


General Rules on Invalidity of Contracts in Serbia

Attila Dudás

Ph. D., Associate Professor, Faculty of Law, University of Novi Sad, correspondence address: Trg Dositeja Obradovića 1, 21000 Novi Sad, Serbia; e-mail: a.dudas@pf.uns.ac.rs

 <https://orcid.org/0000-0001-5804-8013>

Keywords:

Serbian
contract law,
invalidity
of contracts,
nullity, voidability,
non-existent
contracts

Abstract: The Serbian Law on Obligations in the most part retained the general rules on invalidity of contracts from the federal Law on Obligations from 1978. The Law explicitly differentiates two categories of invalid contracts: null and void contracts, on the one hand, and voidable contracts, on the other. Whereas the general legal consequences of both categories are principally the same, *restitutio in integrum*, null and void contracts have some other, more stringent legal consequences as well. The most important is the ban of restitution of performance of the party who acted in bad faith, which in cases when the contract grossly violates good morals may be supplemented by the forfeiture of the object of performance. The effective Serbian Law on Obligations, namely, still contains the rule retained from the federal Law from 1978, according to which the court may order the party who acted in bad faith to transfer the object of his/her performance to the municipality of his/her residence or domicile. Voidable are considered contracts with flawed contractual intention, such as contracts concluded in mistake, deceit or under threat. In addition, voidable are contracts of minors older than 14 years concluded without the consent of their natural or legal guardian, or contracts of adults whose capacity is not completely excluded, but only partially reduced, concluded outside their capacity or without the consent of their legal guardian. Furthermore, since *leasio* is considered a case of mistake making the contractual intention flawed, the remedy is also the voidability of the contract. In Serbian law, a contract is null and void, if it infringes public order, imperative rules or good morals, unless something else is

prescribed by the law or the purpose of the infringed rule implies a different remedy. The illegality and immorality of a contract is scrutinised through its object (content) and cause. Aside from these general rules, the Law on Obligations specifically qualifies usurious contracts as null. Yet, there are several means of „saving” a contract from the consequences of invalidity, primarily by performance, convalidation and partial invalidity. Non-existent contracts are clearly distinguished in the doctrine, but it is questionable whether the Law on Obligations envisages a separate legal regime applicable to this category, distinct from the one applicable to null and void contracts. The law, namely, uses wording or implies in certain cases as if the contract had not been concluded at all. However, in the rules pertaining to legal consequences of invalidity refers only to null and void, and voidable contracts. The doctrinal standpoints differ whether a separate legal regime applicable only to non-existent contracts could be implied from the general rules, regardless that no specific set of rules on non-existent contracts exists in the Law on Obligations.

1. Introductory remarks

In this study a brief overview of the general rules of invalidity of contracts in Serbian law is given. These rules are contained in the part of the federal Law of Obligations (*Zakon o obligacionim odnosima* – hereinafter: LO) from 1978 pertaining to the general rules of contract law, which are in the most part still effective in Serbian law. Aside from these rules, there are many other statutes regulating specific contract-types, prescribing special rules of their invalidity. For instance, naming only the most important, the Consumer Protection Act (*Zakon o zaštiti potrošača*) from 2021 and the Law on the Protection of the Users of Financial Services (*Zakon o zaštiti korisnika finansijskih usluga*) from 2011 prescribe special rules relating to consumer contracts and consumer credit and financial contracts, the infringement of which results in invalidity of the contract or some of its terms. Similarly, the Law on the Protection of Users of Financial Services in Distance Contracts (*Zakon o zaštiti korisnika finansijskih usluga kod ugovora na daljinu*) from 2018 also has special rules on invalidity. By the same token,

the 1995 Law on Inheritance (*Zakon o nasleđivanju*) regulates lifelong maintenance contract and contract on distribution of the estate to heirs during the life of the devisor, whereas the 2005 Family Act (*Porodični zakon* – hereinafter: FA) regulates the nuptial agreement and other contracts relating to proprietary regime of spouses, both envisaging special rules of invalidity of such contracts. According to the well-established principle of *lex specialis derogat legi generali*, in all cases not specifically regulated by these special statutes, the general rules of invalidity laid down in the LO apply.

The LO in the part pertaining to the general rules of invalidity of contracts differentiates explicitly only two categories of invalid contracts: nullity and voidability. This statutory dichotomy raises the question whether the LO recognizes non-existent contract as a special subcategory within nullity with a special set of rules applicable. The objective of the paper is to shed light on the different legal consequences of null and void, voidable and non-existent contracts in Serbian law. The research methods applied are the normative and teleological interpretation of statutory norms, with regard to the relevant and representative Serbian legal literature.

2. Null and void contracts

The LO prescribes that a contract infringing imperative rules, public order or good morals is null and void, unless the purpose of the infringed norm implies otherwise else or the law prescribes different legal consequences for the given case.¹ However, if the prohibition applies only to one of the parties, the contract shall be considered valid, unless the law prescribes something else, whereby the party infringing statutory prohibition shall face appropriate legal consequences.²

The nullity of a contract is determined either by its object (content) or its cause. The LO prescribes that a contract is null and void if its object is impossible, unlawful, undetermined or undeterminable.³ The federal LO clearly followed the French Code civil in the wording applicable at the time⁴, and the effective LO still does, since it prescribes explicitly

¹ LO, Article 103(1).

² LO, Article 103(2).

³ LO, Article 47.

⁴ The reforms of the French Code civil from 2016 repealed the rules on the cause of contract.

that a contract must have a valid cause.⁵ Moreover, it has even more detailed rules on the cause of contract than the French Code civil had before its reforms in 2016. It regulates separately cause in its objective (basis of contract) and subjective meaning (motives for conclusion of the contract). The LO prescribes that a contractual obligation must have valid cause, whereby the cause is considered such if it does not infringe imperative rules, public order or good morals.⁶ The LO further specifies that a contract is null and void if its cause is inexistent or invalid.⁷ Motives, however, that is the cause of contract in its subjective meaning, generally do not influence the validity of a contract.⁸ This applies to lawful motives. Unlawful motives render an onerous contract null and void⁹ only if the counterparty acted in bad faith, that is if he/she knew or should have been aware that the first party concluded the contract under the influence of an unlawful motive.¹⁰ Conversely, unlawful motives always make a gratuitous contract null and void.¹¹ Aside from these rules pertaining to the cause of contract, as one of the preconditions of conclusion of a valid contract, it comes to surface in relation to several other legal institutions as well.¹²

The basic legal consequence of the declaration of a contract null and void is *restitutio in integrum*. The Law, namely, prescribes that both parties

⁵ For more details on the role of cause of contract in Serbian contract law see Jožef Salma, “Kauza obligacionih ugovora,” [Cause of Contract], *Zbornik radova Pravnog fakulteta u Novom Sadu* 40, no. 2 (2006): 177–200.; József Szalma, “Causa (Rechtsgrundlage) bei den Obligationsverträgen,” *Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae*, Sectio Juridica, 48, (2007): 257–282.; Attila Dudás, “A szerződés célja (kauzája) az európai és a magyar jogban,” [The purpose (cause) of contract in European and Hungarian Law] *FORVM – Acta Juridica et Politica* 2, no. 2 (2012): 87–100.; Attila Dudaš, “Kauza ugovorne obaveze – francuski uticaj na Zakon o obligacionim odnosima Republike Srbije,” [Cause of contractual obligation – French influence on the Law on Obligations of the Republic of Serbia] *Zbornik radova pravnog fakulteta u Novom Sadu* 45, no. 3 (2011): 663–680.

⁶ LO, Article 51(1–2).

⁷ LO, Article 52.

⁸ LO, Article 53(1).

⁹ The LO uses the formulation “without effect”, but it is construed as a case of nullity.

¹⁰ LO, Article 53(2).

¹¹ LO, Article 53(3).

¹² See Attila Dudaš, “Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima,” [Cause of contractual obligation according to the Serbian Law on Obligations] *Zbornik radova pravnog fakulteta u Novom Sadu* 44, no. 1 (2010): 145–169.

are obliged to restore the benefits conferred based on a null and void contract. The restoration is primarily to be achieved in kind. However, if that is not possible, or the restitution in kind is not compatible with the nature of the benefits conferred, appropriate monetary compensation shall be paid, according to the market prices valid at the time of delivering the court decision, unless the law prescribes something else.¹³ The additional legal consequence of nullity is the liability for damage. The LO prescribes that the party whom the ground of nullity of the contract is attributable shall be held liable to the counterparty for the damage sustained in relation to nullity, provided he/she acted in good faith, i.e. he/she did not know, neither should have been aware of the ground of nullity, taking into account the circumstances of the given case.¹⁴ The liability for damage in relation to the nullity of the contract is considered the second major area to which the notion of *culpa in contrahendo* is applied, beside the liability for conducting negotiations in bad faith.¹⁵

The nullity of the contract may, however, trigger special legal consequences as well. The LO retained the rule from the federal law on obligations prescribing that if a contract is null and void because it is contrary to imperative rules, public order or good customs, taking into account its content or the purpose the parties intended to achieve, the court may reject, in whole or in part, the request of the party who acted in bad faith for the restoration of the object of performance from the other party.¹⁶ This rule is known as unilateral restitution, since the party who acted in good faith is entitled to restitution while the other, who acted in bad faith, is barred of this right. The doctrine considers this rule the application of the principle of *nemo auditur propriam turpitudinem allegans*.¹⁷ Moreover, the court may decide to order the party who acted in good faith to hand over what he/

¹³ LO, Article 104(1).

¹⁴ LO, Article 108.

¹⁵ Borislav Blagojević in *Komentar Zakona o obligacionim odnosima* [Commentary of the Yugoslav Law on Obligations], edited by Borislav Blagojević and Vrleta Krulj, Vol I. 1st. (Beograd: Savremena administracija, 1980), 315.

¹⁶ LO, Article 104(2).

¹⁷ Jožef Salma, "Načelo nemo auditur propriam turpitudinem allegans i ništavost ugovora," [The Principle of Nemo Auditur propriam Turpitudinem Allegans and the Nullity of Contract] *Anali Pravnog fakulteta u Beogradu* 52, no. 3–4 (2004): 491.

she received on the basis of the unlawful contract to the municipality on whose territory it has its seat, i.e. residence, or domicile.¹⁸ In making such decision, the court takes into account whether the parties acted in good or bad faith, the importance of the endangered asset or interest, as well as the morals of society.¹⁹

The LO explicitly specifies that the right to request from the court to have the contract declared null and void does not cease by the lapse of time.²⁰ In terms of the range of persons entitled to request the declaration of nullity of the contract, the LO sets that the court controls ex officio whether the contract is null and any interested person may give initiative for the judicial declaration of the nullity of a contract.²¹ The LO explicitly entitles the prosecutor to request the judicial declaration of the nullity as well.²² The rule, according to which any interested party may request the declaration of the nullity of a contract, should be interpreted in the sense that the claimant must demonstrate their own meaningful legal interest in the declaration of the nullity.²³ For instance, the creditors of the decedent have legal interest to request the declaration of the nullity of a lifelong maintenance contract concluded by the decedent, since by that the value of the inheritance estate might increase, hence the chances of a successful collection of creditors' claims also increase.²⁴ The phrase "any interested party" comprises the parties themselves. However, it was debated in the doctrine if the party who acted in bad faith (that is who knew or should have been aware of the reason of nullity) should have the right to request the declaration of nullity. The principle of *nemo auditur*, if applied consequently, would mandate such conclusion. However, since the initiative for the declaration of nullity originates regularly from the parties, such outcome would de facto render the null and void contract valid, if the other party, who acted in good faith did not make an initiative for declaration

¹⁸ LO, Article 104(2) in fine.

¹⁹ LO, Article 104(3).

²⁰ LO, Article 110.

²¹ LO, Article 109(1).

²² LO, Article 109(2).

²³ Attila Dudaš in Bojan Pajtić, Sanja Radovanović and Attila Dudaš, *Obligaciono pravo* [The Law of Obligations] (Novi Sad: Pravni fakultet u Novom Sadu, 2018), 389.

²⁴ Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 389.

of nullity. Therefore, the majority opinion in the doctrine is that the claim of the party, who acted in bad faith, for the declaration of nullity shall be granted, but some consequences of the nullity may be rejected (for instance his/her claim for restoration of the benefits conferred).²⁵

The infringement of imperative norms, however, does not need to result in the nullity of a contract in all cases, still less in the harsh consequences of unilateral restitution or forfeiture of the object of the performance in favour of a municipality. There are several legal institutions in the LO the purpose of which is to save the contract from the legal consequence of invalidity.

First, the contract is invalid if it has not been concluded in the statutory essential form. However, a form-defective contract may be convalidated by *performance*. The LO, namely, prescribes that such contract shall still be considered valid if both parties performed their obligations, entirely or in preponderant part, unless it clearly follows otherwise from the purpose for which the formal requisites have been instituted.²⁶ If the purpose for which formal requisites have been prescribed was predominantly the protection of the parties' private interests, the performance may convalesce the formal defects. However, if its purpose was to protect the public interest, the performance cannot render the contract valid.²⁷ The performance of a contract may convalidate its nullity in case of subsequent cessation of prohibition as well. Generally, the subsequent cessation of the prohibition or the cause of nullity does not render the contract valid, regardless whether the parties performed their contractual obligations or not.²⁸ However, the LO specifies, if the prohibition was of minor relevance and ceased in the meantime, the performance of parties' obligations shall render the contract valid.²⁹ In addition, a usurious contract may also be convalidated, regardless of the nullity, which is its primary legal consequence. Similarly to *leasio*, as shall be demonstrated later, there is no principle reason to uphold the nullity of a usurious contract if the discrepancy in the values of the performance and the counterperformance is removed, which is the key reason

²⁵ Salma, "Nemo auditur," 491.

²⁶ LO, Article 73.

²⁷ Bogdan Loza in Blagojević and Krulj, *Komentar*, 221.

²⁸ LO, Article 107(1).

²⁹ LO, Article 107(2).

of its nullity.³⁰ Thus, the LO prescribes that the aggrieved party may uphold the contract by requesting the court to reduce his/her obligation to a level that may be qualified as just.³¹ The aggrieved party may file such a claim in 5 years from the day of the conclusion of the contract.³² By the lapse of this time-limit, the usurious contract cannot be convalidated anymore – the nullity becomes permanent.³³

Secondly, a contract may be declared null and void only *partially*. The LO prescribes that the nullity of a specific clause does not render the contract null and void entirely, if it can sustain without the invalid clause, unless it was a condition of the contract or a decisive motive for which the contract has been concluded.³⁴ However, the LO states that the contract shall still be considered valid, even when the invalid clause was a condition of the contract or the decisive motive of the parties, if the nullity was established in order to have the contract released from that provision and be valid without it.³⁵ The first condition is mandatory: the remainder of the content of the contract must represent a meaningful whole. The other two conditions are prescribed, however, alternatively. The doctrine examined the question of the qualification of the term “decisive motive” in the list of conditions of the partial invalidity. The majority opinion is that it represents cause of contract in its subjective meaning.³⁶

Finally, the LO explicitly regulates the legal institution of *conversion*. It prescribes that when a null and void contract satisfies the conditions of the validity of another contract, then that other contract will be considered valid among the contractors, if it would be in accordance with the purpose they had in mind when they concluded the contract and if it can be taken that they would had concluded that contract, had they known of the nullity of their contract.³⁷ The conversion is applied by the court, *ex officio*, since the court is entrusted with the task to determine the relevance

³⁰ Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 399–400.

³¹ LO, Article 141(3).

³² LO, Article 141(4).

³³ Dudaš, “Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima,” 155.

³⁴ LO, Article 105(1).

³⁵ LO, Article 105(2).

³⁶ Dudaš, “Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima,” 155.

³⁷ LO, Article 106.

of the infringement of the public order and whether it could be convalesced by converting the contract into another one.³⁸ Nonetheless, the initiative for conversion comes from the parties.³⁹ In converting the contract the court must ascertain whether the other contract, into which the null and void contract is being converted, is in line with the objective cause of contract that the parties intended to achieve. Traditionally, the conversion of an invalid contract of sale to a valid lease contract is usually mentioned in the literature as an example.⁴⁰

3. Non-existent contracts

The Serbian literature differentiates non-existent contracts from null and void contracts. In contrast to the latter, non-existent contracts do not contravene public interests, but one of their essential elements simply does not exist.⁴¹ Some assert that, while null and void contracts *de facto* exist until the court declared their invalidity, that cannot be said for non-existent contracts.⁴²

Nonetheless, the LO does not specify a separate legal regime for non-existent contracts in the part pertaining to the general rules of invalidity. It differentiates only nullity and voidability. However, at some places uses wording different from the wording used in the case of contracts that are undoubtedly null and void. For instance, it specifies that a contract concluded by a legal person outside its legal capacity *does not produce legal effect*.⁴³ Similarly, if the contract was concluded without the consent of the competent organ, it shall be considered as *if it were not concluded at all*.⁴⁴ By the same token, the LO prescribes that a sham contract does *not*

³⁸ Salama, "Nemo auditur," 488.

³⁹ Vladimir Vodinelić, *Građansko pravo: Uvod u građansko pravo i opšti deo građanskog prava* [Civil Law: Introduction to Civil Law and General Part of Civil Law] (Beograd: Pravni fakultet Univerziteta Union: Službeni glasnik, 2012), 463.

⁴⁰ Jožef Salma, *Obligaciono pravo* [Law of Obligations], 6th (Novi Sad: Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, 2009), 432.

⁴¹ Slobodan Perović, *Obligaciono pravo* [Law of Obligations]. 6th (Beograd: Službeni list SFRJ, 1986). 449.

⁴² Perović, *ibid*.

⁴³ LO, Article 54(2).

⁴⁴ LO, Article 55(4).

produce legal effect between the parties.⁴⁵ If a sham contract disguises another one, a simulated contract, that the parties really intended to conclude, the latter shall be considered formed, provided the conditions of its validity are met.⁴⁶ However, the non-existence of a sham or simulated contract is confined to the legal relationship between the contracting parties. The LO duly takes into account the interests of third parties who relied on a sham or simulated contract in good faith. Therefore, it prescribes that a claim for the determination of non-existence of such contracts cannot be addressed to a third party who acted in good faith.⁴⁷ The same wording that the contract “does not produce legal effect” is used in relation to formal contracts not concluded in the required form, unless a different consequence is mandated by the purpose for which the formal requirement was established.⁴⁸ In relation to the agreed form, the LO prescribes that a form-defective contract does not produce legal effect, if the parties conditioned the validity of the contract on a special, agreed form.⁴⁹ Finally, in the case of misunderstanding (dissensus), that is when the parties believe that they have reached an agreement, but have different assumptions relating to the cause, object or the legal nature of the contract, the contract is *not concluded*.⁵⁰ Similarly, the LO considers the contract as if it had not been concluded at all, if it was concluded by an agent without the consent or authorisation of the principal, and the latter does not approve the contract subsequently.⁵¹

In addition, there are cases in relation to which the LO does not use any wording implying specific legal consequence (or does not regulate them at all), but the literature asserts that such contracts should be considered non-existent. Such is, first and foremost, a contract concluded under coercion. The LO, as it shall be explained later, regulates explicitly only threat, the legal consequence of which is voidability. Nonetheless, the doctrine is of the opinion that such contract is non-existent, since it lacks one of the prerequisites of conclusion of a contract (freely formed contractual

⁴⁵ LO, Article 66(1).

⁴⁶ LO, Article 66(2).

⁴⁷ LO, Article 66(3).

⁴⁸ LO, Article 70(1).

⁴⁹ LO, Article 70(2).

⁵⁰ LO, Article 63.

⁵¹ LO, Article 88(3).

intention).⁵² Similarly, the LO specifies that parties must have the required capacity⁵³, but prescribes only the consequences of concluding a contract by a natural person with limited capacity, without the consent of his/her natural or legal guardian.⁵⁴ There is no rule on the consequences of concluding a contract by a natural person who does not have capacity to contract at all. Since an essential prerequisite for concluding a contract lacks, the doctrine is of the standpoint that such contracts are non-existent.⁵⁵

The critical issue in relation to non-existent contracts is whether they trigger legal consequences different from the consequences of nullity, or the rules of the LO on nullity apply both to null and void, and to non-existent contracts. Some assert that there are several points on which the consequences of non-existent contracts differ. First, anyone proving legal interest has a right to initiate the declaration of the nullity of a contract, whereby in the case of non-existent contracts only the contracting parties have such right.⁵⁶ Secondly, there is a difference between the nature of legal remedy: in the case of nullity the parties may request both the declaration of nullity and the restoration of benefits conferred, while in the case of non-existent contracts only a claim for restoration is admissible, since there is no contract at all, hence there is nothing to declare null/non-existent.⁵⁷ Thirdly, a difference exists between the legal grounds of restitution of the benefits conferred: in case of nullity the parties are entitled to restitution on the grounds of a specific rule entitling them to such remedy (LO Art. 104), whereby in the case of non-existent contracts the legal ground of the restitution are the rules on unjustified enrichment.⁵⁸ Fourthly, the claim for damages in relation to nullity are to be determined according to the aforementioned rule pertaining to nullity (LO Art. 108), whereby a claim for damages in case of non-existent contract should be assessed according to the rules on

⁵² Krulj in Blagojević and Krulj, *Kommentar*, 299.

⁵³ LO, Article 56(1).

⁵⁴ LO, Article 56(3).

⁵⁵ Krulj in Blagojević and Krulj, *Kommentar*, 298–299.

⁵⁶ Leposava Karamarković, “Apsolutno ništavi ugovori.” [Null and Void Contracts] *Pravni život* 44, No. 10 (1995): 407.

⁵⁷ Karamarković, “Apsolutno ništavi ugovori”, 407–408.

⁵⁸ Karamarković, *ibid.*, 408–409.

the liability for conducting negotiations in bad faith (LO Art. 30).⁵⁹ Finally, it is asserted that convalidation or conversion of a contract could only be applied to non-existent contracts, since the infringement of public policy in the case of nullity excludes the possibility of their application.⁶⁰ Though these arguments bear some merits, differing, not rarely opposing arguments can also be raised. Nonetheless, the conclusion may be inferred that the distinction between the null and void, on the one hand, and non-existent contracts, on the other, is perhaps one of the most obscure debates in the doctrine of the law of obligations. The case law is also rather rambling on this issue. There are decisions in which the courts do not differentiate non-existent from null and void contracts, decisions in which nominally the distinction is made, but the legal consequences are equated to those of the nullity, and decisions clearly differentiating the consequences of the two categories.⁶¹ For these reasons, a standpoint articulated in the recent literature may be strongly supported that the dubious notion of „non-existent contract” should be extrapolated completely from the conceptual confines of the invalidity of contracts and analysed within the theoretical frame of the conclusion of contract, rather as a state of „non-existence of contract”.⁶²

4. Voidable contracts

The LO specifies that a contract is considered voidable, if it has been concluded by a party whose contractual capacity is limited, if the contractual intention of either party was flawed, or when the LO or another statute so prescribes.⁶³

The LO itself does not prescribe when natural persons acquire capacity to contract. It regulates only the consequences of limitations of the capacity. The rules on obtaining the capacity to contract by natural persons are set in the Family Act (FA). The FA prescribes that a minor obtains limited capacity to contract at the age of 14. Until then he/she may conclude only juridical

⁵⁹ Karamarković, *ibid.*, 409.

⁶⁰ Karamarković, *ibid.*, 409–412.

⁶¹ For the detailed analysis of the case law see Katarina Dolović Bojić, *Pravno nepostojeći ugovori* [Legally Non-existing Contracts] (Beograd: Centar za izdavaštvo i informisanje Pravnog fakulteta u Beogradu, 2021), 58–60.

⁶² Dolović Bojić, *ibid.*, 238.

⁶³ LO, Article 111.

acts by which he/she obtains only rights, juridical acts by which he/she obtains neither rights, nor assumes obligations⁶⁴, or juridical acts of small value.⁶⁵ Apart from these juridical acts, they have no contractual capacity. Minors older than 14 years, however, may, beside the aforementioned, conclude any other juridical act, provided their natural or legal guardian consents to.⁶⁶ Since the age restriction for concluding a labour contract is set to 15 years, the FA prescribes explicitly an exception to minors who are in valid labour relation: they may dispose freely over their wage and property gained in the course of labour relation.⁶⁷ Such contracts are valid without the consent of the natural or legal guardian.

Adults regularly have unlimited capacity to contract. However, due to a mental illness or disorder in psycho-physical development, they may be deprived of their capacity to contract, fully or partially. If the deprivation of the capacity is only partial, the court may determine which juridical acts may still be concluded by the person with reduced capacity, without the consent of the legal guardian. In relation to other juridical acts, the position of an adult partially deprived of his/her capacity to contract is equated to that of a minor older than 14 years.⁶⁸ This means that any other contract concluded by an adult whose capacity is partially reduced requires the consent of the legal guardian. As indicated earlier, contracts concluded by minors below the age of 14 (except the three categories already mentioned) or by adults completely deprived of their capacity to contract are considered non-existent, hence triggering the consequences of nullity.

The cases of flawed contractual intention in the LO leading to voidability of contract are threat, mistake and deceit.⁶⁹ In addition, *leasio* is also considered a case of flawed contractual intent in the Serbian law, since the aggrieved party's false assumption regarding the value of the performance or

⁶⁴ These are usually called neutral juridical acts. See Vodinelić, *Gradansko pravo*, 356; Radovanović in Pajić, Radovanović and Dudaš, *Obligaciono pravo*, 218.

⁶⁵ FA, Article 64(1).

⁶⁶ FA, Article 64(2).

⁶⁷ FA, Article 64(3).

⁶⁸ FA, Article 147.

⁶⁹ LO, Articles 60–62, 65.

counterperformance is an essential element of the legal institution, thus results in the voidability of the contract.⁷⁰

A contract may be avoided by the party in whose interest the voidability is established.⁷¹ This is in all cases but one, the party whose contractual intent is flawed. However, in a contract concluded by a minor older than 14 years, or by an adult partially deprived of capacity, without the consent of the natural or legal guardian, the right to avoid the contract belongs to the guardian.⁷² In addition, the LO prescribes that a party with limited capacity also has the right to avoid the contract, concluded without the consent of the guardian, in three months from the day when he/she (re)gained his/her full capacity.⁷³ Exceptionally, the initiative to avoid the contract may shift to the counterparty. He/she may request from the party entitled to avoid the contract to declare, in a deadline no shorter than 30 days, whether he/she would use his/her right to avoid the contract. If the party entitled to avoid the contract does not reply in the indicated deadline or declares that he/she does not stay by the contract, it shall be considered avoided.⁷⁴

The time-limit for avoiding a contract is one year from the day when the party entitled to request avoidance gained knowledge of the ground of voidability, or when the threat ceased, respectively. In the case of mistake or deceit, the phrase “gaining knowledge of the ground of voidability” means that the mistaken party ascertained the true circumstances, i.e. when his/her false assumption of the relevant facts ceased.⁷⁵ However, the right to avoid a contract definitely ceases in three years from the time of the conclusion of the contract.⁷⁶ Since the first time-limit commences from the moment of gaining knowledge of a relevant circumstance by the party entitled to void the contract, it is usually called a “subjective” time-limit, while the other is known as an “objective” time-limit, because it commences from a moment independent from the subjective perception of either party (the time of

⁷⁰ LO, Article 139(1–2).

⁷¹ LO, Article 112(1).

⁷² Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 402.

⁷³ LO, Article 59.

⁷⁴ LO, Article 112(2–3).

⁷⁵ Krulj in Blagojević and Krulj, *Komentar*, 231.

⁷⁶ LO, Article 117.

the conclusion of the contract).⁷⁷ In the case of *lesio* the time-limit is one year starting from the day of the conclusion of contract.⁷⁸ Therefore, in this case there is no “subjective” time-limit, whereas the “objective” is only one year. Failing to avoid the contract in the mentioned time-limits results in the so-called tacit convalidation of the contract: by lapse of time the avoidable contract “heals” or “convalesces” regardless of its defect.⁷⁹ Similarly, a voidable contract may be convalidated by performance, provided that the party entitled to avoidance of the contract knew of the voidability, when he/she performed the contract.⁸⁰ The convalidation can also be explicit, whereby the party entitled to avoidance of the contract declares that he/she waves the right to void the contract.⁸¹ Convalidation is also possible in the case of *lesio*, though not by statement of the entitled party or by lapse of time, but by re-establishing the equivalence between the performance and the counterperformance. Regardless of the existence of mistake concerning the true value of the performance or the counterperformance, the justification of *lesio* is the disturbance in proportionality between the value of the performance and counterperformance. If this disturbance is removed, the justification for the voidability of the contract due to *lesio* disappears. For this reason the LO prescribes that the counterparty may prevent the avoidance of the contract by proffering counterperformance meeting the value of the aggrieved party’s performance.⁸² The major difference between the same means of convalidation of a voidable contract in the case of *lesio* and a usurious contract, which is null and void, is that in the former case the counterparty is entitled to request convalidation, while in the latter the aggrieved party.

The basic legal consequence of avoiding a contract is *restitutio in integrum*, i.e. both parties are relieved from their obligations. Generally speaking, in terms of restitution, the consequences of avoiding a contract are the same as those of the nullity. If one of the parties performed, the other party is obliged to restore the benefits conferred. If both performed, both

⁷⁷ Salma, *Obligaciono pravo*, 415.

⁷⁸ LO, Article 139(2).

⁷⁹ Perović, *Obligaciono pravo*, 478.

⁸⁰ Perović, *Obligaciono pravo*, 477.

⁸¹ Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 405.

⁸² LO, Article 139(4).

are to restore the performance received from the other party.⁸³ The objects of performance are primarily to be restored in kind. If, however, the object perished or its nature is incompatible with the idea of restoration in kind, appropriate pecuniary compensation is to be paid.⁸⁴ In the latter case, the amount of compensation is to be determined in accordance with the market prices at the time of restoration, or the delivery of court decision, respectively.⁸⁵ The LO, however, contains an important exception regarding the scope of the restoration of the benefits conferred, when it comes to voidability due to limited capacity to contract. It prescribes that the counterparty in this case may request the restoration of only those benefits conferred on the party with limited capacity, which are still in his/her possession, consumed in his/her interest or deliberately destroyed or alienated.⁸⁶ The *restitutio in integrum* in the case of voidability, therefore, has an *ex tunc* effect in general, but since it is a remedy for the infringement of parties' private interests there are no reasons against their agreement to limit the scope of the restoration only to the future (*ex nunc* effect).⁸⁷

The ancillary legal consequence of the avoidance of a contract is liability for damage. The LO prescribes that the party responsible for the emergence of the ground of voidability is liable to the counterparty for the damage accrued in relation to the avoidance of the contract, if the counterparty did not know and neither should have known of the ground of avoidance.⁸⁸ In case of mistake this means that the party avoiding the contract may be held liable to the counterparty, since the mistake is not attributable to the latter. In the case of deceit or threat the counterparty or a third party may be held liable for damage, depending to whom is the deceit or threat attributable.⁸⁹ In addition, the LO prescribes a specific ground of liability for a party with limited capacity. He/she may, as the LO says, cunningly mislead the counterparty that he/she has full capacity for the conclusion of

⁸³ Perović, *Obligaciono pravo*, 473.

⁸⁴ LO, Article 113(1).

⁸⁵ LO, Article 113(2).

⁸⁶ LO, Article 114.

⁸⁷ Perović, *Obligaciono pravo*, 473.

⁸⁸ LO, Article 115.

⁸⁹ Dudaš in Pajtić, Radovanović and Dudaš, *Obligaciono pravo*, 404.

the contract. If the contract is still avoided by the guardian, the party with limited capacity shall be held liable for damages to the counterparty.⁹⁰

5. Conclusions

The Serbian Law on Obligations in the part pertaining to general rules of invalidity of contracts differentiates explicitly two categories of invalid contracts: null and void, on the one hand, and voidable contracts, on the other. Null and void are contracts infringing imperative rules, public order or good morals. Whether a contract contravenes any of the three general confines of the freedom of contract is determined through its content (object) and cause. Aside from these rules, in the general part of contract law the LO specifically names usurious contract as null and void contracts. The regular legal consequence of the declaration of nullity is *restitutio in integrum* and liability for damage of the party who acted in bad faith. In the most serious cases the court may decline the request for the restitution of the object of the performance of the party who acted in bad faith and may, truly exceptionally, order the forfeiture of the object of performance in favour of the respective municipality. The contract may exceptionally be saved from nullity by convalidation by performance, conversion and partial invalidity.

A specific issue in relation to the nullity of contracts represents the question whether the LO recognises non-existent contracts or should they be treated as cases of null and void contracts. Although at many instances the LO uses wording implying such conclusion (such as the “contract does not emerge”, the “contract does not produce legal effect”, the “contract is considered as not concluded at all” etc.), the consequences of nullity apply. According to the majority view in the doctrine, a contract concluded under coercion, in misunderstanding, by a party lacking capacity to contract, concluded by an agent without the subsequent approval of the principal, sham and simulated contracts are considered non-existent. The doctrine and the case law demonstrate diverse, sometimes contradicting standpoints. Some even tried to distinguish rules of invalidity of contracts that are being applied differently to null and void, on the one hand, and non-existent contracts, on the other hand.

⁹⁰ LO, Article 116.

When a contract infringes predominantly private interests of the contracting parties, it is voidable. This is the case with flaws of contractual intent (mistake, deceit and threat), limited capacity of contract and *leasio*. In the light of the well-established principles of contract law, a contract may be avoided only by a contracting or a third party in favour of which the right to avoid the contract was established. The right may be exercised only in strict time-limits. Under the Serbian LO the time-limit for the avoidance of contract is one year from the cessation of the ground of voidability and three years from the formation of the contract. *Leasio* is an exception in this regard, since in this case a contract may be avoided in one year from the formation of contract. In Serbian law conversion cannot be applied to a voidable contract, while the application of partial invalidity by analogy to the rules on nullity can be supported, though a direct statutory legal ground is lacking. However, convalidation is the usual way of rectification of flaws in voidable contracts, which may occur tacitly by lapse of prescribed time-limits, by performance or by explicit statement of the person in favour of which the right to avoidance was established.

References

- Komentar Zakona o obligacionim odnosima* [Commentary of the Yugoslav Law in Obligations], edited by Borislav Blagojević and Vrleta Krulj, Vol I. 1st. Beograd: Savremena administracija, 1980.
- Dolović Bojić, Katarina. *Pravno nepostojeći ugovori* [Legally Non-existing Contracts]. Beograd: Centar za izdavaštvo i informisanje Pravnog fakulteta u Beogradu, 2021.
- Dudaš, Attila. “Kauza ugovorne obaveze – francuski uticaj na Zakon o obligacionim odnosima Republike Srbije.” [Cause of contractual obligation – French influence on to the Law on Obligations of the Republic of Serbia] *Zbornik radova pravnog fakulteta u Novom Sadu* 45, no. 3 (2011): 663–680.
- Dudaš, Attila. “Kauza ugovorne obaveze prema Zakonu o obligacionim odnosima.” [Cause of contractual obligation according to the Serbian Law on Obligations] *Zbornik radova pravnog fakulteta u Novom Sadu* 44, no. 1 (2010): 145–169.

- Dudás, Attila. "A szerződés célja (kauzája) az európai és a magyar jogban." [The purpose (cause) of contract in European and Hungarian Law] *FORVM – Acta Juridica et Politica* 2, no. 2 (2012): 87–100.
- Hiber, Dragor. *Pojam bitne zablude pri zaključenju ugovora* [The Notion of Essential Mistake by the Formation of Contract]. Ph.D. thesis, Beograd: Pravni fakultet u Beogradu, 1991.
- Karamarković, Leposava. "Apsolutno ništavi ugovori." [Null and Void Contracts] *Pravni život* 44, No. 10 (1995): 405–421.
- Nikolić, Dušan. *Uvod u sistem građanskog prava* [Introduction into the System of Civil Law]. 11th, Novi Sad: Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, 2013.
- Pajtić, Bojan and Sanja Radovanović, and Atila Dudaš., *Obligaciono pravo* [The Law of Obligations]. Novi Sad: Pravni fakultet u Novom Sadu, 2018
- Komentar Zakona o obligacionim odnosima* [Commentary of the Yugoslav Law on Obligations], edited by Slobodan Perović, Vol I, 1st, Beograd: Savremena administracija, 1993.
- Perović, Slobodan. *Obligaciono pravo* [Law of Obligations]. 6th, Beograd: Službeni list SFRJ, 1986.
- Salma, Jožef. "Kauza obligacionih ugovora." [Cause of Contract], *Zbornik radova Pravnog fakulteta u Novom Sadu* 40, no. 2 (2006): 177–200.
- Salma, Jožef. "Načelo nemo auditor propriam turpitudinem allegans i ništavost ugovora" [The Principle of Nemo Auditor Propriam Turpitudinem Allegans and the Nullity of Contract]. *Anali Pravnog fakulteta u Beogradu* 52, no. 3–4 (2004): 487–495.
- Salma, Jožef. *Obligaciono pravo* [Law of Obligations]. 6th, Novi Sad: Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu, 2009.
- Szalma, József. "Causa (Rechtsgrundlage) bei den Obligationsverträgen."., *Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae, Sectio Juridica*, 48, (2007): 257–282.
- Vodinelić, Vladimir. *Građansko pravo: Uvod u građansko pravo i opšti deo građanskog prava* [Civil Law: Introduction to Civil Law and General Part of Civil Law]. Beograd: Pravni fakultet Univerziteta Union: Službeni glasnik, 2012.

Legal framework:

- Porodični zakon* [Family Act], Službeni glasnik Republike Srbije [Official Gazette of the Republic of Serbia], No. 18/2005, 72/2011 and 6/2015.
- Zakon o obligacionim odnosima* [Law on Obligations], Službeni list SFRJ [Official Gazette of the Socialist Federative Republic of Yugoslavia], No. 29/78, 39/85, 45/89 – decision of the Constitutional Court and 57/89, Službeni list

SRJ [Official Gazette of the Federative Republic of Yugoslavia], No. 31/93,
Službeni list SCg [Official Gazette of the State Union of Serbia and Monte-
negro], No. 1/2003 – Constitutional charter and Službeni glasnik Republike
Srbije [Official Gazette of the Republic of Serbia], No. 18/2020