

THE INVALIDITY AND THE NON-EXISTENCE OF COLLECTIVE BARGAINING AGREEMENTS IN THE SCOPE OF THE HUNGARIAN COURTS' DECISIONS

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Abstract: The biggest innovation of the new Act I of 2012 on the Labor Code of Hungary (LC) was that opposed to its predecessor, as a principle it allows collective agreements and individual labor contracts to regulate the content of work differently from what is stipulated by the Labor Code. The goal of the new LC was to increase the role and efficiency of collective bargaining agreements by promoting flexible collective autonomy to the employer and the trade unions, that means the freedom of the participants of the labor market to regulate their relationship through bargaining agreements adjusting to their (financial, social) needs. The collective bargaining agreements (CBA) constitute an extraordinary legal institution with both contract law and public(labor) law elements. As an agreement, the collective bargaining agreement is the embodiment of the mutual will of the parties involved, the labor union and the employer, although the normative regulations of it are applicable to all the employees employed at the employer.

The aim of my research is to examine the contractual features of the CBAs, especially concerning their validity/invalidity, existence/non-existence to elaborate the case law of the Hungarian courts, and to draw consequences, how the contractual rules of the Labor Code and the Civil Code of Hungary shall be interpreted.

Keywords: collective agreements, invalidity, non-existent contract, labor law

1. Introduction

Collective bargaining agreements are extraordinary legal institutions of private labor law, where the elements of contract(ual) law and public (labor) law are present at the same time. As an agreement, the collective bargaining agreement is the embodiment of the mutual will of the parties involved, the labor union and the employer, although the normative regulations of it are applicable to all the employees employed at the employer.

The biggest innovation of the new Act I of 2012 on the Labor Code of Hungary (LC) was that opposed to its predecessor, as a principle it allows collective agreements and individual labor contracts to regulate the content of work differently from what is in the provisions of the Labor Code. The intention of the legislative body was – as it was expressed in the justification of the Act – to provide a more flexible and extended collective autonomy to the participants of the labor market. With the extended autonomy, the parties would be able to regulate their relationship and the content of work to match their financial, social and other needs.

The general rules of legal statements in the Labor Code went through significant changes not only as the new Labor Code entered into force in 2012, but with the new Civil Code as well, which was enacted in 2014. The new Labor Code contains an

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enumeration of particular provisions from among the sections of the general rules of obligations of the Sixth Book of the new Civil Code, which are applicable in the absence of a relevant provision of the Labor Code. In conclusion, the collective agreements are agreements (as legal acts), which are also governed by the Labor Code, but certain regulations of the Civil Code are applicable as general rules, unless otherwise stipulated. It should be noted that prior to these legislative changes, the interpretation of the relationship of the two acts were quite problematic, because there was no legal provision that would have provided a guideline how the rules of the Civil Code could be applied to the employment and labor relations. However, it could not be stated with a decent certainty that the relationship has been clarified, especially as far as the collective agreements are concerned. If the legislation does not provide sufficient guidance, the practitioners of the legal profession tend to rely on the decisions and interpretation of the courts. The aim of this paper is to present the actual case law of the Hungarian courts regarding the invalidity and non-existence of the collective agreements, and to illustrate that in several cases the guidance and the justification of the judgements are opposing, and as a result, constitute an ambiguous practice.

2. The Legal Nature of Collective Agreements

Under Hungarian Law, collective bargaining agreements can be concluded between the employer or employers' associations, and a recognized (registered) trade union. Unions are special forms of associations registered by the regional courts with a constitutional power. The capacity to conclude a collective bargaining agreement used to be linked to the results of the works council elections, where the union members needed to get the majority of the votes in order to achieve collective contractual capacity. Now, unions having the membership of at least 10% of the total number of employees employed at the employer are authorized to conclude collective agreements. If the employees employed at the employer are not represented by a single union, those unions that have at least 10 per cent membership are entitled to conclude a collective agreement jointly.

Hungarian labor law scholars make a distinction – originating from German dogmatic legal theories – between the normative and contractual part of the bargaining agreements.¹ The contractual part contains provisions that regulate the relationship between the concluding parties, the normative part declares the content of work, in other words, the rights and obligations that arise from or are in connection with the employment relationship. The normative regulations prevail just as legislative acts with respect to the relationship of the employer and the employee, and the employees shall perform their work in compliance with these regulations, regardless if they did or did not have the chance to express their consent or to take part in the bargaining process of

¹ KOVÁCS RITA: A kollektív szerződések szerepe a magyar munkajogban [Roles of the Collective Agreements in the Hungarian Labor Law], in SZÉKELY TÜNDE (szerk.): *XII. RODOSZ Konferenciakötet, Romániai Magyar Doktoranduszok és Fiatal Kutatók Szövetsége (RODOSZ)*; 2011, Editura Marineasa, Kolozsvár, 21. KISS, GYÖRGY: *Munkajog* [Labor and Employment Law], 2005, Osiris Kiadó, Budapest, 399.

the CBA as a member of the trade union.² The contractual part, practically speaking, governs the means of communication and shall be applied only to the concluding parties – the employer and the union, so it behaves the same way as the terms of a contract.

Collective Agreements are legal statements under the Labor Code, just as the employment contracts and any other agreements concluded between the employer and the employee, therefore the general rules of legal statements are applicable. This means that collective agreements are governed by the general rules of representation, forms of the statements and the breach of formal requirements, and the rules and consequences of invalid – void and voidable – statements.

The Labor Code does not give detailed instructions with regards to the contents of the collective agreements, instead, it authorizes the concluding parties to formulate the agreement matching their mutual consent. The authorization to do so is stipulated in Section 277 (2) of the Labor Code, which empowers the parties to regulate the content of work differently as it is in the Part Two (Employment Relationship) and Three (Labor Relations).

3. The Non-existence of Collective Agreements

Although neither the Civil Code, nor the Labor Code defines explicitly what a non-existent contract is, leaning mostly on the theories of legal literacy, the civil and labor courts established a practice to determine and to make a distinction between an invalid and a non-existent contract. According to Section 14 of the Labor Code, contracts constitute the outcome of an agreement resting on the mutual consent of the parties. A similar definition of contracts can be found in the Civil Code as well. From these regulations, it can be inferred that in order for a contract to be existent, it has to be the outcome of the mutual will of the parties which extends to all the terms and conditions the parties consider to be necessary. When the parties have no mutual will, there is no consensus between them, their statements shall not be defined as an agreement. The complete lack of consensus between the parties will also not result in a void or voidable contract or any kind of agreement, hence the rules of invalid agreements cannot be applied, and the legal consequences of invalidity are also not applicable.³

The Business Law Chamber of the Curia (Supreme Court) of Hungary expressed in its Decision 1146/2004. on principal issues that in civil law, false representation constitutes a non-existent contract, because there is no mutual will between the

² BERKE, GYULA: *A kollektív szerződés a magyar munkajogban* [Collective Agreement in the Hungarian Labor Law], 2014, Utilitates Bt., Pécs, 148.

³ György Nádás draws a similar conclusion, when he expresses that from the provisions of the Civil Code it can be inferred that regardless of its validity or invalidity, an agreement is concluded only if it is concluded between the parties. Hence, if there is no consensus between the parties that extends to all the terms and conditions the parties considered to be necessary by any of the parties, the contract does not exist. See NÁDAS, GYÖRGY: *A kollektív szerződések jogdogmatikai kérdéseinek vizsgálata* [Examination of Legal Dogmatic Issues of Collective Agreements], in *Tiszteltetés. Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára*, 2015, ELTE Eötvös Kiadó, Budapest, 324.

represented party and the third party, unless the conduct of the false representative has been approved afterwards. The Curia also expressed that because of the lack of consent and direct intention of the parties, the false representative and the third party also do not engage into a contractual relationship with each other, but civil obligations, such as tort, may arise from their relationship, and the false representative shall repay all the profits that rose from the non-existent contract under the rules of unjust enrichment to the third party. The rules of false representation follow a different logic in labor law. Section 20 of the Labor Code states that if the employer's rights are exercised by an unauthorized person, his actions shall be void, unless the acts of the person are approved by the authorized representative. From this regulation, it can be inferred that in labor law if the contract is an outcome of the action of the false representative, it is an existing contract, and the consequences of invalid contracts shall be applied if it is declared to be invalid by a court of law.

In the case No. Mfv.I.10.094/2010/5., a union concluded a CBA before its registration by the regional courts. The employer terminated several employment relationships with notice citing collective redundancy, referred to the rules of the collective agreement in the termination documents, and provided severance pay to the employees in case the employment is terminated by the employer. The employees claimed that under the collective agreement they would have been entitled to an extra amount of four months of average salary as severance pay if a redundancy occurred, but the employer refused to pay the severance pay, claiming that the collective agreement was non-existent. In its final decision, the court expressed that the registration has a declarative power, and without it the union did not exist. Therefore, the union did not have the capacity to exercise any rights or to express any form of consent, especially to conclude an existing collective agreement. As for the consequences, none of the regulations of the collective agreement bound the parties by law. The court also remarked that the employer invoked the rules of the collective agreement in the documents concerning extra payments if a termination with notice occurred, so regardless of whether the collective agreement was non-existent, the employer was bound by its unilateral declaration regarding the severance payment. Beyond this, however, no rights, obligations and claims could be based on a non-existent contract.

The question may arise, whether an employer could claim back the enumeration that had already been paid as the result of a non-existent contract. As the Business Chamber of the Curia expressed in its decision above, in civil law, the rules of unjust enrichment are applicable, but none of the regulations of the Labor Code say that the rules of unjust enrichment shall be applied in an employment relationship, or in labor and employment law in general. It also has to be noted that instead of the unjust enrichment, the civil law rules of the promissory estoppel are applicable in labor law as well. E.g. if the (intended) conduct of the union has induced a bona fide employer to pay extra enumerations or provide benefits – through no fault of its own – under a non-existent and non-enforceable collective agreement, the court may declare the liability of the union. Nevertheless the application of the promissory estoppel regarding collective agreements has been without an example and has not been established in the practice of the Hungarian courts yet.

4. The Invalidity of Collective Agreements

Just as in civil law, in labor law there are two types of invalid contracts, the void and the voidable contract. If a contract is void, a special procedure is required for the declaration of invalidity, and the court observes it by its own motion. If it is voidable, the court declares the invalidity upon a successful contest. The Labor Code defines its own system of invalidity, establishes its own definitions, and does not refer to the rules of the Civil Code. In labor law, the agreement is void upon the infringement of a mandatory statutory provision, or if it was an attempt to circumvent the law.⁴ The contract is also void if mandatory formal requirements have not been fulfilled. The agreement is voidable by the concluding party if error, misrepresentation, or unlawful duress or coercion occur, and it is invalid only upon a successful contest. Most importantly, in labor law the consequences of invalidity grossly differ from civil law. In civil law, if a contract is void or voidable – and it was declared to be invalid – it is considered invalid from its conclusion. In labor law, the rights and obligations that arise from, or are in connection with an invalid agreement, shall be treated as if they existed under a valid agreement. It also has to be emphasized, that in civil law, anybody who has a legitimate interest can refer to the contract's invalidity without any time constraints if the contract is void, and within one year from the conclusion if the contract is voidable. In labor law, only those who have a legitimate interest can request the declaration of invalidity if the agreement is void, and only the parties who concluded the voidable contract have the right to contest. It can be inferred that for example, the union who took no part in the bargaining process and the conclusion, or the employees alone as individual persons, have no right to contest the invalid collective agreement.

The Curia in its individual court decision (Mfv.I.10.885/2007/3) observed how the legal consequences of invalidity can be applied if a court of law declares the contract to be void. In this case, the employment relationships were terminated referring to the regulations of the CBA providing higher amount of severance payment to the employees. The CBA was found to be void after the transmission of the termination documents. The court expressed that under the rules of the invalidity in labor law, the regulations of the collective agreement shall be treated as if they existed under a valid agreement, regardless of the fact that during the procedure the CBA was found invalid by a court of law. Contrary to this case, the Curia expressed a vastly different opinion in its case (Mfv.I.10.231/2012/4.), where the regulation of the CBA provided a higher amount of severance payment that interfered with the mandatory regulations and limitations of statutory laws on public (property) employers. In this case, the parties terminated the employment relationship on a mutual consent, providing no severance pay to the employee. The employee contested the termination agreement on the grounds of misrepresentation, because he was not informed that if the employment relationship had been terminated by the employer, the collective agreement would have provided extra enumeration. The employer expressed that the regulation of the collective agreement providing extra enumeration was contrary to mandatory regulations (void), and therefore could not be applied. The court agreed

⁴ The Artificial/disguise contract shall be enforced on the terms corresponding to the true intent (secret agreement).

with the respondent employer, and expressed that the regulations of the CBA were “not applicable” because of the interference with the Act.⁵ The Court expressed a third opinion in its principal decision (Mfv. II. 10.983/2001/4.), where it was declared that if an enumeration was paid referring to CBA which was found invalid after the payment, the status existed prior to the conclusion of the contract shall be restored under the rules of the Civil Code.⁶

As these examples show, Hungarian Courts have quite an inconsistent case law regarding the consequences of an invalid collective agreement. Taking into consideration these three cases and the consequences of invalidity described in the Labor Code, the rules of an invalid regulation (contract) shall be applied as if they had existed under a valid agreement. This also means that even if the collective agreement interferes with the mandatory regulations, its rules shall be applied until it is declared to be invalid. It shall be noted that the Labor Code explicitly regulates the rules of invalidity in labor and employment relationships, which means that the rules of the Civil Code cannot be applied to them.

5. The Amendment of the Collective Agreements

The Curia expressed in two of its decisions that only those unions are entitled to amend or modify the CBA who were concluding parties to the collective agreement. Furthermore, the Curia expressed in its decision on a principal issue that the union who concluded the contract is entitled to amend it, even if it loses its collective contractual capacity.⁷ This was a decision that relied on the previous Labor Code, where the union had collective contractual capacity if it obtained 50% of the votes at works council elections. Under the new rules of the Labor Code, as it was mentioned in Chapter 2. of this paper, only 10 percent of the employees employed is required to be a member of the union to conclude a collective agreement, and if the employees are represented by two or more unions at the employer, the unions with a collective contractual capacity are entitled to conclude the contract jointly. In this case, the Curia declared several amendments of the CBA to be void, because one of the unions was absent from the conclusion of the modifications. Although neither the old, nor the new regulations

⁵ Section 13. § (2)-(3) of the Act XXII of 1992 on the Labor Code (previous Labor Code) said, that a collective bargaining agreement may govern any employment-related issues, however, such agreement may not be contrary to legal regulations. Unless otherwise provided for by this Act, a collective bargaining agreement or an agreement between the parties may deviate from the provisions set forth in Part Three of this Act on condition that such deviation provides more favorable terms for the employee.

⁶ The Section 237. § (1) of the Act IV of 1959 on the Civil Code of Hungary, that was in effect at the time the case was ongoing, stated, that regarding invalid contracts, the state that existed prior to the conclusion of the contract shall be restored. The Act V of 2013 on the Civil Code (new Civil Code) significantly changed the system of invalid contracts, making the regulations more detailed. Although, the courts of law would have issued a similar decision with the application of the new rules, in other words, if the state existed before the conclusion could not be restored, the court would have ordered the parties to pay the value of the already fulfilled services (see Section 6:113. §).

⁷ Mfv. II. 10.174/2001. (BH2003. 128), Mfv. II. 10.174/2001/4. (EBH2002. 684).

express it explicitly, it can be inferred from the text of law that the rules and conditions of conclusion are applicable if the collective agreement is amended or modified. The problem is that the case law of the Curia shows that without the consent of all the unions that were originally concluding parties, the collective agreement cannot be modified. We should take into consideration that according to the Labor Code, the collective agreement will cease to apply only if all the concluding unions lose their contractual capacity, so long as only one of the union remains capable to conclude the CBA, the consent of all the smaller unions, who actually lost their contractual capacity, is required for the amendment. I assume the legislative body wanted to tie the both the conclusion and the amendment to the unions who have enough support to conclude an actual bargaining agreement, but in this case, both the regulations and the case law of the courts of law have to be revised.⁸

6. Conclusions

These cases demonstrate that the rules concerning the invalidity and non-existence of the collective agreement, particularly regarding the applicable legal consequences, are in many cases obstructed by dogmatic and interpretational difficulties. The general rules on agreements of labor law are difficult to apply to this special legal institution, which comes to the surface in practice, as it was presented by the Curia decisions. My opinion is that, in the spirit of dogmatic clearance, it would be appropriate to have more detailed regulations in the Labor Code than the currently established regarding the collective agreements, also the case law of the Hungarian courts of law should be reviewed, revised, and summarized in disambiguation opinion issued by the Curia.

As a final conclusion, I would like to point out the interesting fact that regardless of the invalidity and/or non-existence of a CBA, the unilateral statement of the employer referring to the provisions of the collective agreement, thus confirming them, may establish rights to the employees, and the provisions which are more favorable to the employees remain applicable. In general, the employers of the labor market often make the conditions of employment more favorable unilaterally, such as by, replacing the positive impacts of the collective agreements with internal policies and regulations. However, the collective agreement opens up the way for a deal, where it is possible to bargain for benefits with the employer itself, making all the benefits provided conditional to the conclusion of the agreement. The enforcement of these provisions may be quite problematic if the collective agreement is invalid / non-existent, therefore it serves the interests of the employer to validly conclude a collective agreement, especially with trade unions who are capable and authorized to do so.

⁸ LŐRINCZ, GYÖRGY: A munkaviszonyból keletkező kötelek szabályozásáról [Thoughts About the Obligations Arising from the Employment Relationship], in *Gazdaság és Jog*, Vol. 22. Issue 12. (2014), 5.

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