

KALEIDOSCOPE

TEKLA PAPP*

New trends of atypical contracts in Hungary

1. Description of atypical contracts

The regulatory bounds of Hungarian Civil Code were broadened by the development and phenomena of the market economy, which also led to the development of different legal “formations” relying on the contractual freedom declared by the great codices of natural law of the ninetieth century:

- the professional, businesslike management (the regular producing, service providing, commercial activity in order to get profit), the establishment and application of newer and newer contracts became possible because of the so many financial connections and connection among goods, the enormous investments, the cross-border relations of legal transactions, and

- new contractual techniques appeared which exceeded the traditionally institutionalized basic types of contracts: these are too detailed, self-regulating agreements tending to unification, standardization.

The need of the establishment of the group of atypical–different from those contracts expressly mentioned by name in the Hungarian Civil Code–contracts arose because of the economic changes and changes in the legal practice in Hungary at the end of the 20th century.

The characteristics of these contractual relationships are the following:¹

a) Atypical agreements has no Hungarian names generally, *their names have foreign origin* (e.g. leasing agreement, franchise agreement, concession agreement, syndication agreement, licence agreement) or they are designated in a complicated way that does not express the essence of the legal relationship precisely (e.g. consort agreement as an agreement with the purpose of taking part in the group of consumers; timesharing agreement as an agreement with the aim to acquire the right of utilization of a real estate for a definite and repeated period of time).

b) The “Express contracts” (Part Four, Title III) of *Hungarian Civil Code does not dispose of atypical contracts*, they cannot be ranked among the contracts mentioned by their name. It must be noticed that this feature is relative: a new situation can evolve by the amendment and the recodification of the Hungarian Civil Code.

c) *The foreign patterns of practice and legislation and the domestic customs* had a very important role in the establishment and development of the rules referring to atypical

* Dr habil., Ph.D., Associate professor, University of Szeged Faculty of Law, Department of Civil Law and Civil Procedural Law, H-6720 Szeged, Tisza L. krt. 54.
E-mail: papptekla@juris.u-szeged.hu

¹ Papp, T.: *Atipikus szerződések* (Atypical contracts). Szeged, 2009, 9–10.

contracts. The legal constructions formed this way became clear and they were regulated by law within a decade or even few years were enough for it.

d) Except for the syndicate agreement and the franchise agreement, atypical contracts became codified by an *act* (e.g. concession agreement, independent commercial agency agreement) or *governmental regulation* (e.g. itinerant sale, “distance contract”) or *by an implemented international convention* (e.g. factoring, leasing).

e) In the European development of law several efforts to unification can be observed in connection with these agreements (e.g. Directive 85/577/EC about the itinerant sale, Directive 94/47/EC about the timesharing, Directive 97/7/EC about the “distance contracts”) and by the harmonization of laws in the European Union its impact on the Hungarian regulation can be clearly seen.

f) According to the item 200(1) of the Civil Code (“The parties are free to define the contents of contracts, and they shall be entitled, upon mutual consent, to deviate from the provisions pertaining to contracts if such deviation is not prohibited by legal regulation.”), with regard to *the freedom of the contractual type*—abiding by the prohibition of violation of legal regulations—these agreements can be concluded with an optional content and the general rules of contracts (Civil Code, Part Four, Title I) also refer to them.

g) Though there is no obligatory formality in case of some atypical contracts (syndication contract, franchise agreement, operative leasing agreement), the others (independent commercial agency agreement, consort agreement, timesharing agreement, concession agreement, factoring agreement, financial leasing agreement) must be concluded in a written form—according to the rules of law—, but in practice the *written form* is preferred: it is not necessary for the contract to become operative, but it is a kind of a guarantee and it has an important role as an evidence.

h) The effort to create a detailed and precise formulation resulted in the application of *general conditions of a contract and blank contracts*.

i) Generally there is an *economic organization* (point 685(c) of Hungarian Civil Code) or an undertaking in conformity with the Consumer Protection Act (point 2(b) of the Act CLV of 1997) as one of the subjects of atypical contracts but since the trade has been extended and has become more complex, both subjects of the contractual relation can be economic organization or undertaking (e.g. “distance contracts”, factoring agreement, franchise agreement).

j) Atypical agreements *regulate long-term relations of the market* therefore they tend to refer to a permanent legal relationship (except for the “distance contracts” and itinerant sale).

The expression “atypical” itself is not new in the field of the regulation of contracts: in the 20s and 40s of the 20th century this or the category “non-typified” could be found in the literature.² Those obligations relying on legal bases that are different from those institutionalized forms that can be complied with the classification created by Roman law were considered to call contracts without name/classification or innominated/atypical contracts. Licence agreements, syndication agreements, huckstery agreements, tariff agreements and the various compensatory trade agreements belong to this group. The

² See also Villányi, L.: *A magyar magánjog rövid tankönyve* (Short Textbook of the Hungarian Private Law). Budapest, 1941.

content of these contracts were formed by the consent of the parties beyond the rules contained in the general provisions of contract law of the Hungarian Draft of Private Law.³

2. Classification of atypical contracts

In order to classify a part of the modern contracts, the category of mixed contracts (*contractus mixtus*) was established. Agreements including the services provided by express contracts in many ways belong to this group:

a) it can be a contract that *unites the different types* (e.g. purchase agreement combined with donation), in this case the elements of different contracts are combined and they cannot be separated, it cannot be identified from which contract the provisions were originated from;

b) or it can be a contract with a *combination of types* in it (e.g. theatre contract), in this case the features of different contracts are not combined with each other but they are mixed in a new contract in a way that they can be separated and remain identifiable; see the decision of Supreme Court Gfv. IX. 30. 018/2005., this decision is about the breach of a mixed contract—with elements of professional service, agency and leasing—and the Supreme Court separated the legal consequences by types of contracts; the agreement on the utilization of software also belongs to this group as it contains elements of professional service, leases, leasehold and leasing and it depends on the object of the dispute which contractual provisions shall be used (e.g. in case of software-utilization the elements of leases shall be used) (Metropolitan Court of Appeal 5. pf. 21. 373/2006/3.);

c) or the object of the contract *can be an entirely special service* (e.g. agreement in order to manage the tasks of the caretaker; subtenancy agreement concluded for a definite period and combined with agency agreement referring to placing placard—Supreme Court Pfv. XI. 20. 314/2006.; mixed agreement covering a complex legal relation similar to the franchise agreement with elements of leasehold and utilization which refers to of the entry, utilization, operation of a parking system—SZIT-H-GJ-2008-89.), but as for its other features it is not special and not different from the contracts in Civil Code.

Atypical contracts *cannot be ranged—without anxiety—among any classes of mixed contracts*; atypical contracts are a group of *independent, sui generis agreements* for they include all types of mixed contracts or none of them; therefore the mixed contracts and atypical contracts are not the same category: atypical group is *more* (the combination of mixed types) and different (at the same time they cannot be classified among these types).

The innominated contracts *are not considered to be classified as atypical contracts*. These contracts generally appear as “Agreements”, there is no permanent legal relation regulated by them but they cover special legal transaction that does not arise regularly. Contrary to atypical contracts they have no names or nomination, they are not widespread but they are unique and exceptional contracts without normative regulation. The rights and obligations deriving from these innominated contracts can be settled by the application of common rules of contracts of the Civil Code; see e.g. decision of Supreme Court: Pfv. I/A.

³ Papp, T.: Az atipikus szerződések és a magyar Magánjogi Törvényjavaslat (The atypical contracts and the Hungarian Draft of Private Law). In: *Atipikus jelenségek szerződési jogunkban* (Atypical phenomena in our Contract Law). Szeged, 2009, 9–24.

20. 446/2001. (in connection with the agreement close to servitude but it cannot be considered as loan for use).

Those nominated contracts that are regulated in “Express contracts” of the Civil Code are not atypical, but they are typical ones as the agreements concluded in everyday-life are compared to these contracts.

According to the facts mentioned in the first two items, *the following* contracts are considered to be *atypical*: syndication agreement, “distance agreement”, itinerant sale, independent commercial agency agreement, timesharing agreement, consort agreement, concession agreement, licence agreement, franchise agreement, leasing agreement and the factoring agreement.

3. The attitude of the legislator and the judicial practice to atypical contracts

The appearance of atypical contracts resulted in the abandonment of dogmatic traditions and—at the beginning—a very doubtful enforcement of law.

As for the regulation of atypical contracts many views showed up:⁴

a) *absorption-theory*: provisions referring to that express and namely designated contract of the Civil Code which is the most similar to that certain atypical contract (especially in regard to congruency of essential services) must be enabled to receive and “absorb” that atypical contract in question;

b) *combination-theory*: making a “list” (coordination of the contractual facts and legal consequences) referring to the different aspects of the certain atypical contract under which provisions of the express contracts of the Civil Code can be judged;

c) *analogical theory*: application of general rules of contracts of the Civil Code referring to atypical contracts;

d) *creation-theory*: because of the complication to insert atypical contracts in the system of the Civil Code this area of jurisdiction must be codified in accordance with the purpose of the contract and the interest of the parties by the creation of special rules. (This theory is followed by actual legislation in connection with atypical contracts.)

At the recodification—that is still going on—of the Hungarian Civil Code the problem of regulating atypical contracts in a code became highlighted: in the promulgated concept of the new Civil Code (Magyar Közlöny Vol. II., No. 15., 31st January 2002.) the explanatory statements of some parts are contradictory. We consider—by making the actual provisions more flexible—the “distance contract” can be inserted in the special conducts of contracts, the itinerant sale can be included in the special modes of sale, the independent agency agreement can be classified as a special agency, the factoring agreement can be inserted in the rules of assignment and contracts referring to financial services. The timesharing can be codified after its insertion (it depends whether it belongs to possession or contract law). The codification of concession agreement and franchise agreement among utilization contracts and the leasing agreement (relying on the two basic types: the financial leasing and the operative leasing) among the financial and utilization obligations *must be considered*. In our opinion the consort agreement and the syndication contract *cannot be regulated* in the Civil Code. Comparing to the earlier concept the new draft of Civil Code (31st December 2006.) is one step backward in connection with the adaptation of atypical contracts into the Civil Code: from the contracts of this book only two can be found in the Draft. The category of factoring is implied in the definition of assignment [section 5:167. An obligee (assignor)

⁴ Papp: *Ibid.* 14–16.

shall be entitled to transfer his future, conditional claim that is against the obligor, to another person (assignee) by contract], but the provisions of the concept regulating the factoring agreement cannot be found in the Draft. Conversely the independent commercial agency agreement is regulated in the Draft; see: section 5:289. the agency agreement, section 5:96. the contract on solicitation, section 5:310. the characteristics of the solicitation of insurance and B&L association. The agency (intermediary) agreements—as an independent type of contract—are not regulated by the Civil Code; these contracts are considered to be agency of representation, more exactly they belong to commercial (market) agency (Metropolitan Court Gf. 75.600/2004.) According to recent developments there are two drafts of the Civil Code: the Expert Draft of the Codification Commission and the bill no. T/5949. of the Ministry of Hungarian Justice and Law Enforcement. The Expert Draft takes a stand on a code based on monistic view and the reason for it is that the contracts applied in the commercial life and constructed especially for the commercial life do not dispose of attributes that would require a special legal provision. In lack of suitable core to create a type, atypical contracts from the aspect of factoring, leasing and franchise agreements are not regulated by the Draft, but—according to it—it makes the existing contractual law able to solve the emerging legal problems. Similarly to the Draft of 2006 the Expert Draft of 2008 makes the application of assignment (sections 5:176–5:177.) possible for factoring agreement and settles the rules of agency (sections 5:308.–5:315.) and the provisions of the contract on solicitation (sections 5:316.–5:331.). The draft of January, 2009 of the ministry is also suitable for the implication of assignment (sections 5:168–5:165.) and the factoring but instead of agency agreement the intermediary contract (sections 5:271–5:275.) is regulated and the solicitation contracts are reframed (sections 5:276–5:287.) and the leasing (sections 5:340–5:347.) and the factoring (sections 5:348–5:354) agreement are also wished to be codified.

Atypical contracts are generally approached from the aspect of the result by the *judiciary practice*: they concentrate on the judgment of the legal transaction and not on the qualification. Therefore, based on the conditions of the transaction it examines:

- the purpose of the potential intention of the parties;
- the commercial, economic aim wished to be reached;
- the special attributes of the specified service;
- and—apart from the above-mentioned—what the parties considered to be essential from the aspect of the conclusion of the contract when regulating their legal relationship.

The type of the contract is not defined by the nomination given or wording used by the parties, but by its content based on the elements of the definition of the agreement. The openness and flexibility of the judiciary view are confirmed by one of the decisions of the Supreme Court: the title of the acquisition of a property can also be concluded from an atypical contract as according to the contractual freedom the agreement of the parties is legally binding even if the type of the contract cannot be found among the nominated, express contracts of the Civil Code (EBH 2009. 1843., LB Kfv. IV. 37.074/2007.).

4. Groups of atypical contracts⁵

Atypical contracts cannot be classified by only one attribute and the usual classification related to contract law (based on the aspect of subject, object, service) has no result either. Therefore a different classifying is used, which is out of the ordinary: atypical contracts can be divided into independent and not independent (dependent) contracts.

⁵ Papp: *Ibid.* 16–18.

The *independent* group is made up by agreements that are *independent from other legal relationships and other activities*; therefore the concession agreement, the licence agreement, the factoring agreement, the franchise agreement and the leasing agreement belong to this group.

The category of “*non-independent*” (*dependent*) contracts can be divided into two classes depending on the fact whether the atypical contract in question is *based on another legal relationship or activity*. The syndication agreement is an atypical contract connecting to another legal relationship, because it is based on the memorandum of association. The other group of atypical contracts relies on a certain activity—that is conducted professionally, in a businesslike manner by one of the parties—and in this case these contracts transmit the benefit of that certain activity towards the consumer. The distance contract belongs here, because it is related to the purchasing and service-providing activity of the undertaking, similarly to the itinerant sale, the independent commercial agency, the consort agreement and the timesharing agreement. (The regulation of this subdivision of the non-independent atypical contracts is highly influenced by the protection of consumers.)

Atypical contracts can be divided into groups depending on whether their *accessorial or essential characteristics are different from the contracts typically mentioned in the Hungarian Civil Code*. The following contracts belong to the accessorial atypical contracts:

- the distance contract, in this case the way of drawing up the contract means the difference;
- the itinerant sale, because the place of drawing up the contract is special;
- the independent commercial agency, because it is a unique commission;
- the timesharing contract, as it regulates a special utilization right, which cannot be found in Hungarian Civil Code. Considering the substance, the indirect object (the service) of the contract, atypical contracts are fundamentally different from the agreements namely mentioned in the Hungarian Civil Code.

Atypical contracts can be categorized by their *codification* too: whether they are regulated in a legal norm and if yes what kind of regulations or acts they are.

5. New tendencies in the field of atypical contracts

The category of atypical contracts is open and incomplete from many aspects: on the one hand they can belong to the namely codified contracts by a possible insertion in the system of Civil Code, on the other hand the regulation of legal relations by contracts is required because of the changing economic and social circumstances. If the essential elements of these agreements, reflecting the new phenomena, comply with the criteria of atypical contracts,—after a certain period for “crystallizing out”—they can be considered to fall under this contractual category. Hereinafter two contracts are presented that will belong to atypical contracts after some years of consolidation and stabilization:

5.1. Treatment contract

This *name* comes from the German “Behandlungsvertrag” and it has Anglo-Saxon roots as well. This contract is inserted among service contracts in the Draft (Principles of Law; PEL) drawn up by the Study Group of European Civil Code.⁶

⁶ von Bar, C.—Clive, E.—Schulte-Nölke, H. (eds): *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference*. Munich, 2008.

The treatment contract is a kind of agreement according to which the provider of the medical service provides the mentioned medical service for natural persons receiving medical care by abiding by the customs of that profession, the practice (protocol), the ethical rules and principles and in a manner that can be generally expected. The *purpose* of this contract is to provide a medical service that is suitable for the will and interest of the patient or the person who resorts this medical care (High Court of Appeal of Szeged Pf. III.20 308/2007.). The *subjects* of the treatment contract are the provider of the medical service (natural person, legal entity or an organization without legal entity with a license of the public health authority to provide medical services; item 3(f) of Act CLIV of 1997 on Health) and the person who receives this medical service (the generally used designation “patient” is not correct, for a natural person who goes to a screening test and other obligatory examinations/who is vaccinated or gives birth to a child cannot be considered to be ill so as to be a patient). The *direct object* of the treatment contract is to provide or receive medical service; the *indirect object* is the medical service itself.

As for the subject matter of the treatment contract in connection with the rights and obligations of the health care workers (especially doctors) and patients the following statements can be made:⁷

- they are in correlation with each other (the obligation on the side on the doctor appears as a right on the side of the patient; for example the duty to provide information-right to information);
- certain rights can only be effective by complementing each other (for example the right to receive medical service-right to consent);
- in some cases the requirement of exercising a right is an obligation (for example the duty of documentation, data protection-inherent rights);
- on the ground of treatment contract the patient has the right to receive medical service—which is a fundamental right provided by the constitution—so as to every patient has the right to receive medical care that is justified by his health, continuous, appropriate and without discrimination and the right to relieve the pain and suffer [Act on Health section 6, item 7(1)]. The *rights to choose the attending physician* and *to initiate to be examined by another physician* appear as sub-rights of the right to receive medical service. The right of the patient to health care is realized as a *duty to provide health care* on the side of the physician and he has *the right to refuse the examination or treatment* only in cases held by the Act on Health; if the obligation to provide medical service is not exercised according to the rules by the provider, it must bear the *responsibility* for the consequences emerging in connection with the violation of rules (Equal Treaty Authority 1419, 2006.). According to his right of self-determination, the patient can decide whether he exercises his right to get medical care by resorting it (completely/partly) or to refuse it. For the appropriate exercise of self-determination it is essential for the physician to exercise *his own right to choose freely among the scientifically accepted methods of examination and therapy*: relying on his special knowledge and expertise recommendations are made by him on issues related to examination/treatment and the patient voices his opinion about it. The right to self-determination is closely related to the *right to information*: the physician must inform the patient about his state of health, the recommended examinations and operations, the advantages, the consequences of their postponement, the risks, the process and expected

⁷ Papp: *Ibid.* 18–21; Dósa, Á.: *Az orvos kártérítési felelőssége* (Doctor’s Liability for Damages). Budapest, 2004; Jobbágyi, G.: *Orvosi jog* (Medical Law). Budapest, 2007.

outcome of the treatment and about other alternative possibilities. The physician does not have *the duty to inform* if the patient waives his right to information or regarding to his state of health the physician decides to retain certain information Act on Health item 135(1). The right of the patient to *learn and examine the contents of his healthcare documentation* and the *request for information* related to it is a sub-right of the right to information that can only be asserted by complying the *duty of documentation* of the provider of the medical service. The duty of documentation is related to *the obligation of the physician to maintain confidentiality* (the patient can give release from this or an obligation to provide data can be specified by the rules of law) and the *data protection* [according to the Act on Data-Protection data in connection with the state of health is considered to be special and must have an enhanced protection, Act LXIII of 1992, point 2 (2)b)]. The patient has the obligation to pay consideration in return for the provided medical care (in case of private practice/clinic directly, as for public institutions indirectly from the payments of employers and employees).

The treatment contract is a *consensual onerous, bilateral (in case of transplantations multilateral)* agreement of “*facere*” nature that can be concluded in oral or written form or by conduct that implies acceptance. As for the position of the treatment contract among the other contracts, the commission and the contract for work can be noticed from the expressly and namely mentioned contracts of the Civil Code,

- because of the limited possibility to choose institution on the one hand and because of the medical care became a service on the other hand, the personal procedural obligation of the agent and the confidential relation between the principal and the agent which characterize the contract of agency is not necessarily manifested in case of treatment contracts: the right to self-determination (and not right to give instruction) can only be exercised efficiently by the patient if the obligation to inform is discharged by the agent (the physician) with special knowledge;

- according to the contract of professional service, contractors shall be obliged to create some result by work but this is not necessarily a part of each treatment contract [in case of making prosthesis it is (Pest Central District Court 31. P. 89. 625/1994.; Metropolitan Court 41. p. 21. 853/1997); even in case of esth  tique operations, I.V.G. and sterilization procedures, but in case of heart transplantation and cranial operation the diligence is determinant)].

The treatment contract cannot be classed among mixed contracts:

- it cannot be considered as a combination because it is very difficult to define which types of contracts are mixed in it (in case of a treatment in hospital, the elements of leases, deposit and contract of public utility can be mentioned besides the elements of contract and contract of professional agency);

- it is not uniting the different types, as the combination of the contractual elements cannot be recognized: the contractual characteristics that can be determinant in the treatment contract are changing by the types of medical care;

- the purpose of the treatment contract is always a special service that is changing in case of every type of medical care (difference between operation and pulmonary screening) and therefore they cannot be reduced to one special service.

In our opinion the treatment contract is an *independent, sui generis, atypical contract which isn't namely mentioned in the Civil Code*.

5.2. Merchandising contract⁸

The word “merchandising” (in Germany it is “Vermarktung”) means trade/sales/promotion of purchasing goods. Merchandising is a legal institution and an economic phenomenon at the same time: the medium of promotion and marketing. *In economic meaning* the merchandising is the coordination of establishing a shop, furnishing the place, the presentation of goods, the decoration, the variety, the human relations, the packaging, the promotion and motivating the customers in a way that is suitable for fulfilling the needs and requirements of that certain group of costumers.

From the aspect of law merchandising is considered to be an image-transfer. The purpose of the merchandising is the secondary utilization: the utilization of a well-known and accepted image in another field.

As for the designation of merchandising, there are three different definitions: the restrictive category of the Council of Copyright Experts, the definition of image-transfer contract regulated in the Act on Sport and the one created by the International Association for the Protection of Intellectual Property (AIPPI). *According to the Council of Copyright Experts* (expert opinion no. 13/2003.) the purpose of the contractual relationship is the utilization of the typical figures and elements of a work of an author in order to increase the marketability of other works, goods and services. According to the *image-transfer in the Act on Sport* in return for consideration, under a marketing activity the name, image of an athlete, the name, arms of a sports association-body and other intellectual goods in relation with sports activity are used on boards, gifts and souvenirs, clothes, other objects and in an electronic way in order to influence the consumers (Act I. 2004, section 35). According to the *International Association for the Protection of Intellectual Property* the contract has the feature of utilization under which symbols, trademarks, parts of a work of an author, the physical appearance real or fictive persons are utilized in order to motivate the purchase of goods and providing services (supposing that these signals in question are not used in accordance with their original functions but for purchasing goods and services by the general reputation or attraction of the figures).

As for the three definitions we can agree with the one with the most extensive meaning, as the two more restrictive definitions are implied in it: the parts of a work of an author, the fictive persons are mentioned in the definition created by the International Association for the Protection of Intellectual Property and athlete belongs to the category of the real person and the arms/name of a sports organization/association/body are classified as a symbol/trademark according to the extensive definition.

The *purpose* of the conclusion of a merchandising contract is to influence costumers on the market by applying the name/image of a famous person/imaginary figures/characters of a cartoon/figures of novels and tales/trademark etc. in order to motivate them to buy. The motivation of sales, the increase of the marketability of goods are based on the positive consideration of the applied person/labeling and in reason of this merchandising is an effective way of product/service/advertising (the costs of introduction to the market can be

⁸ Vida, S.: *A merchandising védjegyjogi oltalma* (Patent Law Protection of Merchandising). *Védjegyvilág*, (1995) 3, 10–17; Tattay, L.: *A merchandising és a szellemi alkotások* (The Merchandising and the Intellectual Works). <http://www.jak.ppke.hu/tanszek/polgjog/letolt/merc.doc>; Strihó, K.: *A merchandising szerződés* (The Merchandising Contract). <http://jesz.ajk.elte.hu/striho33.mht>; World Intellectual Property Organization: *Character Merchandising-Report* prepared by the International Bureau, WO/INF/108. Geneva, Dec. 1994; Csécsy, Gy.: *A szellemi alkotások joga* (The Law of Intellectual Works). Miskolc, 2008.

reduced by the image-transfer). The turnover of the undertakings applying merchandise is increasing, they have extra profit and they are promoters of the competition in the market by using this legal construction extensively.

The fields mostly affected by merchandising—as the medium of marketing—are: articles of clothing and fashion (e.g. Gucci bag, Benetton T-shirt), printed matters and stationery (e.g. postcard with Tweety on it), entertainment (e.g. the promotion of a concert by a popular tv personality), gifts and knick-knackery (e.g. a cup with Winnie-the Pooh on it), food products (e.g. spice mix by Horváth Rozi), furnishing and household goods (e.g. Tiffany lamp), sports goods and sports equipment (e.g. the sportswear of Nike is promoted by Roger Federer), toys (e.g. Harry Potter board game), goods of health- and beauty care (e.g. Penélope Cruz as the face of L'Oréal) and electronic commodities (e.g. the TAG Heuer watch is made popular by Tiger Woods).

The *subjects* of merchandising are the merchandiser that uses image-transfer in order to increase the negotiability of his goods/service and the entitled (natural person, legal entity, organization without legal entity) that contributes to the commercial utilization of his name/image/parts of his work/corporate name/trademark/indication/logo etc.

The *direct object* of the merchandising contract is the usage and utilization of the goodwill/image connecting to the indirect object, the *indirect object* can be personality (the name/image of a person alive/historical, corporate name of a not natural person), attributes of an imaginary person (name, voice, illustration, multi-dimension reproduction, see Spiderman, Rambo), trademark, illustration, emblem (e.g. sport association), corporate name, parts of a work of an author (characters of animals of a cartoon, melody, book/title of a film etc.) and prestige (e.g. a T-shirt with the name and arms of a famous university).

One of the most important elements of the content of the merchandising-contract is the utilization of the image which does not requires assent (e.g. the promotion of Kaiser beer as “the beer”) or it does require it (e.g. for the utilization of the image of a person alive, for the name of a historic person, the authorization of the Hungarian Academy of Sciences). The utilization for personal purpose can also be possible, in this case the created image (goodwill) is extended to other areas by an undertaking (e.g. a restaurant markets wines with its name on the label). The other important attribute is the legal protection of the entitled person on the one hand against the illegal image-transfer of the merchandiser, on the other hand against the utilization of image/goodwill by the rivals of the merchandiser without title and legal basis (thus without a merchandising agreement). To settle these problems varied ways of protection are provided by law:

- the provisions of Civil Code referring to personality (Act IV of 1959. sections 77–80, 84–85);
- the provisions of the *Act on the Protection of Trademarks and Geographical Product Markings* [Act XI. of 1997, point 5(1)a), section 7., item 12(2), section 27];
- the rules of Copyright Act (Act LXXVI of 1999, section 16.);
- the section of the Act on Sport (Act I of 2004, section 35);
- the norm of the Act on the Press [Act II. of 1986, item 3(1)];
- the rules of the Act on Essential Conditions of and Certain Limitations to Business Advertising (Act XLVIII. of 2008. item 9(2), sections 10, 12, 13, 14, 18, 19, 20);
- the fact of the annex of the *Act on the Prohibition of Unfair Business-to-Consumer Commercial Practices (the Unfair Commercial Practices Act)* (Act XLVII. of 2008, annex point 3);
- the section of the *Act on the Prohibition of Unfair Trading Practices and Unfair Competition* (Act LVII. of 1996., section 8., secondary protection as it regulates the possibility to act against the rival of the merchandiser).

Merchandising is a heterogeneous and complex legal institution of which qualification is influenced by its character of indirect object: it can include elements of the contract of publishing, adaptation to screen, utilization of products related to graphic images, utilization of applied graphic works, advertising, sponsorship, image-transfer, licence, franchise, utilization of commercial/corporate name collectively and severally. In consequence, relying on the varying and special object and content of the merchandising agreement (similarly to the treatment contract) it is an onerous atypical contract with the characteristics mentioned in this study in item 1.

6. “False” atypical contracts⁹

Those contracts can be considered “false” atypical contracts which—*by their name and content—pretend to have some of the characteristics of atypical contracts* (e.g. foreign name; apparently they do not seem to belong to the express contracts of the Civil Code; the role of foreign practice in their Hungarian establishment; applicability of general rules referring to contracts; they are mostly concluded in order to create a permanent legal relation between economic organizations); but as a matter of fact they can be classified as mixed contracts or a nominated, express contract.

As for the definition of the type of a certain contract the name given and the terminology used by parties is not determinant, *the content and elements of the definition of the agreement are decisive*.

Under the *distribution contract*¹⁰ the distributor—restricting his market of acquisition and purchase to a certain geographic area—purchases goods from manufacturer and in return for a discount he purchases these goods in his name and on his behalf, on the basis of a general contract that establishes a permanent legal relationship (Vb/01103; DCFR: Principles, Definitions and Model Rules of European Private Law). As a synonym of distributor the expressions like importer, reseller, purchaser, dealer can also be applied. [Regulation of Ministry of Health no. 4/2009. (III.17.); 104/2007. VJ; 81/2006. VJ; 26/2006. VJ; 21/2006. VJ; 154/2004. VJ; 60/2004. VJ; VEF 2007.2; BDT 2007. 1533.] The distribution contract refers to the purchase and sale of a certain product therefore it can be identified with the purchase agreement (with the chain of purchase) regulated by the Civil Code. The distributor is a merchant who purchases and sells certain products—with regard to his profile of activity—professionally. Our point of view is confirmed by the decision of the Court of Appeal of Szeged Gf. I. 30 332/2007.; BDT 2008. 69.); there is no consignment between the foreign manufacturer and the domestic distributor if the product is purchased by a contract of sale by the distributor and afterwards he purchases the goods recorded as his own stock towards other resellers and users; the profit of his commercial transaction is covered by the margin applied by him.

The content of the dealer contract can be the same as the essential characteristics of the distribution contract on the one hand: it can be aimed at a dealer activity [the judgment of the Court of First Instance in Fiatagri UK Ltd. and New Holland Ford Ltd. v. Commission of the European Communities (T-34/92.); the judgment of the Court of First Instance in John Deere Ltd. v. Commission of the European Communities (T-35/92.) 51/2005. VJ;

⁹ Papp: *Ibid.* 23–25.

¹⁰ Ujlaki, L.: A disztribútor szerződés fogalmának értelmezése (The Interpretation of the Concept of the Distribution Contract). *Gazdaság és Jog*, (2002) 6, 25–26; Vörös, I.: *Nemzetközi gazdasági kapcsolatok joga II.* (The Law of International Economic Relations II.). Budapest, 2004.

292/1996. VJ; 24/1995. VJ] and resale (26/2006. VJ; 2/2003. VJ). On the other hand the dealer agreement can be concluded with the content of consignee/agency and purchase at the same time (5/2004. VJ). Thirdly it may happen that the dealer purchases the product from the manufacturer and he concludes a carriage contract for it with the consumer (Taxation issues No. 1998/150). According to the above-mentioned sales contracts or a consignment or sale combined with an independent commercial agency agreement (and also combined with some elements of deposit) or a postponed sale combined with sale are covered by the dealer contract.

The *conclusion of an outsourcing contract*¹¹ occurs if a service (field of activity) or at least the main part of a service is entrusted to an outsider contractor—who is independent from the aspect of ownership and management—by an economic organization besides the demolition of his possible internal capacities. The reason of externalization is the reduction of the costs, its purpose can be the increase of its operational effectiveness, the concentration on the main activity and to reach a higher level of service. The outsourcing contract can be conducted for placing the processing, service of application, management of application, placing the system-infrastructure, placing the infrastructure, placing the system, placing the course of business, placing the business strategy etc. (87/2006. VJ; 176/2005 VJ; 40/2005 VJ; 15/2003. VJ; 98/2002. VJ; 167/2001. VJ). In our opinion the outsourcing contract can be considered as a professional service contract combined with agency: on the one hand the right to command and the right of control, on the other hand the effort to diligent procedure in that certain case entrusted to him can refer to agency, and providing a service has the character of professional services (as it tends to another result reached by work).

In the background of investment contracts¹² there is always a definite economic purpose: the effort of saving, extra profit or making profit; though the economic intention of the parties of the contract can be reached by different contracts (BH 2007.17.), and the most decisive from the aspect of law is how they reach it, in which legal form, under which nominated contract they are concluded (BDT 2001.398.). We agree with Gyöngyi Harsányi that we must make a difference between contracts regarding the fact whether the operation of investment is arranged by the investor personally or he has it arranged by a specialized undertaking. In case of “personal investment” the contract “with the purpose of investment” cannot be mentioned as a nominated, independent (*sui generis*) contract from the aspect of law: the economic intention is realized in existing types of contracts like loan/deposit/security transactions/transactions of stock exchange/sales agreement/insurance contract/taking a shareholding in an association etc. (Court of Appeal of Szeged Pf. I. 20/057/2005.) If the direct object of the agreement is an investment service provided by a specialized undertaking, in our opinion this agreement will be a mixed contract, a combination of types: with the character of agency (command, control, diligent procedure, portfolio-management, account-management), consignment/independent commercial agency—more exactly commodity exchange, investment of securities, real estate agency, B&L association and insurance agent—(agency/conclusion of transaction) and deposit (the custody of money/security of handed over).

¹¹ Sziebig, P.: *Kiszervezve; Elmélet és gyakorlat az IT-outsourcingban* (Outsourced; Theory and Practice in IT-outsourcing). Budapest, 2006.

¹² Harsányi, Gy.: Befektetési jellegű szerződések kötelmi jog elemzése (Obligation Law Analysis of Contracts with Investment Character). *Gazdaság és Jog*, (1997) 3, 3–6.