UNIVERSITY OF MISKOLC
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THESES OF PhD DISSERTATION

COMPARATIVE PERSPECTIVES OF CONVALIDATION OF FORMALLY DEFECTIVE CONTRACTS FOR THE TRANSFER OF OWNERSHIP OVER IMMOVABLE PROPERTY

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Doctoral Programme: CECL PhD programme

Miskolc
2026

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PART I. SUMMARY OF THE RESEARCH OBJECTIVES

1.1.Subject and relevance of the research

The dissertation examines the legal consequences of non-compliance with mandatory formal requirements in contracts for the transfer of ownership over immovable property. Particular emphasis is put on performance-based convalidation. The central concern of the research is the connection between legal certainty and the protective functions of statutory form, on the one hand, and private autonomy, the parties' genuine contractual intention and the stability of substantially performed transactions, on the other.

Real-estate transactions provide a particularly relevant field for this assessment because formal requirements serve various functions (evidentiary, cautionary, publicity and regulatory) and at the same time protect third-party reliance on public registers. Nevertheless, strictly adhering to regulations which render formally deficient real estate contracts null and void may become disproportionate where

the parties have already substantially performed the obligations from their respective contract.

Although European private-law scholarship extensively discusses invalidity and formal requirements, less attention has been devoted to a comprehensive comparative analysis of mechanisms through which a formally defective real-estate contract may acquire or retain legal effects after performance. The dissertation addresses this issue through a comparative study with a historical overview as well.

1.2.Conceptual framework and delimitation of the research

For the purposes of the dissertation, performance-based convalidation means the legal recognition of a contract (particularly contracts for the transfer of ownership rights over immovable property) initially null and void because of non-compliance with prescribed form where subsequent full performance or performance in preponderant part has

occurred and the purposes of the prescription of formal requirements have been sufficiently achieved.

Convalidation is distinguished from conversion, confirmation, partial invalidity, *ratihabitio* and judicial validation. Registration-based remedy is considered as a functional equivalent only where it constitutes a comparable healing mechanism.

1.3.Research questions, working hypotheses and objectives

The central research question is whether formally defective contracts for the transfer of ownership over immovable property can be convalidated and, if so, under what conditions and with what legal effects. The dissertation also examines how the function of form, the structure of property transfer and land-registration rules influence the availability of convalidation.

The main hypothesis is that performance-based convalidation can reconcile mandatory form with the protection of the parties' genuine will without compromising

at the same time legal certainty. Its applicability, however, depends not only on contract law but also on the national model of property transfer and the role and effects of the land registry entry.

The research further assesses whether classical civil law codifications generally lack convalidation as an independent legal institute, while Central-Eastern European private law systems enshrine performance-based convalidation in the field of real estate contracts.

The main objectives are to clarify the historical and theoretical foundations of convalidation, define its relationship with analogous legal concepts, compare its statutory and judicial manifestations, and identify the limits imposed by public interests and land registry systems.

1.4.Scope and comparative aspects

France, Austria, Germany, Switzerland and Italy serve as classical reference systems, while Hungary, Poland, the Czech Republic, Slovakia, Romania, Slovenia, Croatia and Serbia constitute the main comparative field.

The research concentrates on contracts for the transfer of ownership rights over immovable property, primarily sale and, where relevant, donation. Rules governing entry into the land registries and public notaries are examined insofar as they affect validity, enforceability, proprietary acquisition or the curing of formal defects.

PART II. CONDUCTED RESEARCH, METHODOLOGY AND USE OF SOURCES

The dissertation combines historical, doctrinal and comparative methods. The historical analysis begins with Roman and Canon law and traces the development from strict formalism towards consensualism and techniques preserving the effects of formally defective juridical acts.

The doctrinal analysis focuses on validity, nullity, form, performance and convalidation, with particular attention to the distinction between the obligations-law effects of a contract and its property-law effects. This distinction is decisive because performance of contractual obligations may remedy the formally deficient juridical act inter partes without replacing constitutive registration.

The comparative method is functional and historically oriented. Rather than comparing the letter of the law alone, the dissertation examines how different legal systems respond to the same practical problem: a real-estate agreement that fails to satisfy mandatory form although the parties subsequent behaviour suggests that they consider it binding.

The classical civil law codifications serve as reference models, while Central-Eastern European jurisdictions form the main basis of comparison.

The research is based on national civil codes, obligations acts, acts on property law, on land registry systems, on public notaries, historical pieces of legislation, commentaries, monographs and scholarly articles.

The analysis proceeds on three levels: first, the general contract-law rules governing formal invalidity and its possible remedy; second, the *lex specialis* applicable to formally deficient contracts for the transfer of ownership rights over immovable property; and third, the rules on entry into the land registry which determine whether proprietary acquisition can occur based on a remedied contract.

Legal scholarly literature is analysed critically to compare competing interpretations, particularly concerning the purposes of form, performance of contractual obligations, good faith, prohibition of abuse of rights and the relationship between *favor contractus* and public interest.

Judicial decisions were selected according to their relevance to formal defects in real-estate transactions and the effect of subsequent performance of contractual obligations, or registration in the land registry. Priority was given to decisions of supreme and cassation courts where available.

The accessibility and publication of judicial decisions considerably differ among the examined legal systems. Thus, the case-law analysis does not aim to provide a quantitative overview; rather, its purpose is to present the practical application of convalidation in judicial practice and to identify possible discrepancies between judicial practice and statutory provisions.

PART III. SCIENTIFIC RESULTS AND THEIR POSSIBLE UTILISATION

3.1. General scientific findings

The research demonstrates that convalidation is not a generally established European private-law legal institute. Different methods are observable with the purpose of mitigating the harsh consequences of nullity stemming from formal defects. These techniques include healing curative mechanisms provided by statute, preservation of the legal effects of the respective contract on the obligations-law level, conversion and mechanisms pertaining to good-faith. Therefore, the research required a functional rather than purely terminological comparison.

Three aspects are the most significant for formally defective real-estate contracts. Firstly, the national regulatory framework pertaining to invalidity, the function of the prescribed mandatory form, and the relationship between the contract concluded, proprietary transfer and land registration. Performance-based convalidation could

only occur if the purposes of statutory form have been sufficiently achieved without undermining public interests or protection of third parties.

3.2. Theses of the dissertation

Thesis 1: Performance-based convalidation constitutes a corrective mechanism with the purpose of mitigating the harsh consequences of invalidity due to formal defects. It does not abolish mandatory form but prevents disproportionate nullity where the purposes of form have already been substantially achieved.

Thesis 2: The possibility of convalidation depends on the function of the formal requirement.

Thesis 3: The modus and requirements for property transfer are decisive. A cure which functions at the obligations-law level does not automatically produce proprietary effects and cannot substitute constitutive land registration.

Thesis 4: Convalidation must be distinguished from conversion, confirmation, partial invalidity, *ratihabitio* and

judicial validation because these mechanisms differ in both their conditions of application and legal effects, although similarities are observable in their purpose.

Thesis 5: Comparative analysis must distinguish contract validity, enforceability and opposability. A transaction may remain binding inter partes while being incapable of producing effects against third parties or completing registration.

Thesis 6: The classical civil law codifications examined do not recognise performance-based convalidation as an autonomous institution when it comes to formally deficient contracts for the transfer of ownership over immovable property. Germany is distinctive because statutory Heilung links cure to completion of the proprietary transaction and registration.

Thesis 7: As to Central-Eastern European systems more examples (as opposed to the examined classical civil law codifications) are observed in connection with preserving formally defective real estate contracts, however a generally accepted regulatory framework is also lacking.

Thesis 8: Among the Central-Eastern European systems examined, Croatia and Slovenia provide the clearest

contemporary examples of the application of performance-based convalidation of formally defective real-estate contracts accepted in both legislation and case law.

Thesis 9: Even where convalidation is recognised, performance cannot replace registration with a constitutive effect. Cure primarily affects the contractual relationship on the obligations-law level, while ownership acquisition has to adhere to property-law and registration requirements.

Thesis 10: Legal certainty is not necessarily strengthened by automatically invalidating a fully realised transaction. In appropriate circumstances, preserving its effects may contribute to stability, provided that public interests and rights of third parties are protected.

Thesis 11: Where convalidation is accepted, national legislation should define its conditions and effects and coordinate them with land-registration law. EU-level harmonisation is not justified at the present because national differences stem from deeper structural differences in property law.

3.3. Results concerning the classical civil law codifications

The classical civil law codifications examined show different ways of mitigating the harsh consequences of invalidity due to formal defects. French law illustrates the distinction between validity and opposability, while German law provides the clearest statutory curative mechanism through *Heilung.* Swiss law demonstrates the corrective role of good faith and prohibition of abuse of rights the functional counterparts of which could be observed in Germany, Italy and Austria as well.

The comparison confirms that these systems do not share a uniform regulatory framework or judicial practice of performance-based convalidation. Instead, they apply different techniques which reflecting the specific solutions existing in their respective contract and property law regulations.

3.4. Results concerning Central-Eastern European legal systems

Central-Eastern Europe is not homogeneous either. Hungary, Poland, the Czech Republic, Slovakia and Romania generally maintain strict formal and registration requirements for the transfer of ownership over immovable property and pertaining to these contracts do not recognise performance-based convalidation in the sense examined in the dissertation.

The former Yugoslav legal tradition is distinctive because the Yugoslav Obligations Act from 1978 developed an explicit performance-based rule for formally defective contracts. Its influence is visible in Slovenia, Croatia and Serbia, although their contemporary regulatory frameworks of real estate have been changed.

Slovenian doctrine and case law recognise the theory of realisation, allowing performance in full or in preponderant part to remedy contracts with formal defects where the purpose of form does not require otherwise.

Croatian law similarly allows for performance-based convalidation.

Serbian general obligations law has retained the rule on performance-based remedy form the obligations Act of 1978, but contemporary *lex specialis* on real-estate transfers imposes stricter formal requirements and is generally understood to exclude convalidation of formally deficient contracts for the conveyance of ownership rights over immovable property.

3.5. Implications and possible utilisation

Performance of obligations stemming from the respective contractual relationship and the transfer of ownership must be distinguished. Payment of the purchase price and transfer of possession may constitute performance but do not necessarily result in the transfer ownership rights. Where registration is constitutive, a convalidated contract cannot replace the property-law requirements of acquisition.

The research supports a clear distinction between validity, enforceability, opposability and proprietary

acquisition and rejects the use of convalidation as an umbrella term for all mechanisms preserving defective juridical acts.

For adjudication, courts relying on good faith and prohibition of abuse of rights should explain how these principles interact with the purpose of statutory form and the property-law consequences of their decisions.

The results may assist courts, attorneys, notaries and professionals in the field of land-registration by providing a structured framework based on the purpose of form, the extent of performance, the distinction between contractual and proprietary effects, and the protection of public and third-party interests.

Where national law recognises convalidation, legislation should specify the relevant defects, required performance, legal effects and relationship with entry into the land registry. EU-level harmonisation is not recommended because the differences observed are rooted in existing differences in national property-law and the administrative procedure of land registry registration.

The research also provides a basis for further analysis of digital formalities, electronic declarations, remote notarisation and the changing functions of public registers.

Concluding remark

The dissertation demonstrates that performance-based convalidation is a limited corrective mechanism the possible application of which depends on whether the purposes of statutory form have been achieved without jeopardising public interests, third-party interests or the integrity of land-registry systems. Therefore, in particular cases, preserving contract that has been performed may strengthen rather than weaken legal certainty.

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