



# Validation of Form-Defective Contracts in Hungarian and Romanian Law: A Comparative Analysis with Special Regard to Contracts on the Conveyance of Real Estate<sup>1</sup>

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**Abstract.** The paper examines the intricate interplay between contractual freedom, consensualism, and mandatory form requirements in Hungarian and Romanian law. Both countries emphasize the foundational principle that contracts result from the mutual and unanimous expression of parties' will, allowing autonomy within legal constraints. In Hungary, a historic shift in 1977 introduced a court-led declaration of validity, enabling retroactive validation of contracts by eliminating causes of invalidity. The Hungarian Civil Code permits both *ex tunc* and *ex nunc* validation. Similarly, in Romania, the principles of autonomy and freedom of contract are considered primary, but the Romanian Civil Code mandates specific forms for certain contracts, with nullity arising from non-compliance. However, the Romanian Civil Code provides means of validation of form-defective contracts, focusing on relative nullity (avoidability) but allowing exceptions of absolute nullity in specific cases. The article examines the validation of contracts lacking mandatory formal requirements, particularly the ones on the transfer of ownership of real estate. Namely, in Hungary, validation means granting validity to a contract retroactively by performance of contractual obligations or by eliminating the causes of invalidity, with a few

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exceptions. In Romania, the rules on validation provide remedies through confirmation of a contract that is struck by nullity.

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## 1. Introduction – Mandatory Form as a Restriction of the Freedom of Contract and the Principle of Consensualism

Under the provisions of the effective Hungarian Civil Code,<sup>2</sup> parties have autonomy to engage in contractual agreements freely and exercise liberty to select their respective counterparties, as well as the content of their contract. Deviations from the statutory regulations governing the rights and obligations of the parties within contracts are admissible provided they are mutually agreed upon and not prohibited by law.<sup>3</sup> This provision vindicates the principle of contractual freedom, i.e. that parties possess the freedom to shape their contractual relationship within the boundaries determined by law.

Namely, the assumption of the Hungarian legislation is that individuals engaged in transactions are owners of assets enabling them to assert and safeguard their proprietary rights.<sup>4</sup> Thus, the legislation suggests minimal legal intervention in their mutual juridical relationships, emphasizing limited interference only under specific circumstances.<sup>5</sup>

Another basic principle can be observed among the provisions of the HunCC: the concept of consensualism. It provides the freedom to determine the form of contracts, since it stipulates that a contract is formed through the mutual and unanimous expression of the parties' will.<sup>6</sup> Thus, it is not a mandatory legal requirement in all cases that the contracting parties observe a certain kind of form for the valid formation of their contract.

Similarly to the Hungarian, the Romanian law also lays emphasis on the parties' autonomy of will, providing them with the freedom to conclude any contract and determine its content within the limits set by law, public order, and

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2 2013. évi V. törvény a Polgári Törvénykönyvről [Act V of 2013 on the Civil Code] – hereinafter referred to as HunCC.

3 HunCC § 6:59.

4 Vékás 2006. 115.

5 Ibid.

6 HunCC § 6:63; Bodzási 2014. 3.

public morality.<sup>7</sup> Therefore, the conclusion of a contract according to the RoCC is based on the principle of freedom of contract.<sup>8</sup>

Furthermore, parties enjoy the autonomy to choose the form through which they intend to articulate their agreement.<sup>9</sup> Namely, the provisions of the RoCC foresee the freedom of form of contracts<sup>10</sup> by stipulating that a contract is concluded when the parties reach a mutual agreement if the law does not provide for specific formal requirements.<sup>11</sup> Hence, the principle of consensualism is manifested through the concept of the parties' autonomy of will as well.<sup>12</sup> The RoCC further elaborates on the formal requisites of expressing one's contractual will, asserting that the expression of such intention may take a form of verbal or written communication or be inferred from the conduct of the other party.<sup>13</sup>

Namely, the intention to vindicate private autonomy stems from the recognition that parties in a contractual relationship should autonomously make their own decisions free from state intervention and interventions emanating from the need to protect private or public interest.<sup>14</sup> Thus, parties, having a precise understanding of their juridical relationship, are usually given the opportunity to freely formulate their contract, especially when the issue at hand affects only the two contracting parties.<sup>15</sup> On the other hand, from practical aspects, dispositive rules facilitate the formation of contracts, enabling parties to conclude them more easily and with less financial expenses.<sup>16</sup>

Nonetheless, a growing number of cases can be observed when a certain form is not a requirement for the validity of contracts but is still used to provide a higher level of legal certainty to the weaker party or merely to provide evidence in court proceedings.<sup>17</sup> Comparative legal literature considers this tendency as the 're-emergence of formalism'.<sup>18</sup>

Furthermore, both the common rules of the law of obligations and the specific rules on contracts include mandatory provisions from which the parties cannot deviate by mutual agreement. In these cases, a contractual stipulation contrary to the mandatory provisions – whether explicitly stated by the law or not – renders such juridical act null and void.<sup>19</sup>

7 Legea nr. 287/2009 privind Codul civil [Act No 287/2009 on the Civil Code] – hereinafter referred to as RoCC, Article 1169.

8 Fazakas 2021. 107.

9 Dudás–Hulmák–Zimnioková–Menyhárd–Stepkowski–Veress–Hlušák 2022. 253.

10 Id. 269.

11 RoCC Article 1178.

12 Boroi 2012. 176.

13 RoCC Article 1240.

14 Jójárt 2014. 677.

15 Ibid.

16 Miskolczi Bodnár 2023. 42; Vékás 2006. 115.

17 Beale–Feuvarque–Cosson–Rutgers–Vogenauer 2019. 420.

18 Ibid.

19 Vékás 2013. 228.

The legislative considerations of prohibiting deviations from statutory rules are the complexity of interests affected by the juridical act. Within the realm of contracts, there are situations wherein reasons extend beyond the interests of the contracting parties, encompassing potential impacts on third parties or even the entire community, i.e. with implications potentially outweighing the mutual will of the contracting parties within certain limits.<sup>20</sup>

In the event of non-adherence to mandatory rules, contracts are sanctioned by invalidity and parties are unable to achieve the intended legal effects.<sup>21</sup> The legislation of both countries analysed in this paper encompasses the mentioned rule and foresees that juridical acts, lacking the mandatory formal requirements, are null and void.<sup>22</sup> However, both the Hungarian and the Romanian legislation foresee different means of saving such contracts.

Namely, the HunCC, among the general rules on obligations, foresees the possibility of remedying a contract if it is invalid due to non-compliance with the mandatory formal requirements (*a szerződés alaki hibájának orvoslása*).<sup>23</sup> Furthermore, in the part pertaining to the legal consequences of invalidity, the HunCC provides for the possibility of retroactive validation by the court (*bírósági érvényessé nyilvánítás visszamenő hatállyal*)<sup>24</sup> and validation/convalidation<sup>25</sup> by the parties' will (*a szerződés érvényessé válása a felek akaratából*).<sup>26</sup>

On the other hand, the RoCC foresees only the possibility of validation of contracts (*validarea contractului*) rendered null and void.<sup>27</sup>

In the following, the validation of contracts not concluded in the form required by law will be addressed, with special regard to contracts on the conveyance

20 Miskolczi Bodnár 2023. 42.

21 Kemenes 2016. 3.

22 Fazakas 2021. 110–112.

23 HunCC § 6:94.

24 HunCC § 6:110.

25 The expression of 'convalidation' cannot be found in the HunCC; however, it seems to be in use in Hungarian legal literature and practice, wherein it refers to the cases of convalidation by the parties' will or to convalidation due to the cessation of the reasons of invalidity. See Kemenes 2016; 1/2010. (VI. 28.) PK vélemény az érvénytelenség jogkövetkezményeiről [1/2010. (VI. 28.) Opinion of the Civil Department on the legal consequences of invalidity]]. 'Convalidation' is generally used in the Yugoslav legal tradition for the mentioned cases of saving contracts rendered null and void due to non-adherence to formal requirements, in legal literature. (See Dolović Bojić 2021. 197–198).

26 HunCC § 6:111.

27 RoCC Art. 1261. It seems that Romanian legislation uses the expression of 'validation' when it comes to saving contracts that have been affected by a cause of invalidity. The Romanian Civil Code differentiates two forms of invalidity of a juridical act. Namely, the expression 'invalidity' (*nulitate*) comprises the so-called 'relative nullity' (*nulitate relativă* – which protects the interests of the parties; RoCC Article 1246) and 'absolute nullity' (*nulitate absolută* – which protects public interests; RoCC Article 1247). See more in Boroî 2012. 243–245; Beleiu 2005. 230–232.

of ownership on real estates. First, the Hungarian legislation will be assessed, which will be followed by an assessment of the Romanian one.

## 2. Convalidation of Contracts Not Concluded in the Mandatory Form According to the Hungarian Civil Code

Before analysing the legal regulations in effect in Hungary, a short historical overview should be presented. The Hungarian legal tradition incorporates the so-called *regula Catoniana* from Roman law, stating that the passage of time alone cannot validate an initially invalid juridical act.<sup>28</sup> Hungarian law, influenced by this regulation, traditionally precluded the remedy of invalidity.<sup>29</sup> However, some exceptions could have still been observed to this rule.<sup>30</sup> Namely, it was possible to validate an initially invalid contract due to a change in circumstances or even by approval of the parties.<sup>31</sup>

Hungarian law had foreseen a remedy for contracts with a formal defect as early as in the 1928 Draft Law on the Hungarian Private Law Code, stipulating that a contract concluded in an improper form, unless the law stipulates otherwise, becomes valid through accepted performance.<sup>32</sup>

Nonetheless, the 1959 HunCC briefly allowed parties to remedy their juridical act stuck by nullity, but eventually transferred the right to validate a contract posteriorly to the jurisdiction of the court.<sup>33</sup> Namely, it deprived them of any means to validate their contract by their agreement through the elimination of the causes of invalidity or by confirmation of the contract.<sup>34</sup> Later, Act IV of 1977 on the amendment and Uniform Text of Act IV on the Civil Code of the Hungarian People's Republic<sup>35</sup> introduced into Hungarian law the general concept of declaration of validity by the court.<sup>36</sup>

Validation by court represents a constitutive judicial decision with retroactive effect, wherein the court actively intervenes in the parties' contract, essentially

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28 Siklósi 2014. 232.

29 Ibid.

30 Weiss 1964. 146

31 Ibid.

32 Darázs 2009. [§ 961].

33 Id. 452.

34 Ibid.

35 1977. évi IV. törvény a Magyar Népköztársaság Polgári Törvénykönyvéről szóló 1959. évi IV. törvény módosításáról és egységes szövegéről [Act IV of 1977 on the Amendment and Uniform Text of Act IV on the Civil Code of the Hungarian People's Republic].

36 Darázs 2009. 453.

possessing the authority to make modifications.<sup>37</sup> In this process, the court has the right to modify the contract aiming to rectify the detriment caused by the nullity of the contract to the interests of one of the parties.<sup>38</sup>

As already clarified, the case law and the legal literature under the term validation understand events when the causes of invalidity cease to exist, or the parties eliminate them.<sup>39</sup> Although, under the regulation of the 1959 Civil Code, parties were not able to posteriorly validate a contract struck by nullity, they were provided the option to renegotiate and re-enter into a contract in a valid form, constituting a new agreement, which was practically a new juridical act independent from the previous, invalid one.<sup>40</sup>

The new HunCC, however, allows parties to retroactively validate an invalid contract as of the time of its conclusion onwards.<sup>41</sup> Namely, it regulates cases when the reason for invalidity ceases at the will of the parties because they later eliminate it or when the cause of invalidity ceases for other reasons and the parties confirm their contractual intent.<sup>42</sup> The convalidation of the contract at the will of the parties in general has retroactive (*ex tunc*) legal effect. However, the law also allows the parties to agree to eliminate the reason of invalidity only with effect to the future (*ex nunc*).<sup>43</sup>

The specific issue of adherence to formalities, different from the above-mentioned provisions regarding the validity of contracts, is in the effective HunCC foreseen among the rules of obligations, more precisely in the regulation on the formal requirements of the declaration of will to conclude a contract. They specify that if either statutory provisions or the mutual agreement of the parties mandate a prescribed form for the declaration of intent to conclude a contract, then its validity is contingent upon the adherence to the specified form.<sup>44</sup> Furthermore, the HunCC has a separate rule regarding the written form of legal declarations, foreseeing that if a legal declaration is required to be made in writing, it is considered valid if at least its essential content has been recorded in writing.<sup>45</sup> Thus, *argumentum a contrario*, the conclusion emerges from this provision that the lack of formal requirements renders such a contract invalid.<sup>46</sup>

37 Wellmann 2014. 67.

38 Kemenes 2016. 4–5.

39 1/2010. (VI. 28.) PK vélemény az érvénytelenség jogkövetkezményeiről [1/2010. (VI. 28.) Opinion of the Civil Department on the Legal Consequences of Invalidity]; Kemenes 2016. 5.

40 Menyhárd 2021. 15.

41 Ibid. 15.

42 Osztovits 2014. 282. For example, parties are able to validate their mutual agreement rendered invalid by concluding it in a sufficient form, procuring a missing official consent, etc.

43 HunCC § 6:111 para. (3)

44 HunCC § 6:6.

45 HunCC § 6:7.

46 Wellmann 2021. 218.

The legislative intent is discernible from these rules: a commitment to maximizing individual private autonomy, which aligns with the restricted application of written form in contract law within the HunCC.<sup>47</sup> However, according to the legal literature, it seems that documenting legal declarations in writing is becoming more frequent, even when it is not mandated by law, since it provides stronger proof.<sup>48</sup> Nevertheless, in these cases, the failure to observe the stipulated form does not render the juridical act null and void.<sup>49</sup>

Among the general rules on contracts, the Hungarian law addresses the legal consequences of formal defects. It merely provides special regulations for remedying such juridical acts by stipulating that a contract null and void due to a lack of formal requirements may still become valid, up to the extent of the performed obligations, upon acceptance of performance.<sup>50</sup> This provision is connected to the general rules of obligations in the HunCC regarding the formal requirements of the declaration of will.<sup>51</sup>

In these cases, the contractual intent usually does not suffer from any defect; rather, it is the inadequacy in the means of declaration of intent that causes the invalidity of the contract.<sup>52</sup> Thus, as a general rule, a defect leading to invalidity can be rectified through performance of obligation.<sup>53</sup> Particularly within the realm of commercial contracts, it may be a reasonable recourse for a court to remedy an otherwise well-functioning contract from its invalidity and proclaim its validity.<sup>54</sup>

### **3. Validation of Contracts on the Conveyance of Ownership on Real Estate Not Concluded in a Mandatory Form According to the Hungarian Civil Code**

The HunCC in force seems to adhere to the provisions of the 1959 Civil Code, which stipulated a mandatory written form as a requirement for the validity of contracts on the conveyance of ownership on real estate<sup>55</sup> and foresees the same form as well.<sup>56</sup>

47 Benke–Nochta 2018. 97.

48 Wellmann 2021. 219.

49 Ibid.

50 HunCC § 6:94.

51 Wellmann 2021. 218.

52 Juhász 2022. 191–192.

53 Ibid.

54 Weiss 1969. 438–439.

55 1959 HunCC § 365 para. (3).

56 HunCC § 6:215 para. (2).

Furthermore, the applicable Hungarian Civil Code followed the same path, establishing an exemption from the general rules of the law of obligations by ruling out the possible remedy of formally deficient legal declaration of the parties' will in cases where a statute mandates its recording in a public deed or a private deed with full probative force<sup>57</sup> or when the contract pertains to the transfer of ownership of real property.<sup>58</sup>

As mentioned above, in its rules on the legal declaration of will, the Hungarian legislation sets forth general provisions related to written form applicable not only to contracts but also to all legal declarations in general, thus comprising contracts as well.<sup>59</sup>

According to the effective Hungarian regulation, the performance of the contractual obligation remedies only the violation of the requirement of simple written form, while the law excludes the possibility of validation in some cases, especially when a juridical act is aimed at the conveyance of ownership rights on real estate in order to preserve legal certainty.<sup>60</sup>

Although the legislator provided for a simple written form for a contract for the conveyance of ownership rights on real property, such contracts are still excluded from the general provisions pertaining to the validation of formally deficient real estate contracts.<sup>61</sup> Namely, for the valid conclusion of such contracts it is sufficient if the parties' intent to transfer ownership rights is evident from the content of the contract and contains the identification of the involved parties and their mutual obligations.<sup>62</sup> The lack of any other element the parties agreed upon does not impact the validity of the contract.<sup>63</sup>

Contracting parties are, nonetheless, free to express their contractual will in any form they choose. However, these juridical acts cannot produce legal effects, neither the parties can demand performance of obligations based on such acts, since they are initially struck by invalidity.<sup>64</sup> Although the HunCC excludes the possibility to remedy formally defective contracts on the conveyance of

57 Private documents with full probative force (evidentiary value) are a specific sort of documents in the Hungarian legal system. Namely, in Hungary, a distinction between private documents with full probative force and ordinary private documents can be made based on their probative force. The former is considered as full proof until it is proved otherwise. On the other hand, the authenticity of the ordinary private document must be proven by the party presenting the document as evidence in the event that it is contested, or the court considers it necessary. (See in detail: Harsági 2015. 23.)

58 HunCC § 6:94 para. (1).

59 Benke–Nochta 2018. 98.

60 Fazekas 2018. 112.

61 HunCC § 6:94 Sec 1 in connection with § 6:215 para. (2).

62 XXV. számú Polgári Elvi Döntés – az ingatlan-átruházási szerződés érvényességéről [XXV. Civil Law Decision of Principle – On the Validity of Contracts on the Conveyance of Ownership on Real Property] – hereinafter referred to as Civil Decision No XXV.

63 Ibid.

64 HunCC § 6:108; Fazekas 2018. 112.



ownership rights on real estate by acceptance of performance, parties are still able to validate their agreement, by the subsequent conclusion of a written contract observing the mandatory provisions.<sup>65</sup> However, this solution raises the question already elaborated in the part on the general rules of convalidation: the subsequently concluded contract would represent a new, individual juridical act that is independent from the previous informal contract struck by nullity.<sup>66</sup>

The case law adheres to the provisions mentioned above. The Curia (Hungarian Supreme Court) addressed a specific matter in connection with the mandatory written form of real estate contracts. The plaintiff in the case transferred ownership to the defendant by a sales contract. According to the original version of the contract, the purchase price of the property was 14 million HUF, of which the buyer paid 10 million HUF in cash to the plaintiff and deposited an additional 4 million HUF on the escrow account of the plaintiff's attorney. The ownership was subsequently recorded in the defendant's favour in the land registry. Later, the parties modified the contract, excluding the buyer's claim against the plaintiff for the purchase price, opting to pay the remaining portion in cash. Although the modification was signed, the verification by the attorney occurred only during the course of the lawsuit. The plaintiff received the remaining purchase price in three instalments. The plaintiff requested the court to declare the invalidity of both the sales contract and the subsequent agreement modifying it, asserting that they deprived the creditors of their security and provided the defendant with undue advantage.<sup>67</sup>

In its decision, the Curia referred to the regulations in § 6:215 para. (2), § 6:6 para. (2), and § 6:7 para. (1) of the HunCC, stipulating that for the validity of a contract on the conveyance of real estate ownership and the validity of its amendments it is sufficient if the essential elements are articulated in a written form. According to the Curia, in this specific case, this requirement is duly fulfilled by expressing the essential elements of the contract in a private document concluded between the contracting parties.<sup>68</sup>

In connection to the general rules of the HunCC, regarding real property, Act CXXII of 2013 on the Transfer of Agricultural and Forest Land<sup>69</sup> and Act CCXII of 2013 on Certain Provisions and Transitional Rules in Connection with the Land

65 Fazekas 2018. 112.

66 Menyhárd 2021. 15.

67 Case No Gfv. 30206/2019/12 of the Curia.

68 Ibid.

69 2013. évi CXXII. törvény a mező- és erdőgazdasági földek forgalmáról [Act CXXII of 2013 on the Transfer of Agricultural and Forest Land] – hereinafter referred to as Land Transfer Act.

Transfer Act<sup>70</sup> should also be assessed.<sup>71</sup> Namely, by entering into force, the Land Transfer Act introduced a new, stricter formal requirement for the validity of contracts pertaining to the conveyance of *in rem* rights on agricultural lands<sup>72</sup> by stipulating that the transfer of ownership rights of agricultural and forestry land or any other juridical act affecting land ownership must be documented in a paper-based deed equipped with security elements as specified in the regulation issued for the implementation of this law.<sup>73</sup>

However, the Land Transfer Act does not specify the legal ramifications when a contract is not formed in the mandatory form stipulated by law. In this case, the general provisions of the HunCC apply.<sup>74</sup> According to these rules, such a contract would be rendered null and void if not concluded in the mandatory form, without the possibility of ‘convalescence’ by performance because of the exception instituted regarding real property.<sup>75</sup>

#### 4. Validation of Contracts Not Concluded in a Mandatory Form According to the Romanian Civil Code

In Romanian law, parties are also legally afforded the freedom to articulate their contractual intent through different means, including oral form. However, at certain instances, the law mandates for different contractual arrangements specific formal requirements under the sanction of nullity.<sup>76</sup> Thus, three manifestations of the expression of the consent to contract can be differentiated on the basis of the legal consequence of non-compliance with the rule mandating a specific form:<sup>77</sup> the form *ad probationem*, which is not a requirement for the validity of the juridical act but merely serves evidentiary purposes and may be important in relation to juridical acts of greater importance between the contracting parties

70 A 2013. évi CCXII. törvény mező- és erdőgazdasági földek forgalmáról szóló 2013. évi CXXII. törvénnyel összefüggő egyes rendelkezésekről és átmeneti szabályokról [Act CXXII of 2013 on Certain Provisions and Transitional Rules in Connection with the Land Transfer Act] – hereinafter referred to as Implementation Land Act.

71 Szilágyi 2022. 148.

72 Anka Márton 2015. 371.

73 Land Transfer Act § 8; Decree No. 47 of 2014 (II. 26.) Korm. of the Government laying down Security Requirements and Rules of Issuance of Paper Format Documents Concerning the Transfer of Property Rights of Land or Containing Other Kind of Written Legal Transaction affecting Property Rights of Land § 1 and 2.

74 Anka Márton 2015. 371.

75 Ibid.

76 RoCC Article 1242 para. (1).

77 Boroi 2012. 177.

or in the event of a dispute before a court;<sup>78</sup> the form *ad validitatem*, which is a requirement stipulated by law and essential for the validity of the juridical act;<sup>79</sup> the form *ad opposabilitatem*, which are formalities not affecting the validity of the given juridical act but necessary to make it opposable against third parties – persons who did not participate in its formation.<sup>80</sup>

As mentioned earlier, similarly to the Hungarian legal regulation, by the provisions of the RoCC juridical acts not concluded in the form required for their validity are considered null and void.<sup>81</sup>

However, even if a contract concluded with the omission of a law-mandated form, the RoCC provides for possible remedies for such juridical acts.<sup>82</sup> Namely, the RoCC stipulates that a null and void contract can be validated if the causes of nullity are remedied by confirmation or in other ways foreseen by law.<sup>83</sup> By enabling validation, the intention of the legislator was rooted in the principle of saving juridical acts from nullity because they are formed to realize the negotiated intentions of the parties.<sup>84</sup> Thus, they should be annulled only when it is strictly necessary.<sup>85</sup>

The analysis of the mentioned provision implies that the concept of validation comprises not only confirmation but also other legal means aiming to remedy invalidity. Thus, validation is not a legal process itself but rather a generic term, including a range of legal actions that are meant to eliminate the legal consequences of nullity.<sup>86</sup>

According to the provisions of the RoCC, the confirmation of an invalid contract may arise from the expressed or tacit intention to waive the right to invoke the nullity of such contract.<sup>87</sup> Although a possibility to validate formally deficient contracts may seem unambiguous at first glance, a question has arisen in Romanian legal theory as to whether this provision encompasses both cases of invalidity.<sup>88</sup> Namely, Article 1261 of the Civil Code does not explicitly specify any causes of validation even though the title of the respective article is *Cauzele de validare* [Causes of Validation].<sup>89</sup>

Furthermore, the wording of the mentioned article, *contractul afectat de o cauză de nulitate* [a contract affected by a cause of invalidity],<sup>90</sup> considers the

78 Id. 182; Veress 2022. 270.

79 Veress 2022. 270; RoCC Article 1179 para. (3).

80 Boroi 2012. 183; Veress 2022. 270.

81 RoCC Article 1242 para. (1) in connection with Article 1179.

82 Beleiu 2005. 240.

83 RoCC Article 1261.

84 Urs 2014. 170.

85 Ibid.

86 Ibid.

87 RoCC Article 1262.

88 Urs 2014. 173.

89 Ibid.

90 RoCC Article 1261 para. (1).

causes of both absolute and relative nullity,<sup>91</sup> which would suggest the possibility of validation of null and void contracts. However, the examination of Article 1262 para. (1) in connection with Article 1248 para. (4) and Article 1247 para. (4) of the RoCC seems to imply that the rule on validation primarily pertains to relative nullity except in specific cases where the law allows confirmation for contracts affected by a cause of absolute nullity.<sup>92</sup>

The author of the previous reference illustrated his conclusion by the example of the provisions regarding gratuitous acts, which stipulate the right of universal successor or successor under universal title to waive the right to invoke defects in form or any other grounds for nullity, without prejudice to the rights of third parties and thus confirming the juridical act.<sup>93</sup>

Thus, the law stipulates in specific provisions regarding each individual juridical act whether it is possible to validate in the event of their nullity. This would, *argumentum a contrario*, imply that if the legislator has prescribed a mandatory form for a juridical act without allowing for validation through confirmation or other means, the act could not possibly be remedied.

The case law seems to follow this reasoning. The First Civil Chamber of the High Court of Cassation and Justice of Romania in case No 2054/2020 decided an appeal on the decision of the City Court of Braşov. The plaintiff has initiated proceedings to establish the absolute nullity of a contract on donation, whereby the plaintiff conveyed the sum of EUR 63,000 to the defendant. The plaintiff claimed that the ground for nullity was the failure to adhere to the requisite authentic form stipulated by Article 1011 para. (1) of the Civil Code. The High Court found that the Court of Appeal of Braşov applied the provisions of Article 1011 para. (1), (2), and (4) of the Civil Code correctly when it acknowledged the sanction of nullity of the juridical act concluded between the parties due to the lack of the required form of authentic public deed.<sup>94</sup>

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91 Ibid.

92 Ibid.

93 Ibid.

94 Case No 2054/2020 of the First Civil Chamber of the High Court of Cassation and Justice of Romania 14 October 2020. <http://www.scj.ro/en/1093/Jurisprudence-details?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=176464#highlight=##%20Principiul%20conversiunii%20actului%20juridic> (accessed: 15.11.2023).

## **5. Validation of Contracts on the Conveyance of Ownership on Real Estate Not Concluded in a Mandatory Form According to the Romanian Civil Code**

Unlike the Hungarian Civil Code, the Romanian legislation does not explicitly exclude the possibility of validation of formally deficient contracts on the conveyance of ownership on real property. In this regard, Article 1244 and Article 885 in connection with Article 1676 should be analysed.

These provisions outline that, particularly in the context of sale of immovable property, the transition of ownership is contingent upon adhering to land registry regulations. Thus, the transfer becomes legally effective, applicable between involved parties and produces legal effects towards third parties solely upon its registration in the land registry.<sup>95</sup> Juridical aiming at the conveyance or establishment of ownership rights, required to be registered in the land registry, must be concluded in the form of authentic notarial deed<sup>96</sup> under the burden of absolute nullity.<sup>97</sup>

As it has already been mentioned, the RoCC does not forbid validation of contracts on the conveyance of ownership on real estate. However, following the logic highlighted in the assessment of the general provisions, the conclusion could be drawn that such juridical acts could not be validated because the law prescribes nullity without exceptions.

The Romanian legislation appears to align with the Hungarian one, wherein the formality requirement is not intrinsic to the contractual validity but rather constitutes an essential element triggering the intended legal consequences of the contract.<sup>98</sup> In this context, the invalidity is contingent upon the stipulations and application of other legal consequences imposed by public law, particularly the strict formal requirements for registering the conveyance of ownership in the land register.<sup>99</sup>

Bearing in mind the aforementioned conclusion, it is important to note that Romania has not yet established a coherent land registry system.<sup>100</sup> According to Article 56 para. (1) of Law No 71/2011, the application of Article 885 para. (1) of the RoCC is conditional upon the completion of land registers for each administrative-territorial unit.<sup>101</sup> Until this condition is met, the registration of

95 RoCC Article 885 in connection with Article 1676.

96 See more in Veress 2022. 271.

97 RoCC Article 1244.

98 Fazakas 2021. 110–111.

99 Ibid.

100 Bîrsan 2015. 126–127.

101 Lege nr. 71 din 3 iunie 2011 pentru punerea în aplicare a Legii nr. 287/2009 privind Codul civil [Act No 71 of 3 June 2011 on the implementation of Act No 287/2009 on the Civil Code]; Bîrsan

ownership rights and other *in rem* rights in the land registry is solely for the purposes of opposability (enforceability) against third parties, as stipulated by Article 56 para. (2) of the same law. Consequently, between the parties involved, the transfer of ownership rights will take effect at the time of its conclusion in authentic notarial deed, in accordance with Article 1244 of the Civil Code.<sup>102</sup>

## 6. Conclusions

The legal frameworks of Hungary and Romania share fundamental principles related to contractual freedom and consensualism, allowing parties the autonomy to shape their contractual relationships as they see it fit but obeying general legal constraints. Both laws recognize the principle that contracts are formed by mutual and unanimous expression of the parties' will. However, mandatory formal requirements and the consequences of non-compliance differ, particularly concerning validation of contracts not concluded in the required form.

The Hungarian Civil Code historically adhered to the *regula Catoniana*, prohibiting the retroactive validation of invalid contracts. The shift in 1977 introduced the concept of declaration of validity by the court, whereas the Hungarian Civil Code in force permits parties to validate contracts by subsequent termination of the cause of invalidity, either retroactively (*ex tunc*) or with legal effect only to the future (*ex nunc*).

Contracts related to the conveyance of ownership rights on real estate in Hungary traditionally required a mandatory written form. Performance remedies the violation of the formal requirements of a simple written form but not in cases when the law mandates the form of a public deed or a private written instrument with full probative force, or the juridical act is aimed at the transfer of ownership rights over real estate. The legislator's intent is to preserve private autonomy while limiting the application of written form, emphasizing the form of authentic notarial deed for certain contracts.

On the other hand, the Romanian Civil Code mandates specific forms for certain contracts under the sanction of nullity for non-adherence to formal requirements. However, the Romanian Civil Code provides possibilities for validation as well, allowing parties to confirm their null and void contract. The confirmation of a contract can arise from expressed or tacit intent to waive the right to invoke nullity. However, while the RoCC recognizes the possibility of validation, it primarily pertains to relative nullity, with exceptions for absolute nullity in specific cases.

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2015. 126–127.

102 Bîrsan 2015. 126–127.

The Romanian legislation does not explicitly exclude the validation of contracts on the conveyance of ownership on real estate in the rules pertaining to cases when validation is possible. However, validation is contingent upon the specific provisions related to each juridical act, i.e. validation is possible if the rules regarding certain types of contract specifically allows it.

In conclusion, while both Hungary and Romania vindicate the principles of contractual freedom and consensualism, they differ in their approaches to validation, especially concerning real estate contracts. The Hungarian law allows validation, emphasizing private autonomy. However, it is not possible in relation to contracts on the conveyance of ownership rights on real estate, infringing the rules on formal requirements of such juridical acts. Similarly, the Romanian legal system enables validation. Although validation of formally deficient contracts on the conveyance of ownership on real estate is not explicitly forbidden in Romanian law, by analysing the relevant legal rules and case law, it can be concluded that the validation of contracts on the conveyance of ownership rights on real estate is not allowed.

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