (among other things) a corrective measure to the concept of nullity that puts a sign of equality between various situations, which is a disadvantage of this concept. Would it not also be a mistake, only a smaller one, to (a priori) remove from the field of application of the conversion one reason for nullity (e.g. immorality of the contract, or, to be more precise, immorality of the purpose of the contract) which also implies various situations between which no sign of

[66] Supreme Court of the Republic of Croatia Rev 3144/1995 of 28 June 1999.

[67] "The defendants concluded a gift contract on December 13, 1976, by which the second defendant donated an a one-room studio apartment in Z. to the first defendant ... On 28 May 1991, the defendants concluded a disputed conversion contract according to which they stated that the purpose of the said gift was not to transfer the ownership of the studio but to transfer the rights of management of the studio to the first defendant as long as the second defendant's family uses the 76 m2 apartment. The plaintiff considers that the mentioned gift contract is legally valid and that there is no basis on which in terms of the provision of Art. 103, paragraph 1 of the Law on Contract and Torts (hereinafter: LCT), the said contract was null and void, and in such a case there is no place for the conversion of such a contract by reference to Art. 106 of the LCT because the existence of a null contract is a presumption – if the other prescribed conditions from Art. 106. of the LCT for the conversion of such a void contract into another valid contract between the same parties have been fullfilled... Considering the plaintiff's claims, the lower courts found that the said gift contract concluded among the defendants on 13 December 1976 was not null and void because it had all the necessary essential elements, and therefore constituted a permissible legal transaction, so there are no preconditions for the conversion of such a valid legal transaction, which is why they determined that the contract on conversion is a null and void legal transaction ... [Unlike the lower courts, which missed this, the Supreme Court notes the following:] If such claims of the defendant were established as true, i.e. if the claim of the auditor that the second defendant donated the said studio apartment to the first defendant with the fulfillment of the set condition to give his wife a larger apartment which according to the parties was given to the wife of the second defendant, then such a gift contract, according to the understanding of this court of audit, would at least be contrary to the morals of the society and as such null and void (Article 103 of the LCT) ... Namely, as already stated, this court considers that the (in)validity or nullity of the gift contract – which is of prejudicial significance regarding the nullity of the disputed conversion contract – should be examined so as to establish whether that gift essentially constitutes an inadmissible non-refundable participation of the employee in the allocation of the apartment."

Here we do not prejudge whether the conditions for conversion would be met in the event of such nullity of the gift contract, just as the Supreme Court of the Republic of Croatia did not prejudge, but allowed the possibility that these conditions may be met in case the contract is null and void due to having an immoral purpose.

equality can be placed? To conclude, the conversion of void contracts should not be a priori excluded, no matter the reason fr nullity.[68]

Conversion and convalidation.– We stated earlier that the nullity must be final in order to enable the conversion of a contract. We find the confirmation for this within case law:

Only a void legal transaction that cannot become valid can be converted, if it follows from the will of the parties that the conditions for the creation and validity of another legal transaction are met.[69] As a void contract can be convalidated in exceptional cases, we must consider the relationship between convalidation and conversion.[70] The following rules apply to the relationship between conversion and convalidation: A) A null contract that has been convalidated cannot be converted, nor is there a need for the conversion; B) A null contract that has not been convalidated, but could still be convalidated cannot be converted. As a convalidated transaction is more in accordance with the stated will of the contractor, convalidation gets the priority compared to conversion; C) A contract that has not been convalidated, and the possibility of the convalidation has been eliminated, can be converted.

PARTIALLY NULL CONTRACTS

Here we ask the question whether the conversion of the invalid part of a partially void contract can be performed. Most authors[71] refuse to apply con-

[68] If we summarize the previous two segments of the paper, we see that the conversion is excluded in case of non-existent contracts, while it is applied in case of null contracts, and from the aspect of conversion the division we have chosen is relevant. On the other hand, the division of null and void transactions into non-existent and void *stricto sensu*, which is present in domestic theory and which we did not adhere to, proved to be of no use in determining the scope of conversion, from two points of view: first, transactions void *stricto sensu* can be converted, and second, non-existent, according to this understanding as well, undoubtedly include the case of a joke, complete business incompetence and misunderstanding, cases which, as we know, do not convert.

[69] Decision of the Higher Commercial Court, Pž. 9915/2006 from 11 May 2007 Case law of commercial courts – Bulletin no. 4/2007..

[70] A null contract is convalidated by balancing values (Art. 141 of the LCT – shark loan contract); by execution if the prohibition was of minor importance (Art. 107, paragraph 2 of the LCT) or an essential form was violated, but not in the general interest (Art. 73 of the LCT); by subsequent permission (e.g. Art. 87 and 88 of the LCT). For more details: Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* third non-revised edition, Belgrade, 475–476.

[71] D. Berneith, (Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesells-*

version in this case. The application of the institute of partial nullity precedes the application of the conversion. If it saves a valid part of a contract, there is no need for conversion, nor a place for applying it. If the application of this institute cannot save the contract, then it is null and void in its entirety, and as such is subject to conversion. However, according to one part of German theory,[72] the application of conversion (Art. 140 of the GCC and Art. 106 of the LCT) to the invalid part of the contract is possible and it must precede the application of the institute of partial nullity (Art.139 of the GCC and Art. 105 of the LCT). Only if the application of the institute of conversion does not give results, the question of saving the valid part of the contract by applying the institute of partial nullity will be raised. So, the idea is clear: one should first resort to "repairing" the invalid part of the contract, and only then, in case of failure, to removing it.[73] Here we must state that one of the projects regard-

chaften, (German Edition) 1st Edition, Kindle Edition. Frankfurt am Main, 35, fn. 192) cites the proponents of this point of view who, however, do not explain it: Martin Ahrens, Herbert Roth, Wendt Nassall, Peter Ulmer. The following authors (D. Berneith, 35, fn. 193) offer arguments in favor of this point of view: *Arnd Arnold, Michael Beurskens.*

[72] D. Berneith, (Berneith, D. (2016). *Op. cit.*, 35, fn. 191) lists the proponents of this position: Florian Faust, Hermann Ebel, Heinrich Pierer von Esch.

[73] In that context, we must mention here the legal understanding adopted at the session of the Civil Department of the Supreme Court of Cassation held on April 2, 2019, regarding the problem related to the validity of loans indexed in Swiss francs, which we will briefly present (Bulletin 1/19). A question arose regarding the validity of the currency clause (the court determined the conditions for its invalidity, which we will not discuss here) and the validity of the loan agreement (the court characterizes the agreement as partially null and void, but the institute of partial nullity does not apply). The Supreme Court resolved the problem by a targeted and broader interpretation of rules on conversion. (Trifunović, P. (2019), Konverzija ugovora sa posebnim osvrtom na "švajcarce", *Pravna riječ,* časopis za pravnu teoriju i *praksu ,* 59/2019, 253–266, 264.) In this way, the order of application of the institutes was obviously changed in such a way that the conversion precedes partial nullity, and the contract is considered partially null and void. The provision on the currency clause is null and void and the conversion of that provision is to be performed, which, however, must include other provisions, because it is impossible to simply mechanically replace it, and leave the rest of the contract unchanged. We conclude that this is an unconventional application of the institute of conversion, and that the court agreed with the position on the role of conversion represented by Ramm, according to which conversion serves to achieve a socially desired result based on the alleged will of the parties. Immediately after the adoption of this paragraph, the legislator passed the Law on the Conversion of Housing Loans Indexed to Swiss francs (Official Gazette of the Republic of Serbia No. 31/19) – which, however, despite its name, is not connected to the institute we deal with in this paper. Therefore, it is neither a judicial nor a legal conversion of the contract. We cannot accept the position that the name this law is based on the conversion of one currency (CHF) into another (EUR) – Dolović Bojić, K. (2020), O konverziji ugovora u srpskom pravu sa posebnim osvrtom na sudsku konverziju, *Annals of the Faculty of Law of the Univeristy in Belgrade*, year LXVIII 1/2020, 146–163, 164. Pravna enciklopedija 1, Belgrade, 1985 defines another type of conversion, different from the one that is the subject

ing the harmonization of European civil law is the preliminary draft of the European Contract Code (Gandolfi Code), which in Article 145 regulates the conversion in an original and more detailed way than national civil codes and according to paragraph 2 of this article conversion is applicable to individual provisions of the contract.[74] We will conclude that the partial conversion of a contract is extremely problematic, but that it certainly deserves to be the subject of a separate paper.

VOIDABLE CONTRACTS

The question of the possibility of conversion arises when one of the parties decides to void a contract. The Portuguese Civil Code (hereinafter PCC) explicitly provides for the conversion of annulled voidable contracts (por. *anulado*).[75] In terms of comparative law, this is one of the most controversial issues regarding the institute of conversion. There are almost no dissonant tones in domestic literature: conversion is excluded in the case of voidable contracts (either it is not mentioned at all or it is explicitly excluded – without or with a brief explanation).[76]

According to Article 111 of the LCT, a contract is void when it is concluded by a party with limited legal capacity, when there was a defect in its conclusion regarding the will of the parties, as well as when it is determined by the LCT or a special regulation. But the reasons for voidability are not what essentially separates the possibility of converting a voidable transaction from

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of this paper, and we are of the opinion that this is exactly the conversion in question in the mentioned law: „...*Conversion is a change in the conditions under which an agreement was originally concluded (usually a loan agreement)... In the case of a loan agreement, the conversion actually means changing the conditions under which the agreement was concluded (e.g. the deadline and manner of repayment of the loan, the amount of the interest rate, etc.). In this way, the conversion represents an amendment to the contract; certain new rights and obligations are created between the creditor and the debtor, so the consent of the creditor is usually required for the conversion. In practice, the so-called forced conversion is possible, when the consent of the creditor is not required.*"

[74] European Contract Code (English version). Available at: http://www.eurcontrats.eu/site2/docs/EuropeanContr.pdf.

[75] While the preliminary draft allowed for the conversion of voidable contracts (Por. anulavel). Gandolfi's Code also provides for the conversion of an annulled voidable contract (Article 145, paragraph 5).

[76] Exceptions in this regard: Vodinelić, V. (2017). *Građansko pravo, Uvod u građansko pravo i Opšti deo građanskog prava,* Third non-revised edition. Belgrade, 472 and Gavella, N. (2019) *Privatno pravo.* Zagreb: *Narodne novine*, 330, fn. 168.

the possibility of converting a null and void transaction.[77] The reasons for disputing the conversion of voidable transactions can be found in the specifics of the institute of voidability itself, i.e. in the annulment itself. The fact is that, unlike a null and void contract, it produces an effect, and that effect can be taken away from it by the party in the contractual relationship – by annulment. A voidable contract, unlike a null and void one, cannot be converted before it is annulled.[78] At this point, we must emphasize that the right to annul a voidable contract is a transformational right that is exercised through the courts in our country and in Italy, while in Germany it is exercised out of court.[79] *It is necessary to determine whether the exercise of this conversion right makes the application of the conversion impossible*;[80] thus, whether a voidable contract may be converted after the annulment.

In Italian theory, more than in German, the question of the conversion of an annulled voidable contract is disputable.[81] *G. Gandolfi* writes that in terms

[77] After all, a transaction by an older minor is voidable in some legislations, while in some it does not produce effect until approval (which can be classified as nullity or as pending ineffectiveness – Schwebende Unwirksamkeit). Also, the conclusion of a contract by an agent acting in a conflict of interest is in some legislations a reason for fragility (ICC, Art. 1394 and the PCC, Art. 261), while in other legislations it is not, but can be classified as a reason for nullity or pending ineffectiveness. – Schwebende Unwirksamkeit (Art. 181. of the GCC).

[78] An oposite point of view: Conversion can occur only in respect of those invalid legal transactions that are null and void, or those voidable transactions that would be annulled at someone's reques. *Conversion does not occur in respect of voidable legal transactions that are not threatened with annulment*. Gavella, N. (2019). *Op. cit.*, 330, fn. 168.

[79] Vodinelić, V. (2017). *Op. cit.,* 479.

[80] According to Vodinelić V., for an annuled voidable contract*: A) It will be considered that it cannot be converted if the right of the party to annul the voidable transaction is considered more important, because the conversion of the transaction would recognize the effect of [another contract] despite the right of the party not to get the effect; B) It will be considered that it can be converted if it adheres more to the fact that the reason for the voidability of the annulled contract is not an obstacle to the validity of the contract into which the concluded annulled contract is converted, and whose legal effect is what the parties wanted to achieve by the annulled contract.* Vodinelić, V. (2017). *Op. cit.*, 472.

[81] *C. Diez Soto* excludes this possibility and states the reasons against, which are mentioned in literature. We will list some of them: A) the very text of Article 1424 of the ICC, which speaks only of null and void contracts (which is also the case with Article 106 of the LCT); B) Although the norm providing for conversion must be fundamentally connected to the protection of the principle of private autonomy, it is not justified to regard an analogous application outside the limits of an explicit legal provision as an expression of this general principle. Therefore, the norm should be interpreted restrictively; C) Incompatibility of reasons for voidability, especially flaws related to will, with conversion. As for other reasons: limited legal capacity of one of the contracting parties or a conflict of interest between the representative and the represented party (Article 1394 of the ICC), it is possible to imagine alternative transactions for which the reason for annulment would no longer be relevant; D) Conversion can lead to unfair consequences for one party or the

of convertibility, the prevailing view in Italian doctrine, as in German, is that an annulled voidable contract is in the same legal position as a void one.[82] *G.Giaimo* states that part of the Italian doctrine approves the conversion in this case,[83] and he excludes this possibility.[84]

While the majority within German legal theory today speaks in favour of the possibility of converting an annulled voidable contract,[85] *Reichsgericht* rejected this view in 1912, declaring *in obiter dictum that the conversion was*

other; E) The conversion is intended to provide an exceptional solution for maintaining a business initiative, which is considered worthy of protection, and which does not produce an effect due to reasons of a technical nature typical for the system of control over private autonomy. Such exceptional treatment does not appear to be justified in the presence of a transaction that can be cured in another way. Diez Soto, C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 141–144.

[82] Gandolfi, G. (1988, reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea.* Milano, 239–240.

[83] Those are Cfr. L. Cariota Ferrara, Il negozio giuridico nel diritto privato italiano, Napoli, s.d., 376; A. Fedele, La invalidità del negozio giuridico di diritto privato. Torino, 1943, p. 39, nota I; G. Mirabelli, Dei contratti in generale. Torino, 1967, 455; Carresi F., Il contratto. Milano, 1987., 591. Giaimo, G. (2012). *Il Codice civile., Commentario; Art. 1424,* Giuffrè. Milano, 33 fn. 32.

[84] The explanation is that a voidable contract produces effect, and since its annulment arises from the will of one of the parties, it is not clear why the party would first act to annul the contract and then save it by conversion, to obtain the same or even reduced effect, knowing that there are other possibilities: the party may waive the right to annulment (convalidation by waiver), wait for the expiration of the preclusive period for exercising that right (legal convalidation), etc. However, from the point of view of domestic law, we are of the opinion that the circle of persons who have the right to annul the contract is wider than the parties in the contract, which is why, we believe, the previous argument is not valid. Any person who has a direct legal interest has the right to annulment, which brings the circle of persons who can request the annulment of a voidable contract closer to the circle of persons who can request that the contract be declared null and void. Pajtić, B., Radovanović, S., Dudaš, A. (2018). *Obligacioni pravo*. Novi Sad, 402.

[85] D. Berneith cites supporters and opponents of the possibility of converting an annulled voidable contract, which clearly shows the position of German doctrine:

The supporters are: Beurskens, Ellenberger, Faust, Hefermehl, Mansel, H. Roth, Wendtland, Bork, Enneccerus/Nipperdey, Köhler, Wolf/Neuner, O. Fischer, Leenen, Brasch, Schönwetter, Gleim. (Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Berueck-sichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition, Kindle Edition. Frankfurt am Main, 36, fn. 195).

incompatible with the transformational right of annulment.[86] Consequently, there is also a minority opinion that rejects conversion in this case.[87]

According to opponents of the conversion, the annulment of a voidable contract by one of the parties annuls the declaration of will, and after the annulment we have no basis for conversion. The will for annulment is also the real will which ends the effect of a contract, so conversion against that real will is not possible, but the party should reach its aim by concluding a new contract. Consequently, the conversion will fail. However, according to D. Berneith, the conversion will fail not because the actual will for the contract has been annulled by consuming the right of annulment, but because the conditions for conversion have not been met, specifically – a hypothetical will that cannot be determined due to annulment. When in exceptional cases a hypothetical will exists, despite the fact that the actual will for annulment is expressed, the conversion will be possible.[88] *D. Berneith* concludes that the possibility of conversion should not be ruled out in the case of annulled dilapidated contracts, although this possibility will generally be eliminated in specific cases, most often due to the impossibility to determine the hypothetical will.[89] Finally, we believe that the possibility of conversion should not be ruled out a priori. With regard to partially voidable contracts,[90] what we have previously stated for partially null and void contracts applies. Application of conversion is extremely problematic.

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[86] RCC 79, 306, 310. which in a certain way contradicted the earlier position in another case (RCC 62, 184, 186) that due to Art. 142 par. 1. of the GCC Art. 139. of the GCC (partial nullity) applicable to voidable transactions – partial voidability. Berneith, D. (2016). *Die Konversion: Eine rechtsdogmatische und am Parteiwillen orientierte Untersuchung des § 140 BGB unter besonderer Beruecksichtigung nichtiger Verfuegungen von Todes wegen und Nachfolgeklausen bei Personengesellschaften*, (German Edition) 1st Edition, Kindle Edition. Frankfurt am Main, 36 f. 196.

[87] Opponents: Flume, Dorn, Krampe, H-J. Finger, Siller, Spieß. (Berneith, D. (2016). *Op. cit.*, 37, fn. 197).

[88] *Ibid*., 38–40.

[89] *Ibid*., 42.

[90] The LCT does not prescribe partial voidability, while the OIZ in Art. 918 explicitly prescribed this institute which is also found in other legal systems. Knowing that the application of "pre-war" regulations (including the OIZ) is the only legally regulated manner of filling legal voids, if the issue of partial voidability of contracts appeared before the courts, we believe it is possible the rules from the OIZ would be applied. In simpler terms, applying this institute is analogous to the application of the institute of partial nullity. Such a position can be found in domestic theory: … it is rightfully stressed in doctrine that there are no principal obstacles to analogously applying the rules of partial nullity to partial voidability. Pajtić, B., Radovanović, S., Dudaš, A. (2018). *Obligaciono pravo.* Novi Sad, 405.

VALID CONTRACTS

The understanding of conversion as a requalification, namely the requalification of a valid contract, can also be found in domestic case law from 2002: The contractors concluded a valid gift contract for an apartment without any encumbrances, which was verified in the court, and executed. However, the parties orally agreed that the gift recipient would support the donor for life, which he did, but did not receive an apartment under a lifetime care contract, but earlier under a gift contract. According to the Supreme Court, the gift contract was converted into a bilateral contract for pecuniary interest by which one contractor undertakes to support and care for the other contractor for life - who assigns him his property while still alive (a contract for which, in terms of form, it is sufficient that the signatures of the contractors on such a contract are verified in court). Therefore, according to the Supreme Court, this is not a gift, but this a pecuniary interest transaction (which is why there is no violation of the reserved portion of the plaintiffs, which would occur if it was a gift).[91] We see that this is a conversion as a reclassification of a valid contract, which is unacceptable. A valid contract cannot be converted. While requalification leads to the legal effects actually sought, the conversion gives a contract effects that the parties did not foresee.[92]

[91] The Supreme Court of Serbia, Rev. 1424/02 from October 3rd, 2002.

[92] Peeraer F. (2014). "Nietigverklaring vs. gerechtelijke conversie van een contract of van een contractueel beding" in S. Stijns en P. Wéry (eds.), De rol van derechter in het contract, die Keure, Brugge, 321–372., 11.

We have seen before that according to some German authors conversion is a special case of interpretation (Articles 133 and 157 of the GCC). In French theory, there is a position on the possibility of reclassifying a null and void into another contract if the conditions for its validity are met, which should be a conversion. (Chantepie Gaël, Latina Mathias, 2016. La réforme du droit des obligations, Commentarie théorique et pratique dans l'ordre du Code civil, Paris, 481, listed according to: Dolović Bojić, K. (2020), O konverziji ugovora u srpskom pravu sa posebnim osvrtom na sudsku konverziju*, Annals of the Faculty of Law of the University of Belgrade*, year LXVIII 1/2020, 146–163, 151.) The inadmissibility of conversion as a requalification is perhaps best illustrated by an example from French legal history. Although the French legal system is still a bastion of resistance to the expansion of the institute of conversion in the European continental legal circle, (unsuccessful) efforts have been made to obtain a general rule on conversion in the French Civil Code. In 1945, a commission was established to change the FCC. The General Part Subcommittee considered several proposals for a general rule on conversion. *"When a void legal transaction satisfies the conditions for another legal transaction, the latter will be valid, if it can be considered that the parties would have concluded that contract if they knew about the nullity of the original one."* This proposal, modeled on Article 140 of the GCC, was then redacted in order to stay in the field of interpretation. *"The nullity of a transaction does not prevent the will of the parties to produce an effect when this will can be interpreted as applicable to another legal transaction whose conditions for validity are met."* Then,

CONCLUSION

The general conclusion could be "borrowed" from an Italian author who wrote the following about the conversion of a contract: *"Everything about this institute is problematic."93* However, we believe that we have come to some new insights regarding the field of application of the conversion, and in this section we will briefly summarize them through the following specific conclusions: 1) Conversion is applied to void contracts, and it is unjustified a priori to exclude the application in case of immoral and illegal contracts. 2) The initial nullity is not enough for the application of this institute, but all other available institutes for the survival of the contract must be unsuccessfully exhausted beforehand. And the exceptional possibility of convalidation of a void contract precedes the application of the conversion. 3) The unconventional application of conversion to the invalid part of a partially void contract – partial conversion of a contract – is extremely problematic. 4) With non-existent contracts, the logical question is how to heal something that does not exist, and for this category of contracts conversion is excluded (we believe that the paper is, at least in traces, a contribution to domestic theory on the differentiation between void and non-existent contracts). A simulated contract is never converted and relative simulation is an institute different from conversion. 5) The nullity of a contract in Article 106 of the LCT must be interpreted broadly, as the inability of a contract to produce effects. 6) In the matter of voidability, we have taken an affirmative stance regarding the applicability of the conversion. 7) A valid contract is not to be converted and conversion is an institute different from requalification.

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this second proposal was assessed as such that it gives the court too many possibilities for redacting the contract, and the proposal of conversion as a requalification followed: *"When a legal transaction is void, it may obtain the qualification of a valid legal transaction, if such qualification is in accordance with the expressed intention of the parties".* Such a proposal for a conversion rule, that was supposed to be found in the general part of the FCC, adopted by the subcommittee on 5th of December 1946, was considered, assessed as erroneous and useless (fra. *Erronée et inutile*), and rejected on 12th of February 1948. It was assessed as wrong because a legal transaction that can be reclassified is not null and void, but incorrectly qualified, and useless because such a provision would be nothing but a form of interpretation. (For more details, see: Gandolfi G. (1988, reimp. 1990). *La conversione dell'atto invalido. 2) Il problema in proiezione europea,* Milano, 136–142.)

[93] *Franco Carresi.* Listed according to: Diez Soto C. M. (1994). *La conversión del contrato nulo: Su configuración en el Derecho comparado y su admisibilidad en el Derecho español*, 10.

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