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VII. SUBCONTRACTS

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1. ADMISSIBILITY AND SCOPE OF SUBCONTRACTS[1]

Subcontracts are one of the concepts (elements) of private law (civil law). Featuring it in ReNEUAL Model Rules is adequate by reason that the cases related to subcontracts,[2] *(subcontratación*[3]*)* are also relevant for the EU administrative organs.[4]

Subcontracts are such contractual doctrinal (dogmatic) constructions *('dogmatischen Konstruktion')* the prefiguration of which has already existed in Roman private law. However, its real content is difficult to unfold. At present, it is only revealed that in case of *locatio conductio operis* (lease [of creation */opus/*] or enterprise) we can only speak about – with the non-sourceful term – *sublocatio* (subcontracts/sublet).

There are legal scholars who mentioned that only one type of a case should be highlighted, that is the responsibility of the employees (Gai. D. 19, 2, 25, 7). This source stated indistinctly the responsibility of employees (in case of business contract), but it was controversial by pandectists (entrepreneurs culpability as prerequisite).[5]

In a wider sense, there is a significant rule of Roman law on the subject that a ship owner is obliged to deal with all the acts of the sailor *(nauta)* as he applied the sailor at his own risk (Ulp. D. 4, 9, 7 pr.).[6] Besides this rule there is a conflicting rule too – based on an interpolated source – which states that the entrepreneur does not belong to his/her own risk *(adhibuit)* practically for employees with non-professional properties (improper work) (Ulp D. 4, 9, 7, 4).[7]

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1 The author of the sub-chapter is Gyula Koi.

2 ReNEUAL (EN version) 173.

3 ReNEUAL (ES version) 239. (At the time of writing this paper, the text of Model Rules was available only in English and Spanish *(Código ReNEUAL de procedimiento administrativo de la Unión Europea).* Currently there are many other language versions, which are based on the updated English version from 2015: French *(La codification de la procédure administrative de l'Union européenne – Le modèle ReNEUAL);* German *(ReNEUAL – Musterentwurf für ein EU-Verwaltungsverfahrensrecht*); Italian *(Codice ReNEUAL del procedimento amministrativo dell'Unione Europea);* Polish *(ReNEUAL Model kodeksu postępowania administracyjnego dla Unii Europejskiej);* Romanian *(Codul reneual de procedura administrativa a Uniunii Europene).* The updated version of 2015 is the basis for the English print version of the Model Rules – including linguistically improved introductions and explanations. The English print version has been published containing an additional comparative chapter *(Administrative Procedure Acts: History, Features and Reception.)* in 2017 by Oxford University Press (OUP). Our citations in this paper refer to the draft versions.

4 For the connection between administrative law and civil law see Koi Gyula (2008): A közigazgatási jog szerepe a megalkotandó Polgári Törvénykönyv tükrében. (The Role of Administrative Law in the Mirror of the New Hungarian Civil Code.) *Polgári jogi kodifikáció,* 2008/2. 3–12. It is worth drawing attention to the appearance of the German specialty *private administrative law (Verwaltungsprivatrecht; Derecho privado administrativo)* in the regulation. ReNEUAL (EN version) 152–153; ReNEUAL (ES version) 217.

5 On the problem see Windscheid, Bernhard (1879): *Lehrbuch des Pandektenrechts.* Stuttgart, Ebner–Seubert. 509; Zimmermann, Reinhard (1996): *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Oxford, OUP. main text1124; footnote 218. On the cited Gaius text see Földi András (1997)*: Kereskedelmi jogintézmények a római jogban. (Commercial Legal Institutions in Roman Law.)* Budapest, Akadémiai Kiadó. 37, footnote 50.

6 Földi (1997): *op. cit.* 79.

7 Földi (1997): *op. cit.* main text 80; footnote 79. See also Schulz, Fritz (1911): *Die Haftung für das Verschulden der Angestellten im klassischen römischen Recht.* Wien, Hölder.

The modern, clear regulation of subcontracts is contained in the article[8] of the French *Code civil* (1804) article 1797 according to which the entrepreneur's (contractor's) liability is valid for the subcontractor and it is irrespective of the entrepreneur's (contractor's) fault.[9] The current French law regulates the issue of subcontracts *(sous-traitance)* in the Law 75-1334. (31 December 1975).[10] In the German law *Bürgerliches Gesetzbuch* (1896) the rules of subcontracts *(Subunternehmen)* are not specifically included,[11] similarly to the solution of the old and new Italian *Codice civile* (1865 and 1942)[12] and the Spanish *Código civil* (1889).[13]

The four titles (*titre*) of the French law mentioned above regulates the questions of the general definitions *(dispositions générales)* /1–3. §§/, direct payment *(paiement direct)* /4-10. §§/, direct action *(action directe)* /11–14. §§/, and diverse provisions of dispositions *(dispositions diverses)*.

A subcontract[14] under this legislation is the case where the entrepreneur (contractor) entrusts, on his/her own responsibility, subcontractors who are wholly or partly obliged (as contractual parties) to comply with the contract of business or the public contract (public contract)/public procurement contract *(marché public)*.

The contract is recognised to be small-valued till 600 euros based on the exercise of the French *Conseil d'État*. The cancel (resignation) from the direct (customer's) entrepreneurial fee payment is required to be accepted also orally by the other party.

The commencement of the action, the joinder, and the amendment refer to all types of subcontracts. The miscellaneous provisions refer to the territorial scope of the act; these questions will be examined in the analysis of relevant provisions of ReNEUAL Model Rules. The theoretical prefiguration of ReNEUAL Model Rules of that practice-based, subcontract-related[15] legal literature, which exist from the time of *European Communities* (EC),[16] but this has only a legal history significance.

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8 This article entered into force in 17 March 1804 by the 7 March 1804 codification.

9 „L'entrepreneur répond du fait des personnes qu'il emploie." On this problem see Néret, Jean (1979): *Le sous-contrat*. Paris, LGDJ.

10 Wiederkehr, Georges et al. (2014): *Code civil*. Dalloz, Paris. 2278–2280. Also available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000889241 (Downloaded: 15.10.2015.)

11 Schulze, Reiner (2014): *Bürgerliches Gesetzbuch. Handkommentar.* Baden-Baden, Nomos.

12 di Majo, Adolfo (2003): *Codice civile. Con la constitutzione i trattati U.E. e C.E. e le principali norme complementar.* Milano, Giuffrè.

13 Agencia Estatal Boletín Oficial del Estado (2013): *Código civil de Espana actualizado*. Available at: www.boe.es/buscar/act.php?id=BOE-A-1889-4763 (Downloaded: 15.10.2015.)

14 For legal literature see Néret (1979): *op. cit.* 169–194.

15 Commission of the European Communities (1989): *Practical guide to legal aspects of industrial sub-contracting within the European Community* I. *The sub-contract.* Luxemburg, OOPEC; *European guide to alliances between subcontracting SMEs.* Luxemburg, Eur-Op. 1998.

16 On this topic see G. Toth Akos (1990): *The Oxford Encyclopaedia of European Community Law I. Institutional Law II. The World of Internal Market.* Oxford, Clarendon.

The fifth Hungarian Draft Civil Code from 1928 (referred as HDCC) regulated subcontracts, too.[17] The first three expressions of article 1599 of HDCC stated that on a subcontractor: "Any person who is involved in creation of works, especially as employee, subcontractor, or supplier of materials in a building construction, which is based on a conclusion with a contractor who is obliged to create a work (but not with the customer of the work): he [the employee, the subcontractor, or the supplier of materials] shall be entitled to demand wages or other considerations from the customer of the work only to the extent that he is debtor of the contractor in respect of producing of the work."[18]

Primarily in a construction (building) contract, the subcontractor was mentioned together with others involved in (employee, supplier of materials). The claim for consideration (salary or other – fee is not named by the HDCC draft) is basically possible against the contractor (and against the customer only if the customer becomes the contractor's debtor). The first adopted Hungarian Civil Code (Act IV of 1959, article 398; referred as HCC) is very remarkable in the later Hungarian regulation; it stated, that the contractor enforces his rights based on the defective performance of the subcontractor, when the contractor has an obligation to honour his liabilities, provided that he examined the quality.

The so-called *Grand Commentary of HCC*[19] named that regulation appositely and validly the 'extended' liability of a subcontractor (collaborator). On the basis of this regulation, the liability of a subcontractor (in case of emergence of the conditions of the text of the article) will be 'extend' to the duration of the liability of the contractor. The reason of this regulation was the complexity of activities (one contractor versus numerous subcontractors with different special tasks). But the activity of a contractor was possible after the acting of subcontractors, shared in time, and after the completing of the work will come to light the liabilities of the single subcontractors. This liability extinguishes by the period of limitation.

The regulation extended to those cases, when the abeyance of limitation was not applicable. Currently, the guaranteed times became limitation times, and the abeyance of the term is limited to the recognition of the error. In the life of the regulation of present days, the regulation of *New Hungarian Civil Code* (Act V of 2013, referred as NHCC) is similar to the old one, that concerns the rules of contracts of professional services to subcontracts. But the Hungarian civil law supports the dispositive nature of the law of obligations, and the rules are statutory *(cogent).*

The article 6:129 of NHCC is applicable to the regulation of avail of collaborators (former auxiliary performance in HCC). It has not a special provision to requisition of

[17] *500. számú Törvényjavaslat Magyarország Magánjogi Törvénykönyve. (No. 500 Draft Civil Code of Hungary.)* s.l., (1928) s.n. See also the German version: *Ungarns Privatrechtsgesetzbuch. Entwurf. Amtliche Übersetzung.* s.l., (1928) IM.

[18] *Törvényjavaslat Magyarország Magánjogi Törvénykönyve. op. cit.* 423.

[19] Havasi Győző (1981): *XXXV. fejezet A vállalkozás. (Chapter 25. Contract for Professional Services.)*= In Eörsi Gyula – Gellért György eds.: *A Polgári Törvénykönyv magyarázata II. (Commentary on the Hungarian Civil Code II.)* Budapest, KJK.

subcontractors, or the subcontracts, and the new regulation does not apply to the old regulations on general (principal) contractors.[20]

The article IV-37 of ReNEUAL Model Rules regulates the admissibility (*admisibilidad*) and scope (ámbito) of subcontracts. The ReNEUAL Model Rules give a concept in the basis of Continental Roman law-based (civilian) traditions of the civil law: "'Subcontractor': any person who/that has entered into a contractual relationship with the contractor for the purpose of implementing an existing EU contract."

It follows to the expression "who/that", that the subcontractor is a natural person, or business association with (or without) legal personality (or other type of organisation).

In the regulations of ReNEUAL Model Rules, paragraph (1) discusses the question of admissibility, with the same wording as DCFR IV. C. – 2:104 and IV. D. – 3:302, furthermore article 161 of EFR (Regulation 966/2012). In case of an enactment, several legal texts with similar wording will contradict the principle of the unity of the legal system, therefore this practice is unnecessary and counterproductive. The draft text on admissibility stated that the permit (approval) of the EU authority is unnecessary for the signing of the subcontract, except, that the contract is bound to a personal performance (*intuitu personae* – nature). In fact, the legal text expresses concrete and rigorous (but well-founded) conditions applying to the subcontractors. In the personal field, the regulation naming the expertise (adequate competence), in the property field, the quality of using of tools and materials will be in harmony with EU rules (EU contract, and the applicable laws), teleologically (goal-based interpretation) the tools and materials fit to achieve the particular purpose for which they are to be used.

The application (applicability) means the main quality of the thing (this quality can be natural quality or legal quality). For example, the performance is not possible with a bakers' shovel, when the object of the contract is rowing, but in an emergency case, rowing is possible with a bakers' shovel. The EU Financial Regulations is applicable to the financial accountability.

Paragraph (2) in a four element-based system (contractor – subcontractor – customer – EU authority) is a main rule, excluding the direct relationship between the subcontractor and the EU authority. EU contracts give an exception from this main rule, but only from the scope and consequence of the relationship.

Paragraph (3) states the contractor as a main obligor of the contract, and expresses the unlimited liability of the subcontractor to EU authority. The regulating of two non-inclusive rules in the same paragraph is a codification mistake.

Paragraph (4) excludes the liability of EU authority for third parties (consumers and others) in case of negligence of a subcontractor.

[20] Bartal Géza (2014): Vállalkozási szerződés az új Ptk.-ban. (Contract for Professional Services in the New Hungarian Civil Code.) *Gazdaság és Jog* 2014/1. 9–16. On subcontract see especially page 10.

2. CHOICE OF THE LAW APPLICABLE TO SUBCONTRACTS[21]

Questions of law applicable to subcontracts are discussed in paragraph (1) of the ReNEUAL Model Rules. Two possible cases shall be separated by the rule: the first case – not explicitly articulated – is where the law applicable to subcontracts is related to specific provision, although it is mentioned by the wording of the rule 'in a negative way'. The regulation does not mention explicitly, but it seems likely that the specific provision with sufficient legal ground shall be interpreted as the determination of the applicable law. A fault of the rule is that these specific provisions are not mentioned in that part of the EU law where they may be found. The other branch of the regulation is where the law applicable to subcontracts are defined by national law, which is the law applicable to entrepreneurial activity. Obviously the law applicable to enterprise due to its formation, namely the national law of enterprise, might be like this. Consequently, it follows that the EU law excludes its applicability. Theoretical background of this article is theory of the choice of law of international private law (conflict of laws)[22] – obviously supplemented by the characteristics of EU law. In practice, the theoretical background of the widest nature, based on Roman Law and through this on the codification of European Civil Law, is provided by Contractual Law. In relation to its paragraph IV-38, the regulation (2) contains only one exclusive rule, with regard to which it explains that article IV-37. is not touched upon by the content detailed in paragraph (1) of our analysis, meaning that basic rules considering subcontractors are not modified by the law applicable by the choice of law. From all this it may be derived that European Union stipulates the application of regulation incorporated in the Model Rules.

3. DUTIES OF THE EU AUTHORITIES TOWARDS SUBCONTRACTORS[23]

Despite its seemingly voluminous nature, paragraph (1) is a technical rule on the merits. The reason for its creation is the lack of direct relationship between EU law and subcontractors, which may be derived from the speciality of subcontractors.

In the same place, numerous obligations of the European Union regarding the legal procedures of subcontractors are also detailed. As of now, subcontractor legal procedures cover: the investigation of the lawfulness of EC's legislation or other orders (article 263., TFEU), actions at law to ascertain violation of law before the EC, the contractual responsibilities of the EU (article 340., TFEU). Based on the lack of direct relationship and because of the legal proceedings of subcontractors, the regulation articulates many obligations towards European authorities. These may be summed up as the principles of the adequate administration and are specified in the commented paragraph (articles III-3., III-5., III-7.,

[21] The author of the sub-chapter is Dániel Iván.

[22] For details see Mádl Ferenc – Vékás Lajos (2012): *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga. (The Law of Conflicts and of International Economic Relations.)* Budapest, ELTE Eötvös Kiadó. 555.

[23] The author of the sub-chapter is Dániel Iván.

III-8., III-9., III-10., III-11., III-13., III-14.,[24] III-15., III-22., III-23., III-29., III-30., III-31., III-32.). Most of the principles incorporated in this article are part of the domestic regulations of most of the EU countries, at the same time, several principles have been taken over from other branches of law (articles III-10., III-11., III-14. in the principles of criminal procedural law),[25] furthermore numerous principles function as basis for all legal proceedings (articles III-3., III-9., III-13., III-15., III-22., III-23., III-29., III-30.), otherwise there are several principles, which are not interpretable in this construction (articles III-5., III-31.), eventually there is a principle that was incorporated in the Model Rules based on technical progress (article III-32.).

Paragraph (2) servers as the warranty rule for the usability of paragraph (1), in other words this means that the EU authority needs to enable the contractor to satisfy its informative obligations towards the subcontractor – as per the principles regarding adequate administration registered in paragraph (1).

In paragraph (3) there is the regulation of a legal situation, where the authority being one of the parties in an EU contract – without specific constraints – says that the performance of the subcontractor may be objected in any case. With regard to this, the regulation declares the obligation of the EU authority to provide information towards the subcontractor. Based on this, and in connection with impingement, the subcontractor is entitled to hearing. The EU authority has the possibility to substitute any subcontractors, but in this case the EU obliges the subcontractor to provide information beforehand. On top of the declaration of intent, the EU shall also provide reasoning for the same matter. Furthermore, the subcontractor shall be supplied with the possibility to articulate his/her observations, since the submission of the request for the substitution of subcontractors shall be preceded by the transaction of these proceedings.

Paragraph (4) in relation to the contractor and the subcontractor obliges the EU authority to execute continuous controlling – this concerns the financial stability of the contractor. This obligation is already established prior to the awarding of the EU contract

[24] It is important to notice the decision of EFTA Surveillance Authority on privilege against self-incrimination (442/12/COL, 29 November 2012.): "In assessing claims made in relation to the privilege against self-incrimination, the hearing officer may consider whether undertakings make clearly unfounded claims for protection merely as a delaying tactic." [Paragraph (9)] "Where the addressee of a request for information pursuant to Article 18(2) of Chapter II of Protocol 4 to the Surveillance and Court Agreement refuses to reply to a question in such a request invoking the privilege against self-incrimination, as determined by the case-law of the Court of Justice and the EFTA Court, it may refer the matter, in due time following the receipt of the request, to the hearing officer. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the hearing officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director of the Competition and State Aid Directorate of the conclusions drawn, to be taken into account in case of any decision taken subsequently pursuant to Article 18 (3) of Chapter II of Protocol 4 to the Surveillance and Court Agreement." [Chapter 2. Article 4. Paragraph (2) Point b)]

[25] For details see Belegi József – Berkes György eds. (2015): *Büntető eljárásjog* I–III. *Kommentár a gyakorlat számára. (Criminal Procedural Law I–III. Commentary for Practice.)* Budapest, HVG-ORAC; Belovics Ervin – Tóth Mihály (2013): *Büntető eljárásjog. (Criminal Procedural Law.)* Budapest, HVG-ORAC. 596.

to the contractor and endures the whole term of the contract. Practically this lasts until the fulfilment of the contract, until the perfection of the so called *'contractus'*.

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