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NEW CIVIL CODES IN HUNGARY AND IN CZECH REPUBLIC

(THE PRAGUE-BUDAPEST PAPERS)

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Guest Editorial on the 'Prague–Budapest papers'

The papers published in these proceedings are results of two conferences held by the Faculties of Law of Charles University and Eötvös Loránd University (ELTE) on 20 June and on 10 October 2014 in Prague and Budapest respectively, dedicated to the new Czech and Hungarian Civil Codes.

Both universities are considered to be the most prestigious in their country. The Law Faculty of Charles University was founded in 1348. Presently, with more than 4500 students, it is the largest accredited law faculty in the Czech Republic. Tuition at the Faculty of Law of ELTE began in 1667. No other Hungarian Faculty of Law has a longer uninterrupted record.

Their similar historical, cultural, economic and legal background also served as a basis for fruitful cooperation, resulting in the two conferences and the present proceedings from them. The special reason for the joint conferences, namely the new Civil Codes of the Czech Republic and Hungary, both of which entered into effect in 2014, also emphasises the similarities between the two countries.

The aim of the conferences was not necessarily to summarise the new Civil Code of the Czech Republic (Act 89 of 2012, entered into effect on 1 January 2014) and the new Civil Code of Hungary (Act V of 2013, entered into effect on 15 March 2014) as a whole, but rather to present and discuss some main notion, regulation or fundamental change in each presentation. On the Hungarian side, the lectures were given either by civil law professors who actively participated in the creation of the new Hungarian Civil Code, or by junior academic staff members, while the Czech team consisted predominantly of the youngest generation of civil law scholars – research fellows from the Center for Comparative Law at Charles University.

An additional curiosity of the conference held in Budapest was that the lectures were organised basically in pairs, i.e. similar topics were presented by a Hungarian and then a Czech lecturer. These topics reviewed numerous different parts of civil law, such as assignment of contract and transfer of property (presented by András Kisfaludi and Bohumil Dvořák), law of torts (presented by Ádám Fuglinszky and Jiři Hrádek) and the regulation of some contracts, e.g. sale and purchase, insurance, credit and loan (presented by Balázs Tőkey, Rita Sik-Simon and Petra Joanna Pipková). A great advantage of this solution is that the differences between the regulations of the same area will be unequivocal and it therefore facilitates the mutual utilisation of the experiences to a considerable degree. Additionally, the programme covered the principle of

legitimate expectations in the new Czech Civil Code, presented by Jan Balarin, while Orsolya Szeibert spoke on Solidarity and Maintenance Obligations in the Family.

As mentioned above, the conferences focused on specific parts of the two Civil Codes; however the overall concept of the Czech Civil Code was also presented by Luboš Tichý, director of the Center for Comparative Law of Charles University, as the first lecture of the conference held in Prague. Otherwise, this conference also dealt with a wide range of civil law topics, such as unjust enrichment (presented by Attila Menyhárd), consumer protection (presented by Stephan Heidenhain), law of succession (presented by Hella Molnár), civil law partnership (presented by Zoltán Csehi), law of trusts (Miloš Kocí), protection of personal rights (presented by Eva Ondřejová) and protection of trade secrets (presented by Gábor Faludi).

Summarising the impressions of the two conferences, it seems that a period of extensive cooperation lies ahead. These two events were the first conferences of this kind organised by the two Law Faculties, and their programmes, as well as the presented papers, form an exceptionally strong basis for future intensive cooperation. By presenting these papers, we hope that other scholars will intend to join us and a Central European comparative legal network will be formed. Let us share this spirit and the Prague–Budapest papers with our distinguished readers.

Prague–Budapest, 7th April

Attila Menyhárd
Editor

Luboš Tichý
Guest Editor

General Questions

Luboš Tichý*

Ordre Public, Abuse of Rights and Other General Clauses and the New Czech Civil Code

I Introduction

This paper deals with several basic categories which are often called principles or basic rules of civil or private law. The aforementioned qualification of these terms is not the subject of our research, however.

We consider good faith, good morals, *ordre public* and other categories mentioned in the civil code to be general clauses and will analyse them in this respect. For the Czech Civil Code (hereinafter NCC), it is characteristic that, in contrast to some of its predecessors and in comparison to some foreign codifications, it is literally overflowing with such general clauses; this holds especially true for the basic principles of the general part.[1]

The subject of this contribution is foremost a sort of introduction into another text which will deal with the significance and functioning of these general principles (II). The paper will also deal with a phenomenon which is new to Czech private law and, it should be pointed out, has been quite surprising. This is the concept of (internal) *ordre public.* The Czech judiciary may have traditionally encountered this institution in the area of international private law and possibly also in the area of EU law. Now this term is being introduced into the Civil Code,[2] obviously inspired by the Swiss ZGB. This paper will thus aim to clarify the standing of *(ordre public interne)* within *ordre public* in general, and to set out its relationship to other general clauses, such as good faith and good morals. Finally, it will compare different approaches and applications of this institution in continental Europe as well as in common law. Special emphasis will be paid to the understanding of *'ordre public interne'* in France. Within part three of this paper, we also will attempt to set the content, significance and the function of this institution within the Civil Code. This will take place within a description of its relationship to the concept of good morals, which traditionally fulfilled the function which is now, to a large part, provided by the institution of public order.

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1 See typically sections 1–8 of NCC.

2 *Ordre public* in section 1 para 2 and section 588 of NCC serves as barriers of party´s autonomy.

Finally, in part four, we will deal with a phenomenon of the abuse of rights, which had endment already been anchored in the socialist civil code after its in 1992 but nevertheless deserves a more in-depth treatment. We will analyse this phenomenon in its relationship to other types of unauthorised exercises of law, i.e. good morals and good faith. The measure of abuse is relevant because the absence of legal protection is only a consequence of excessive abuse.[3] This part of the paper (IV) will deal with the consequences of the application of the abuse of law.

II General Clauses in the Civil Code

1 Notion

Regardless of whether we consider them legal principles or believe them to have another normative function, general causes are a characteristic phenomenon for the codification of private law. They have a characteristic flexibility which gives a certain vagueness to their use. If we consider that the BGB is typical in terms of the occurrence of such general clauses and that, put differently, it is characteristic of the provisions contained in Section 138 (good morals) and Section 242 (good faith), then, in the case of the NCC, we can talk about a plethora of these terms, which becomes especially apparent from Sections 1–8.[4] From another viewpoint, one can consider this an overburdening by extra-legal notions[5] potentially or explicitly contained in the general clauses. The NCC thus contrasts with other codifications like, for example, the new Hungarian approach, and especially with the previous socialist civil codes in the Czech Republic which were completely devoid of any extra-legal traits.

2 Problems

With general clauses such as good faith or good morals, the main problem lies in their vagueness which does not allow direct application. On the other hand, many consider legal norms to be fully fledged[6] and, despite their vagueness, are formally equal, precise legal rules that are part of a positive legal order.

Together with the industrial revolution in Germany, Sections 138, 157 and 242 of the BGB gained great popularity (for example, Section 242 was celebrated as 'the paragraph of kings'). All attempts to mark these sections as meaningless provisions[7] failed. Under the influence of law

[3] See s 8 NCC.

[4] See the categories of *ordre public,* good morals as well as other terms in s 1–8, such as expectation, decency etc.

[5] Apparently, this is a reaction to previous codes, which did not refer to values and extralegal notions.

[6] See Ernst A. Kramer, *Juristische Methodenlehre* (4th edn, CH Beck 2013, München, Manz Wien, Stämpfli Bern) 70 et seq.

[7] Cf. Peter Jung, 'Die Generalklausel im deutschen und französischen Vertragsrecht' in Baldus, Müller-Graff (eds), *Die Generalklausel im europäischen Privatrecht* (Sellier 2006, München) 37 et seq.

and interessen jurisprudence[8] this provision experienced its heyday. Even such sharp criticism as voiced by Hedemann,[9] who warned of a fragmentation of law and the lack of principles in its application, did not change this. General clauses had their crisis in Germany only with their being discredited under the National Socialist regime,[10] but they were again rehabilitated as a result of the works of Karl Engisch[11] and Josef Esser.[12]

3 Use of General Clauses

General clauses are often used in legislation because it is impossible to include the infinite number of case studies needing regulation. This calls for a general and abstract case description with the use of general indefinite terms *(effet utile),* which leave wider room for application.

The more casuistic the actual legal system, the greater the need for such general clauses. This can be seen in a comparison of the BGB and the ABGB. The latter has been constructed with very 'open' legal norms, which deal with changes in the environment to which they are applied rather well. As such, the need for flexible clauses is significantly lower than in the case of the casuistically devised BGB.

At the same time, general clauses should be viewed as gaps in the law.[13] Flexible, indefinite legal norms and general clauses (for example principles of faith,[14] good morals and due cause), should be viewed as a certain sub-chapter of gaps in the law planned by the legislator. The same holds true for the DCFR,[15], which is full of such generally held terms. They are empty formulations which only at first sight appear to be expressed precisely. On closer reading they become indefinite and open to multiple interpretations. Hedemann[16] called these clauses a piece of open law-making and intended gaps in the law. Heck[17] classifies them as delegating norms.

4 The Function of the Court

The completion of general clauses is considered to be their 'interpretation.' The normative and also legislative function of the court is, in this case, quite often denied or even forced out. These are, however, basically the result and the expression of the spirit of the times *(Zeitgeist).*[18] Any

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[8] See Philipp H. Heck, *Begriffsbildung und Interessenjurisprudenz* (1932, Berlin).

[9] See J. W. Hedemann, *Flucht in die Generalklauseln* (1933) 58 et seq.

[10] Bernd Rüthers, *die Unbegrenzte Auslegung* (7th edn, CH Beck 2012, München).

[11] See Karl Engisch, *Die Idee der Konkretisierung in Recht und Wissenschaft unserer* Zeit (1953).

[12] Cf. Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956).

[13] See Kramer (n 6) 75 et seq.

[14] See NCC, s 2958, 2959.

[15] Cf. e.g. Criticism in Bénedicte Fauvarque-Cosson, Denis Mazeaud (eds), *European Contract Law* (Sellier 2008, Munich) 101ff., 150 et seq.

[16] See Hedemann (n 9) 58.

[17] Heck (n 8) 4.

[18] Christian Baldus, *Historische und vergleichende Auslegung im Gemeinschaftsrecht – zur Konkretisierung der „geringfügigen Vertragswidrigkeit"* (n 7) 22 et seq.

talk about some sort of common knowledge is only an illusion. Legally-politically, this does not involve knowledge but sentience. Against the argument that these are gaps in the law, it is held that it instead is a planned loosening of legislation or the diffusion of the boundaries of the law. The history of judicature shows an unheard-of imagination by the legislative courts, which find these phenomena appealing. A significant number of new legal institutions are indebted to these very clauses. In Germany, for example, the best example is the abuse of law, which the law does not deal with expressly.[19] The same goes for preclusion and doctrine of *Wegfall der Geschäftsgrundlage.* General clauses are marked as the cuckoo's eggs[20] of the liberal legal system.

5 Classification and the Mutual Relationship of Selected General Clauses

It is useful to explore certain characteristic traits of the individual general clauses, on the basis of which they can be classified and compared. This certainly leads to a better understanding of their significance and function.

With regard to the expression of these phenomena in statutory law, one can distinguish between cases where general clauses have been explicitly set in the legal rules on one hand and those legal norms (rules) where general clauses have not been expressed explicitly but they may nevertheless be deduced and applied since the law contains certain very vagne uncertain terms which require their application. Thus, for example in Section 2958 and 2599 NCC respectively, compensation for inflicted harm or wrongful death can be set based on the principles of decency. One can therefore deduce a principle of decency (called 'objective good faith'),[21] not only in connection with the amount of compensation, but also as a general function for the entire scope of the Civil Code.

Similarly, the law holds (e.g. in Section 2061, para.1, lit. a) that a buyer expects certain characteristics. This terminology is the basis for legitimate expectations for a generally known category, e.g. from EU law.[22] One could continue like this on the basis of similar concrete provisions. It can also be claimed that these 'implicit' general clauses have the same or similar meaning as those which are explicitly presented in the NCC.

Looking at the function of the clauses, one can distinguish between those general clauses which have a materially limited functionality and are mainly focused on the relationships

[19] Cf. e.g. Arndt Teichmann, 'Venire contra factum proprium – ein Teilaspekt rechtmissbräuchlichen Handelns' [1985] Juristische Arbeitsblätter 497 et seq.

[20] Pfeiffer called it a 'foreign thing' in continental Europe: Thomas Pfeiffer, 'Die Generalklausel auf der Agenda der europäischen Privatsangleichung' (n 7) 29.

[21] Decency is interpreted as objective good faith by Czech authors [see Filip Melzer, Petr Tégl, in Melzer, Tégl (eds) *Občanský zákoník* § 1.117 (Civil Code) Leges 2013, Prague 152 ff.]. This should be the opposite of subjective good faith in property and succession law.

[22] Cf. e.g. Hans W. Micklitz, 'Legitime Erwartungen als Gerechtigkeitsprinzip des Europäischen Privatrechts' in Krämer and others (eds), *Law and Diffuse Interests in the European Legal Order, Liber Amicorum Norbert Reich* (Nomos 1997, Baden-Baden) 245 et seq.

within the law of obligation or possibly material law and those which are valid on a general level. Here we can find good faith, good morals or *ordre public.* A similar standard to the standing of principles of a general nature and functionality can also be attributed to the categories of decency, the good faith of contractual parties, justness and legitimate expectations.

The terms *abuse of law, circumvention of the law,* and *harassment* have a different function and significance. These are legal institutions of the general part of civil law or are of a general character which goes beyond civil law itself.

How can the mutual relationship between these terms be defined? As will also become apparent from part four of this paper, these terms are in specific types of relationships, e.g. cause and effect. As in German law, the abuse of law is an effect of the violation of good faith.[23] In contrast, Austrian law considers the cause of an abuse of law to be a conflict with good morals.[24] According to what seems to be the majority opinion in the Czech Republic, the abuse of law is a result of the violation of a number of these general clauses, which function as certain legal or moral principles.[25]

III Ordre public. Its Variety

1 Types

Ordre public as a defensive tool, as well as a tool with a certain positive charge, has several different aspects. It traditionally appears in the Czech legal order and is anchored as international public order in the Act on international private law.[26] It also has a conflict-of-law form as well as an international procedural form. The common aim of both of these forms is to prevent the influence of the application of a foreign legal order that is in conflict with the fundamental values of the domestic social order. According to this, there exists a union *ordre public* in the primary law of the EU (TFEU).[27] Finally, the institution of *ordre public interne* has been introduced into the new civil code;[28] this has a somewhat different aim than the above-mentioned types of public order, but nevertheless has the same trait of defending basic principles and values.

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[23] See Manfred Wolf, Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (10th edn, CH Beck 2012, München) 230 et eq.

[24] Cf. Georg Graf in his comments on Sec. 879 ABGB in Kletečka, Schauer, *ABGB – ON* (Manz 2010, Wien) paras 60–224 and Heinz Krejci, 'Comments on Sec. 879 ABGB' in Rummel (ed) *Kommentar zum ABGB* (3rd edn, Manz 2000, Wien) paras 48–55.

[25] See III.5 of this paper.

[26] Cf. s 4 of the Act. No. 91/2012 Coll. Interestingly enough this law does not define *ordre public,* as opposed to the previous Act No. 97/1963 Coll. which understood *ordre public* as principles of social and legal order on which one has to insist (see s 36).

[27] See Art. 36, 45 para 3 and 52 para 1 TFEU.

[28] See III.4 of this paper.

2 Ordre Public in International Private and Procedural Law (Ordre Public International)

This institution belongs to the general section of international private and procedural law and serves to defend legally relevant influences which are in conflict with fundamental values or with the ideas of a certain community, especially states and the European Union. According to the classic concept of international private law, public order is a sort of safety valve, i.e. an essential tool against harmful foreign norms, decisions and their influences. It is thus a defence mechanism against legal actions on the basis of the choice of law, a borderline indicator which is in conflict with the mentioned values or against the results of foreign legal decisions. It is an uncertain term which needs to be defined more precisely.

In international private law, there are a number of problems which often have very ambivalent developments. On a European level, this term is filled with European values,[29] especially the human rights included in the European Charter of human rights of the EU. In this form, *ordre public* is understood to be, in the negative sense of the term, a defence mechanism.[30] It nevertheless also has a positive function in the enforcement of certain values, which takes place through the so-called directly applicable legal norms.

3 Ordre Public in Primary Union Law

Ordre public includes states' interests of essential importance.[31] It is defined by the ECJ as a violation of law in a situation where a sufficiently serious threat exists which concerns the basic interests of the community.[32]

The concept of *ordre public* in Article 36 TEEC cannot be interchanged or confused with understanding the concept in the area of national police law. It denotes the set of basic rules determined by the highest power, which must be taken into account and which are issued protection of to the political and social society structure of the member state. The application of the *ordre public* by the national authorities of the member state has to be contingent on the fact that, except for *ordre public* violations on the basis of a violation of the law, there exists a real, sufficiently serious threat, which affects the fundamental interests of society. [33]

Ordre public Européen, as a vague legal concept, primarily causes the *ordre public* a problem of competence, since who is to decide who has the authority to determine the content of the concept in the end. In this respect, it clearly shows the independence and autonomy of EU law. Even in this respect, supranational control is typical for EU law. Also, here the member states

[29] See para 2 of the Preamble of TEU.

[30] See. e.g. Werner Schroeder in Rudolf Streinz (ed), *EUV/AEUV* (2nd edn, CH Beck 2012, München) 536 para 9.

[31] Jörg Becker in Jürgen Schwarze, *Kommentar zu EUV und EAUV* (3rd edn, Nomos 2009, Baden–Baden) Comments on Art. 36, para 11.

[32] See *Case 30/77 Regina v. Bouchereau* (1977) ECR–1999, paras 7–8.

[33] See Walter Frenz, *Handbuch Europarecht* (Bd 1 Europäische Grundfreiheiten, Springer-Verlag 2004, Berlin and others) 358–359, paras 943 et seq.

have some room for discretion at the first stage/level, which they fulfil by their internal perceptions. However, at the second stage/level, this reasoning is subject to Union control, so the core of the concept is in hands of the ECJ at the end. *Ordre public* can therefore be classified as a union framework concept. Schematically, these three different techniques can be defined. The first category includes defining this concept. This is (respectively was) evidenced in the Directive 244/221. A different definition is made through the ECJ case law. In this framework, it turns out, the ECJ refers to certain categories as parts of *ordre public*.[34] The ECJ is focused on the development of certain directives of the interpretation, which are used to fill the window of this flexible concept.[35] The basic ideas of case law/jurisprudence are to secure basic freedoms from restrictions by the member states, as well as the interpretation of the reservations included in the system of EU law. Besides, the ECJ examines whether the national law reacts to national subject matters in the same way as to EU subject matters.

4 Ordre Public (Ordre Public Interne) in Private Law in France, Switzerland, Italy, Germany, the UK and the USA

a) France

The French Civil Code (hereinafter CC) has a special significance for the concept of *ordre public,* primarily in Article 6, which says that it is not possible to deviate by a contract from laws relating to *ordre public* and good morals[36]. It is followed by conclusions in Article 1133, which states that the cause is unlawful if prohibited by law or contrary to morality or *ordre public*.[37]

Article 6 (besides others) divides the laws into two categories: those which cannot be deviated from and those that apply regardless of the different intentions of the parties. It thus distinguishes mandatory and dispositive laws. The purpose is to safeguard the *ordre public* and good morals, which limits the autonomy of the parties. That is why in the French legal system the mandatory laws indicate mandatory regulations as laws of *ordre public* respectively laws of *ordre public* (national). It is the public interest that defines the mandatory private law so designated by Roman jurists (D.2, 14, 38: *ius publicum privatorum pactis mutari non potest* – Papinian, or D.50, 17,45: *privatorum conventio iuri publico non derogat* – Ulpian). Contracts in conflict with Article 6 are invalid. Some French authors try[38] to make a wider definition of *ordre public* so they interpret this Article as meaning that 'legal action is invalid if it is

[34] Wolfgang Wurmnest, 'Ordre public' in Leible, Unberath (eds), *Brauchen wir eine Rom O Verordnung* (JWV 2003, Jena) 446 et seq.

[35] Ibid.

[36] See Art. 6 Code Civil: *On ne peut déroger, par des conventions particulières, aux lois qui interessent l´ordre public et les bonnes moeurs.*

[37] Art. 1133 Code Civil: *La cause est illicite, quand elle est prohibiée par la loi, quand elle est contraire aux bonnes moeurs on à l´ordre public.*

[38] Marcel Planiol, *Traité élementaire de droit civil* (11th edn, 1998, Paris), art. No. 293, and Felix Wiget, *Der zivilrechtliche Begriff der öffentlichen Ordnung* (Graphische Werkstätten 1939, Aarau).

inconsistent with either the laws of public order or good morals.' But that makes Article 1133 unnecessary. In reality, therefore, there are three cornerstones of the law: the law, good morals and public order. Law are not all legal regulations within the meaning of 1133 CC, but only those legal standards that limit autonomy and which are mandatory in nature in that they were issued because of *ordre public* or good morals. In practice, not all contracts violate the mandatory statutory law, but only those that are in conflict with express statutory prohibition.

According to Marmion,[39] *ordre public* is an institution of society, which determined the status of individuals, legal entities and the holders of state power within society,[40] Actions contrary to *ordre public* are, according to Simitis,[41] acting against the law, which prohibits any deviation, serves public or political goals, protects third parties or law.

Mandatory legal norms are expressed by the terms in Article 6 CC *(Lois d´ordre public).*[42] That is also the case for Articles 686, 791, 900, 1130, 1133, 1172, 1387, 1388, 1443 and 1451 CC. According to the prevailing opinion, all mandatory norms are to be considered to be norms of *ordre public.*[43] The case law very often designates regulations as *ordre public* if their mandatory nature is not to be deduced from the text itself.[44] A special category of laws of *ordre public* is redundant. The term *loi impérative* is fully sufficient.[45] In the new draft of the Code Civil, the expression *disposition légale impérative* is therefore included. Article 6 CC is hence used in all cases in contradiction with the mandatory rules. According to the prevailing opinion back in the 19th century, a contract was in contradiction with Article 1133 only when the contract was in conflict with a mandatory rule. Despite this, the courts hesitated to state/proclaim/declare nullity, because of the stated contradiction to *ordre public.* They invoked good morals or even natural law instead. There was an assumption that the conflict is better justified in this way. This attitude was a result of the prevailing liberal concept, according to which anything that was not explicitly forbidden was allowed.[46] The restrictive interpretation of Article 1133 is not used anymore. This provision has to be applied regardless of the statutory prohibitions. The crucial argument lies in the theory that contractual autonomy is rendered by the legislator. The individual is therefore bound by the legal order.[47] The prevailing opinion in the 19th century resulted in the identification of Article 1133 with Article 6. The problems with *ordre public* seemed to be

[39] Jean Marmion, *Étude sur les lois d´ordre public* (1924, Paris).

[40] See Marcel Courtier, *De la notion de l´ordre public dans le code* (1904, Paris).

[41] Konstantin Simitis, *Gute Sitten und ordre public* (N. G. Elwert 1960, Hamburg) 81.

[42] Marcel Planiol, Georges Ripert, *Traice de droit civil francais* (1930, Paris) para 226.

[43] Henri Malaurie, *L´ordre public* (1955, Paris) 7., Bertrand Fages, *Droit des obligations* (4th edn, 2006, Paris) para 169.

[44] See the judgment of the Supreme Court of France Cass. Rep from 18. 3. 1867, D. 1867 – according Simitis (n 41, 83) and Cass. 1re civ 7 dec. 2004 No 0111.823, JCP G 2005, I 141.

[45] Philippe Malaurie, Laurent Aynnes, Philippe Stoffel-Munck, *Les obligations* (6th edn, LGDJ 2013, Paris) para 648.

[46] According to Boulanger (Jules Boulanger in Etudes Ripert, vol. I, 62) the content of *ordre public* can be made more concrete on the basis of the principles of current law. This opinion has been criticised since not all principles have to be applied [Malaurie, (n 43) 118]. *Ordre public* has to be assessed in compliance with the legal institutions which it serves [Malaurie, (n 43) 69].

[47] According to Simitis (n 41) 84.

a problem of the status of *ordre public*[48] and in this way problems related to the mandatory provisions were also dragged into the area of *ordre public.*[49]

b) Switzerland

Ordre public is a term used mainly in the state and police law, and also in private international law. First of all, it relates to governmental public order. Article 2 of the Constitution holds that one of the federal aims is to keep peace and order. Article 16 holds that disturbance/violation of the internal order is the pre-condition to federal intervention.[50]

Here, *ordre public* imposes regulations on individuals in order to maintain public safety and public order.

The Swiss concept has its basis in Articles 6 and 1133 of the French CC and also in Articles 31 and 1343 of the Italian Codice Civile. In Switzerland, *ordre public* was enacted, in addition to good morals, in Article 2 ZGB. In Switzerland, *ordre public* is attributed to numerous functions. It is believed that public order has only an interpretative role with regard to mandatory legal rules. If it is not clear whether the particular rule has a mandatory nature, it is necessary to ascertain whether it serves the public order or not.[51]

Wiget and Egger[52] considered *ordre public* to be a subcategory of good morals. Gauch and Schleup[53] understand *ordre public* as a complex of mandatory banishing rules of public law. According to Broggini,[54] as a general clause *ordre public* performs an individual control function for the preservation of public policy with regard to the basic values. If the contract is evidently in conflict with the basic ideas immanent in the legal order, public order is applied without this particular contract being in conflict with the particular mandatory rule. Zufferey-Werro[55] a credits *ordre public,* alongside illegality, with an independent meaning.

The concept of *ordre public* as a set of mandatory rules concludes that these rules are issued in the public interest as a concretization of *ordre public.* According to Kramer,[56] *ordre public* is a separately applicable general clause, filled by values and which should primarily fill the gaps in the law.

However, examples from the practice of Swiss courts are not convincing. *Bundesgericht*[57] considered a clause in the by-laws of a company to be in conflict with *ordre public* because it

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[48] According to Art. 16 of the Federal Constitution of Switzerland a violated *ordre public* establishes grounds for the intervention of the Federal State.

[49] On *ordre public* of the police, See Wiget (n 38) 136.

[50] See Wiget (n 38) 121, 141.

[51] Cf. Wiget (n 38) 142.

[52] August Egger, *Schweizerisches Obligationenrecht* (4th edn, Stämpfli 1987, Bern) para No. 507.

[53] Peter Gauch, Werner R. Schluep, *Schweizerisches Obligationenrecht* (4th edn, Stämpfli 1987, Bern) para 507.

[54] Francesco Broggini, *Ordine pubblico e norme imperative quali limiti alla liberta contracttuale in diritto svizzero* (Festgabe Schönberger 1968, Zürich) 93 et seq.

[55] Jules Zufferey-Werro, *Le contract contraire aux bonnes moers* (These Fribourg, 1988).

[56] Ernst A. Kramer, Berner *Kommentar, Das Obligationenrecht* (Bd. VI, 1. Abteilung, Stämpfli 1991, Bern) Kommentar zu Art.19–22 OR, 72.

[57] See case BGE 74 II 158 (163).

allowed third parties to enforce resistance against any resolution of the General Meeting, and such a clause is contrary to the basic principle of private law. The court's decision in Basel[58] considered that an agreement that rights against one's spouse cannot be drawn from marriage to be a violation, because such an agreement is against the legal institute of marriage. Also, the consent of a female athlete regarding a doping procedure was invalid because it denied all her procedural rights. *Ordre public* was considered to be the criterion governing general business terms.

Ordre public may also serve to control the contractual content to be performed on the basis of a constitutional legal evaluation, including the indirect effect of fundamental rights. For example, it was referred to regarding the entitlement to equal pay for both women and men.

c) Italy

Ordine pubblico[59] carries out the task of *ordre public* and public policy. According to Art.1343 CC, causa of a contract is unlawful if it violates the mandatory provisions of a statute, *ordre public* interne or corrupts good morals. The same applies to the subject of the contract and to the motives of contracting parties.

d) Germany

Influenced by the French CC, the *ordre public* was incorporated in the bills of BGB of Hessen (1844)[60] and of Bavaria (1840).[61] During the preparatory work *(traveaux preparatoires),* it became part of the first proposal of the German BGB (§ 106), but then it was excluded.

In the German literature,[62] there are three views on *ordre public.* The first group sees in good morals, as well as in *ordre public,* the criteria of unwritten law and within them can be seen three variants[63]: *ordre public* and good morals are different terms, overlapping terms, or a senior term and a subordinated term. The second group understands good morals as a factual and *ordre public* as a regulatory criterion. The third group distinguishes both terms according to the technical aspect: *ordre public* points at the written law, good morals emphasise unwritten law.[64]

Flume considers legal action to be invalid if it "negates the values, which the legal order must implement according to valid legal conviction, so the legal recognition of legal action negating these values is incompatible with the purpose and task of the law.

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[58] See case BGE 109 II 123 (125).

[59] The meaning of the Italian *ordine pubblico* is similar as the *ordre public interne* in French law. Pursuant Art. 1343 Codice civile the causa of a contract is illegal if it contradicts mandatory laws, *ordre public* or good morals.

[60] See Art. No. 84: *Verträge, welche auf einem unerlaubten Verpflichtungsgrunde beruhen, sind ungültig. Der Verpflichtungsgrund ist ein unerlaubter, wenn er von Gesetze verboten oder wenn er der guten Sitten oder der öffentlichen Ordnung zuwider ist.*

[61] Art. 80: *Nichtig sind diejenigen Geschäfte, welche gegen ein gesetzliches Verbot, gegen die Sittlichkeit oder die öffentliche Ordnung abgeschlossen sind.*

[62] Simitis (n 41) 172 et seq.

[63] Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* (zweiter Band, 3 rd edn, Springer 1979, Berlin) 366.

[64] Werner Flume (n 63) 266.

e) United Kingdom

The term *ordre public* corresponds to the term of public policy in the Anglo-American legal family. Public policy in the broad sense means an expression of moral, political and social principles that determine the development of law at any time. Agreements which are contrary thereto are illegal and invalid.[65] In the case of Michel v. Reynolds (1711),[66] the ban on competition was regarded as invalid because it was inconsistent with the public interest and therefore with public policy. In the Egerton case (1853),[67] the court considered the agreement to be contrary to public order because, according to this agreement, the inheritor was supposed to provide a peerage to the deceased. The condition was valid because it was not prohibited. Nevertheless, the contract was contrary to public policy because it pressured the King[68] to grant the peerage to someone according to a private contract.

According to prevailing opinion[69] of the doctrine of public policy, the judge is not necessarily bound by precedents and must take into consideration the content of the public policy as being variable. The principle that contracts in contravention of public policy are invalid shall continue to apply. Its use is governed by ideas which are determined at the particular time of relevant the public opinion.

Public policy could be cited in cases relating to:

– contracts related to the Common Wealth[70]
– contracts related to public service[71]
– tax matters
– cases of obtaining the benefits of criminal conduct, protection of religious freedom and tolerance, contracts resulting in the ignorance of generally accepted obligations,[72] contracts threatening personal freedom, agreements contrary to good morals, contracts inconsistent with the protection of family life, restriction of trade, restriction of economic(respectively business) activity, restricting economic competition.

When evaluating conflict with public policy, it is necessary to evaluate the ultimate purpose of the transaction, in particular the intention of the parties.[73] Illegality is found when the parties concluded a contract with the knowledge and realisation that the outcome of the contract would be contrary to public order. This must be determined in each particular case. If only one party to the contract had unfair intentions, the whole contract is invalid.

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65 See *Alexander v. Rayson* (1936) 1 K.B.182.
66 Cf. Simitis (n 41) 113.
67 See *Egerton v. Earl of Brownlow,* 23 (1854), L.J.Ch.348, according to Simitis (n 41) 113.
68 Cf. Simitis (n 41) 113.
69 Cf. e.g. case *Lord Macnaghten in Nordenfelt v. Maxim Nordenfeld* Co (1893) A.C.565.
70 See Cheshire-Fifoot, *Law of contract,* 247.
71 Cf. Polock, Winfield, *Principles,* 298 ff.
72 See case *Regazzoni v. Secia* (1958), A.C.301.
73 Polock-Wifield (n 71) 370 ff.

f) USA

The English influence has been decisive for a long time.[74] However, it has become less decisive. While defining public policy, it is necessary to take into consideration the Constitution, statutes and precedent. The provisions of the Constitution have absolute preference.[75]

The meaning of the term public policy is a principle in which one cannot act legally if they act against the public or public welfare.[76]

5 Ordre public in the New Czech Civil Code

Melzer and Tégl[77] differentiate between *ordre public interne* in the broad and narrow senses. In the first case, it is an aggregate of rules, the observance of which is, according to prevailing socio-ethical beliefs, a necessary, unreserved condition for proper human coexistence in a certain society. In this conception, the rules are not distinguished according to origin and rules of good morals are also included. The narrower concept tries to specify the term *ordre public* alongside the category of good morals. *Ordre public* represents just those above-stated rules which have their basis in the legal order as such *ordre public* interne relates to the term 'public interest', though these two terms are different. *Ordre public* is violated if the public interest is breached to such a degree that common living is fundamentally endangered, which results in the need of the public authority's intervention without stating individual initiatives.

I. Pelikánová and R. Pelikán[78] emphasise the difference between *ordre public* and *ordre public* in international private law, which is considerably narrower and covers order in public affairs. In *ordre public* the term is extraordinarily broad and essentially corresponds with the term of public interest. It is a set of rules or principles governing how to behave in public, certain maxims on which society insists. It is also used in a narrower sense, which concerns only behavioural rules regarding publicly accessible places. Nevertheless, in the broader sense it is comprised of principles, on which society insists.[79]

Both of these opinions show a wide variety of weak spots, which have their common denominator in not considering the newly established term *ordre public* in its full context. Inner *ordre public* is one of the forms of public order, which has a specific function in private law, particularly in the scope of the Civil Code. For that reason it is necessary to define inner public order and specify its content with regard to its specific function, not only towards the other forms of public order, but also towards other categories, which have the same independent position as public order, even though they are fulfilling similar functions. This includes good morals.

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[74] See Simitis (n 41) 142 et seq.

[75] *Gandoufor v. Hartmann* (1892, 49 F.181, Twin City Pipe Line Co.v. Harding Glass Co.1931, 83 L.A.R.1168).

[76] Worksmen´s Comp.Bd.v. Abbot. (1925) 47 L.A.R. 789.

[77] See n 21, 60, 61.

[78] Irena Pelikánová, Robert Pelikán, 'Comments on Sec.1 para 2 NCC' in Švestka, Dvořák, Fiala (eds), *Komentář k občanskému zákoníku (Commentary' on the Civil Code),* (Vol. 1 Wolters Kluwer 2014, Praha) 16.

[79] See n 78, 17.

Ordre public as an institution embodied in the Civil Code (Sections 1 par. 2 and § 588) is not a summary of mandatory provisions; legal regulations and rules of police law are not its content and it does not contain moral rules. It is the expression of the public, social interest, which contains constitutional principles and constitutional order, including fundamental human rights.

Its function is to sanction Juridical Section acts, which are contrary to it.

According to section 1 par. 2. agreements violating public order are forbidden and according to section 588 legal acts obviously violating public order are absolutely invalid.

At first sight there is an obvious contradiction between the effects of *ordre public* in the first and the second case. From the point of view of the result, this contradiction would mean that particular actions, even though they are forbidden, are not necessarily sanctioned with nullity. This contradiction is necessary to be resolved by considering the first provision (section 1 par. 2) to be a proclamation of a particular principle, which is then specified in a special provision section 588.[80]

This provision sanctions legal acts, which are in qualified contradiction to public order. It is the only way to interpret quite an unhappy dictum that an act 'obviously violates ordre public'. The literal interpretation of this rule would lead to the opinion that *ordre public* means a complex of specific public order and police regulations, which handle maintaining peace or a particular order of things in a common, factual and not legal contact.

The qualified breach (see 'obvious') is necessary to be understood as a flagrant contradiction between the legal act and the content of the *ordre public* as its result.

The application of *ordre public* is represented by the sanction of nullity of the legal act from its very beginning, which the court takes into account as its official duty.

6 Comparison

a) Essence

The institution of *ordre public* is a category which serves to defend a certain community or the legal order and legal relationships which have been built based upon it from influences coming from foreign legal systems which may disturb a certain equilibrium emanating from the domestic legal order.

The institute of public order is thus a tool, albeit used only exceptionally, against such 'harmful' influences. As we will see, the scope of this instrument is rather wide.

It can thus be said that this is a tool intended to limit freedom (party autonomy), legal actions and their results, the scope of action and applicability of foreign legal decisions, and finally the inhibition of the movement of the basic factors of the domestic market, the foundation of which is the defence of a certain community (state, EU etc.) in the interest of certain values or common values.

[80] Cf. Luboš Tichý, *Obecná část občanského práva (General part of Civil law)* (CH Beck 2014, Praha) 309.

The particular concepts differ from abuse of right in the content of this institution. In some cases all mandatory regulations are considered to be that content, another time some mandatory regulations of a specific kind, such as police regulations, are considered to be it, at some other cases these are values or rules shared in a particular society.

Autonomy of parties is original and *ordre public* interferes with its sphere as an exception. The reason for that is public interest. Included is the case that the contract concerns a state's legal institute or something which is considered by the nation's majority as a condition of peaceful common living.

b) Function and development

The main function of the *ordre public* is to restrict the free will (autonomy of parties) with its content. Nevertheless, the contradiction with this content has its result in the sanction of nullity, because the violation of the public order is forbidden.

Contractual freedom in its liberalistic formulation could have been restricted only by the freedom of others. Mandatory provisions and *ordre public* served this purpose. Freedom and *ordre public* are expressions of two sides of the same idea.[81] *Ordre public* was an exceptional phenomenon. Regarding Arts. 6 and 1133 CC, it must have been used with extraordinary moderation.[82] In the (judicial) decisions, *ordre public* has been referred to in the sense of protection of the French nation and fundamental values. The theory held the view that *ordre public* serves to secure the order of existing society as well as to carry out the decisive political opinions in society.[83] According to this, *ordre public* is a political term. *Ordre public* is then warranted by law as a consistent set of rules. At the same time, it is necessary to see *ordre public* in the historical perspective as the protection of the achievements of the French revolution against the feudal system. The legislator could not foresee all situations which were contrary to these objectives and so there is the general tool of public order as a clause for protecting of the existing social order.[84] It ensures that the minimum legal rules, which guarantee that social affairs will run according to the legislator's notions, will be respected. Since the legislator's value system is his political idea, *ordre public* enforces the implementation of political aims with legislative power.

The content and function of *ordre public* also changes. Contracts for employment, which during the war assigned work orders in Germany, were lawful; these became contradictory to *ordre public* after the end of the war. For example, before the principle of *ordre public,* it was policy that an extramarital child was not eligible to demand either acknowledgement of paternity or alimony. This policy was superseded in 1933, when the duty of an extramarital child's father to pay alimony was recognised. If *ordre public* turns out to be stronger than mandatory provisions, it is obvious that, for example, a causal contract may become void with this legal development.

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[81] Julliot de la Morandiére, *Cours élémentaire* (vol.I. 1932, Paris) 388 et seq.

[82] *Ordre public* interne should be considered adequate functioning of the private law institutions [Malaurie, (n 43) 70].

[83] See 45, para 648.

[84] See (n 63) 367.

Ordre public can have an interpretative function, while the concept of *ordre public* as a subcategory of good morals can have some importance in those legal orders where this category is not known (e.g. BGB, ABGB). In these jurisdictions, good morals are objectified in the direction of the *ordre public.* From this perspective, it is irrelevant whether the terms *ordre public* and good morals have a separate function or whether they have similar meaning.

c) Ordre public and good morals

The applicability of these two concepts, i.e. order public and good morals, essentially should not overlap with regard to their meaning, content and ultimate objective. If somebody acts contrary to good morals, the consequences should only result from the meaning and function of good morals, unless *ordre public* would (in certain cases, possibly) also cover certain aspects of such actions. Each of these institutions has a different objective and therefore a different scope of application.

The position of *ordre public* is relevant to good morals. Simitis[85] held the opinion that good morals are part of *ordre public* (opposite Flume[86]), exclusively the moral imperatives to be applied in the field of sexual and family life.

Ordre public cannot be separated or distinguished from good morals. If someone tries to do so, it is an artificial differentiation. What is immoral is, in many cases, contrary to public order. On the other hand, there are cases in conflict with *ordre public,* which are also immoral. If the conflict with *ordre public* is not immoral, it is usually a neutral action from the ethical point of view. On the other hand, an action could be considered to be one which is contrary to good morals but does not violate *ordre public.* The fact that, in many cases, there is no contradiction between good morals and *ordre public* could be explained so that the reasons contained in Art. 20/para 1 OR invalidity of the contract are not enough without mentioning *ordre public* and they expressly mention only impossibility, illegality and conflict with good morals.

d) General and assessment of ordre public in compared legal orders

Comparing *ordre public* in individual legal orders results in a relatively unorganised picture, at least at first sight. This picture is frequently characterised by internal discrepancies, particularly in relation to good morals, as well as sanctions for contracts and other juridical acts which are affected by *ordre public.* Often the relation to good morals is unclear. After all, this apparently results from the idea, according to which the term *ordre public* should also include good morals.

e) Ordre public in the New Czech Civil Code

For the NCC, the following rules should apply:

– Unlike good morals (see its content above), the content of *ordre public* should not include all mandatory regulations of a given legal order, including public law rules.

– *Ordre public* also shouldn't contain moral values, which are included in good morals.

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[85] Cf. Sinitis (n 41) 197.

[86] Cf. Flume (n 63) 365.

Ordre public should have its specific content and scope of application, as well as specific effects. The basis and content of *ordre public* is the legal order's basis, thus that of constitutional law and fundamental human rights.

IV Abuse of Rights

1 The Term and Relation to other Kinds of Unlawful Exercise of Rights

a) Introduction

The term 'abuse of rights' is very equivocal, which is illustrated by its different conceptions in jurisprudence, even in the same jurisdictions, as well as by a very different understanding of this institute's content, its conception and applicability. For instance, Pulkrábek[87] believes that abuse of rights contravenes not only good morals and good faith, but also other fundamental values. According to this author, this term also includes types of unlawful exercise of rights, which very often, and even in principle, are excluded from the category of abuse of rights.

b) History. Development. Overview

This legal institution of *ordre public* appears in Civil law legal reasoning in the second half of the 19th century in French case law. The principle excluding liability in delict when invoking one's own right had been upheld for a long time when Art. 1382 CC was applied. However, exemptions have appeared since the 1850s. Liability could be invoked provided that the claimant was not abusing their own right. A number of papers dealing with this issue had been published in French and Italian academia throughout the 20th century, though none of any great significance. Most of them namely refer to the Roman law institution of *aemulatio vicini*. Other authors addressed the issue as a conflict between law and morals. Abuse de droit can be established if the invocation of one's own right does not serve its initial economic or social purpose. As such, there was no explicit rejection of this concept. Addressing abuse of rights was perceived as a clear logical flaw as law and its absence could not coexist. Later, the doctrine of E. L. Josserand,[88] distinguishing between the subjective and objective elements of abuse, prevailed in French doctrine. From a subjective point of view, abuse can be established if a claimant uses their own legal position in pursuit of condemnable aims. In contrast to this, the objective abuse of rights does not depend on any mental element and can be established if the entitled person invokes their rights to pursue aims conflicting with the initial purpose of the rights invoked. Simultaneously, legal standing equals legal institution. This is still an unknown concept in common law that still

[87] Zdeněk Pulkrábek, in Melzer, Tégl (ed), *Občanský zákoník § 1–117 (Civil Code)* (Leges 2013, Praha), Comments on Sec. 8 para 1, 149 et seq.

[88] Josserand, *L´abuse des droits* (1904, Paris) according to Filippo Ranieri in Basedow, Hopt, Zimmermann, *Handwörterbuch des europäischen Privatrechts* (Bd. II, Mohr Siebeck 2009, Tübingen) 1259.

upholds Lord Halsbury's famous quote from *The Mayor of Bradford v Pickles:*[89] 'If it was a lawful act, however ill the motive might be, he had a right to do it.'

In Germany, W. Siebert[90] adopted Josserand's concept; however, German and French theories differ. French theory classed abuse of rights as the law of torts. In German theory, however, impermissible execution of a right fell within the scope of good faith *(Treu und Glauben).* Unlike the French doctrine, Siebert[91] also developed a theoretical justification for the judicial mechanism modifying the content of rights through the impermissible execution of rights, which may significantly relativise legal and contractual norms.

The concept of abuse of rights has been added to a number of codifications in Europe, with the exception of Germany. The German BGB only recognises the prohibition of bullying in § 226 BGB. The Swiss Civil Code explicitly recognises the prohibition of the abuse of rights[92] with regard to the principles of good faith and stipulates that a manifest abuse of rights cannot enjoy legal protection. This provision served as a model for a number of other European civil codes. Nonetheless, Italian legislators chose not to explicitly codify the abuse of rights as the Codice Civile[93] already provides for the prohibition of the exercise of rights with the aim to bully others in the section governing property rights. The prohibition of the abuse of rights has been adopted by Sec. 281 of the Greek Civil Code. Article 5 of the Polish Civil Code provides for the prohibition of the abuse of rights. The idea has also been adopted by the Civil Code of Portugal from 1966, as well by Art. 7 of the Spanish Civil Code in its version from 1964 prior to any amendments.

The *venire contra factum proprium maxime* covers a wide range of cases, where considerations regarding the protection of good faith may cause changes in the substantive basis of the case. The exceptional nature of interference in the subject matter is thus very important. Conventional reference merely passes the very core of the issue. It is not the unlawfulness of a legal entity's whole conduct that is decisive. Evaluating the conduct as a legally ethical value is not convincing enough to justify changes in the legal qualification of the substantive basis of the case. Silence *(non licet)* does not result from diverging and conflicting behaviour, but stems from a specific faith worth protecting which, under certain circumstances, may lead to the adaptation of the subject-matter to that respective faith.[94]

The basis of the claim, that the subject-matter should correspond to the faith of the parties, rests to a certain extent on the principles protecting the faith of the respective parties as developed by Canaris[95] and modified by Bydlinski[96] in Austrian law. Under this concept, the

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[89] See The Mayor, Alderman and Burgesses of the Borough of Bradford v. Pickles (1895) AC 587 – cit. according to Ranieri (n 88) 1259.

[90] See Art. 833 Codice civil.

[91] See Siebert (n 90) 128–137.

[92] See Heinrich Honsell, Comments on Art. 2 para 2 of the Swiss Zivilgesetzbuch (Lichtenhahn 2009, Basel) paras 1, 4.

[93] See Art. 833 Codice civil.

[94] Cf. e.g. Günter A. Roth in *MünchKomm BGB* (5th edn, CH Beck 2007, München). Comments on Sec. 242 BGB, paras 176–422.

[95] Claus Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (CH Beck 1971, München).

[96] Franz Bydlinski,' Willens- und Wissenserklärungen im Arbeitsrecht' (1976) 83 ZAS, 133.

substantive basis of a case is a flexible system. The decisive factors are not explicitly enumerated as they are specified on a case-by-case basis. The basic model, the subject-matter of which is sufficiently determined, is in any case flexible enough to accommodate flatly different conduct by the parties. The conduct, however, may be scrutinised in a perspective different from Canaris' abuse of rights.

Recognising the application of the *venire maxime*, namely that differing legal consequences may be exceptionally justified on the basis of protection of good faith, brings about significant legal consequences.[97] Firstly, the 'clear' prohibition of ambiguous actions, (with no connection to the theory of faith whatsoever) must be refused. This leads to a major impact for the passive extinction of rights. This legal category cannot be justified solely by this elementary concept.[98]

2 Chicanery and Assessment of Abuse

a) Introduction

The abuse of rights persists in the unfair assertion of a right, especially if such assertion conflicts with the protection of good faith or good morals. Such prohibition relates to all rights. Not only the assertion of a claim, but also the exercise of a constitutive right based on a notice, a defence or a controlling interest in corporate law may be deemed impermissible. Moreover, the prohibition of abuse of rights is a recognised principle of EU law.[99] Deceitful or abusive claim is impermissible under the well-established case law of the ECJ.[100]

b) Chicanery

The exercise of rights is impermissible when done with the intent to harm others. This provision (§ 226 BGB) defines abuse very narrowly. It is thus insufficient if the harmful objective is only one out of many objectives pursued by the entitled person and the rest of them remain lawful.

Exercise of a right to information in a situation when this right is still enforced even though the entitled person is aware that its basis has ended, may serve as an example of chicanery.[101]

c) Role of good faith

Prior and current conduct

Conflict with good faith occurs if a person invokes a right they did not previously acquire in good faith. Enforcing rights from a contract with their awareness that the representative of the other party misused its representation may serve as an example. A similar situation arises when a creditor claims contractual penalty even though they incited the debtor to act contrarily to the contract.

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97 Peter Mader, *Rechtsunmißbrauch und unzulässige Rechtsausübung* (Orac 1994, Wien) 121 et seq.

98 Cf. Mader (n 97) 124 et seq.

99 See Case C-265/02 *Halifax*.

100 See Case 104/79 *Foglia v. Novello* [1980] ECR 745.

101 Roth (n 94) 292 et seq.

An instance when the legal standing of one party has been modified in an unfair manner would be treated similarly. Such cases typically occur when the addressee prevents completion of expression of the other party's will by removing the mailbox.

The same can be said of the situation when a creditor asserts their right while using it as a pretence to achieve unfair aims.

It is against the principle of good will to act contrarily to one's own prior conduct.[102]

d) Role of good morals

It is very difficult to qualify an abusive exercise of right only by interpretation of the particular norm because the act is incompatible with a certain higher standard represented by good morals. Its application may make an impression that such a right is not protected sufficiently. However this right is just restricted by the prohibition of abuse, as the actual realized law is unjust.[103] This is not about each attempt of abuse, but about clear legal abuse, which must not be in doubt.

3 Relevant Aspects

a) Basic types of abuse

An exercise of a right is abusive if its connected interest, or purpose is condemnable. Primarily, it involves bullying or similar cases. There is no performance interest or steep inequality of interests taking part in favour of the one who is invoking this law or, because of that, gaining the consequences that are not recognised by the law. Otherwise, the actor is characterized as being full of contradictory behaviour. It does not mean anything else than the exercise of right is not covered by the law invoked. The law is evidently narrower as it appears to be at first sight.[104]

– Classic wall case: erection of a wall in order to prevent a neighbour's view.
– Flagrant imbalance of interests: lessor evicts an ill lessee on the day of the end of the lease, although he doesn´t need the flat.
– Inconsistent behaviour. Not every act like this is a abuse and only those that initially inspired confidence deserves protection, if damage is caused.
– To invoke technical deficiency can be, in certain circumstances, abuse, if it is incompatible with the purpose of the law or the deficiency was caused by a trick.
– Abuse of prescriptions. If one party claims prescription despite a reasonable reliance of other party on its silent waiver of such a claim.

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[102] Roth (n 94) 173 et seq.
[103] See (n 86) 366.
[104] According to Hans Merz comments on Art. 2 ZGB in Peter Liver and others (eds), *Berner Kommentar,* Einleitung (Stämpfli 1966, Bern) 303 et seq.

b) Extralegal values[105]

Section 8 of the New Civil Code determines a content limit for the exercise of all subjective rights and also creates a possibility to take non-legal aspects into consideration by the application of the law. The prohibition of abuse of rights serves as a corrective in all cases, as the appeal to the formal rule of law in force is contradictory to what appears to be legal in the interest of material justice. It leads to the relativisation of subjective rights.[106]

c) Degree of abuse

The relevance of the legal role in the meaning of the prohibition of abuse of rights cannot be overlooked. It is relevant where there is no law based on legal transaction; however, in cases when there is a norm of law, that norm holds for everyone in its effect. In that case, it is the misuse of the norm and the misuse of the law that constitutes abuse.[107] An example is a judgment of the Supreme Court of Switzerland from the area of corporate law, Art. 2 ZGB is a crucial norm that acts as the enforcement of public order and morality and its validity is applicable in the whole legal system. As long as the judge's enforcement of the law seems to appear to be a legal abuse, this principle has a narrow connection with the application of the law. The court of justice should not make a decision that would lead to a certain result of the formal legal order which is in obvious contradiction with the ethical requirement element.

The collocation[108] 'obvious misuse' expresses that it is necessary to prevent the legal protection of the law only where the intention, and thus the aim, of the law opposing the use of apparent law was not intended to do so by the legislator, or where the law needs to be marked as defective, because certain cases are in noticeable contrast with the social-ethical basis of the legal order.

d) Subjective or objective abuse

An action tending towards a misuse of the law should be considered as misuse and judged regardless of its subjective aspect. The only exception is liability for damage caused by wilful misuse of the law. Here, the subjective aspect is required in the most important form, namely wilful misuse (section 2909 of the NCC).

e) Consequences of the prohibition of legal abuse

At first sight, it seems that, in the event of legal conflicts, or rather issues of good manners, abuse should lead to invalidity (e.g. according to § 580 NOZ, or rather Art. 20 OR). Absolute nullity would not in many cases be an adequate solution. It would be inappropriate. What is the

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105 Hector L. Mac Queen, 'Illegality and Immorality in Contracts: Towards European Principles' in Hartkamp and others (eds), *Towards European civil code* (4th edn, Wolters Kluwer 2011, Alphen am den Rign) 555, 559.

106 Stefan Vogenauer The Prohibition of Abuse of Law: An Emerging Principle of EU Law in de la Feria (Hart 2011, Oxford, Portland) 521, 556.

107 See BGE 128 III 201.

108 Cf. Art 2 para 2 of the Swiss ZGB and Sec. 8 of th Czech New Civil Code (NCC).

purpose of modifying subjective or lawful rights in the sense of balancing interests, eventually tending towards compensation for damages?

This aspect is very debatable, primarily in Czech literature.

From my point of view, it is about the criterion of the importance, or rather the criterion of obvious legal abuse. It is, after all, also the aim of the legislator. The goal is to distinguish trivial cases from obvious legal abuse representing obvious unacceptable interference. In such cases, the court should judge the question ex officio.

4 Abuse of Rights according to the New Civil Code

The legislator sets a general limit for the exercise of the right by setting down that its abuse does not enjoy legal protection. It means that a legal claim is restricted in its application towards third parties according to the standard of legitimate use. The outlawry of the abuse of law is based on that.

The abuse of law presumes the existence of applicable law, which uses the proper exercise of legal protection. This right, however, is exercised contrary to its purpose. This is how the term 'abuse' can be understood. There are two forms of the contradiction between formally existing and substantive rights, which deserves legal protection as justice-oriented law:

a) The right is exercised in a way contrary to the idea of law. This exercise is contrary to the substantive right itself, which presumes a balance of the interest of the possessor of this right and the other party, which imposes a corresponding obligation to this right.

b) Quite rarely there are some cases when, as a result of a change of circumstances based on a lack of justice, the material right itself, not the way of its exercise, does not fit the principle of the balance of interests usually acquired at the past.

The section 8 sets a content limit for the exercise of all rights and in this way creates a possibility to take some out-of-law standards into consideration while exercising the right. The prohibition of the abuse of right is a legal remedy in all cases, where achieving a formally rightful legal rule is contrary to what is considered as desirable in the interest of material justice. In this regard a certain kind of emphasis on the relativity of the right itself appears.

The scope of applications of the section 8 only exceeds the effect of the right based on the legal act. It actually concerns all legal entities which gain their rights from the law itself. The abuse then means deducing rights from so-called false gaps in law. In this case we can speak about the abuse of legal rules, i.e. abuse of law. In these cases, it occurs that the legal protection of the law is denied, where laying claims is contrary to the legislator's intention, because such exercise or authorisation was not quite clearly meant by the legislator or where the law can be described as dubious in content in a broad sense, because it is in sharp contrast to the socio-ethical bases of the legal order in a particular case.

The abuse of law leads to the loss of legal protection, which is otherwise inherent in every right in the case that the aggrieved person wants to apply to the court. However, the juridical act, which is based on the abuse of right, is not void. The aggrieved person has a right to legal protection.

Jan Balarin*

The Principle of Legitimate Expectations in the New Czech Civil Code

I Opening: Scope of Discussion

In discussing the principle of 'legitimate expectations',[1] I have to start with some remarks about the articulation of values in Czech civil law, because 'legitimate expectations' are about equity. With 'values' I mean universal tenets that are frequently referred to in civil-law codifications as interpretation instruments to bridge material (sector) rules in order to achieve fairness in concrete cases.[2] They are usually expressed as equity norms or standards.

After those introductory remarks, I will continue with comments on the background to the concept of 'legitimate expectations' and try to analyse it briefly. I will describe the public-law roots of the concept of 'legitimate expectations' and refer to its reflection in EU civil law. The last part of this overview provides information on the implementation of the principle in the new Czech Civil Code. We will see that, although the new law follows the trend and 'legitimate expectations' are employed in various contexts, the principle is far from being universally applicable.

II Equity Categories in Civil Code

The Czech Civil Code of 1964[3] that preceded the current one[4] originally showcased quite extensive rules on 'values' and overriding principles, but these were conforming to the prevailing ideology (accentuated social – in the meaning of 'collective' – dimension of civil law) and would

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1 We may talk of 'reasonable expectations' too; the phrases are synonymous.

2 I am aware that the terminology is not unproblematic. Civil law values are not identical to normative principles. Values are primarily an extralegal phenomenon. For more detailed analysis see e.g. Cass R Sunstein, 'Conflicting Values in Law' (1994) 62 Fordham Law Review 1661–1673, Gerhard Sprenger, 'Über echte und scheinbare Objektivität von Rechten bei der Legitimation von Recht' in Arend Soeteman, Mikael M Karlsson (eds), *Law, Justice and the State III: Problems in Law* (Franz Steiner Verlag 1995, Stuttgart, 38–53). Nevertheless, there are certain rules of law, the purpose of which is to transform value effects into normative environment; this is especially true of concepts like 'legitimate expectations.' As such, equity principles may be regarded as normative reductions of values.

3 Act no 40/1964 Coll., the Civil Code.

4 Act no 89/2012 Coll., the Civil Code.

nowadays sound inacceptable.[5] After the turnaround in 1989 the Civil Code has been stripped of these provisions, mostly without any substitution.[6] Since then the Civil Code continued with more or less sterile rules – it was a technicist statute in its exact meaning. The underlying values were either constructed by case law (not without difficulties)[7] or extracted directly from the constitutional order.[8]

The new Civil Code changed the course and presents itself as value-based.[9] At this point the legislator took care that the Code resembles more the Austrian Civil Code (ABGB) than the German one (BGB). The act uses terms like 'values' [§ 2(1)], 'acknowledged principles of justice' [§ 3(3)], 'purpose of law' [§ 2(2)], etc. – these concepts are plentiful especially in the introductory (general) part of the Code. This is a good starting point but this approach looks to be poorly implemented. It is difficult to find a system in the tangle of equity categories that the new Civil Code introduced. We keep the old concept of good morals, but brandish new terms like 'honesty' [§ 6(1)], 'decency' (e.g. § 2958ff), 'abuse of law' (§ 8) and other which all are imperatives imposed on subjects of law. It is questionable whether these concepts have been well considered. They are duplicated or overlapping and their contours are blurred.

It cannot be posited that, if classic rules of law will be, here and there, supplemented by words which represent values (such as 'fairness'), the law will automatically improve to a qualitatively higher level than the pure technicist approach. To employ values in law means to process them by the same juridical methodology as ordinary civil-law matter (ownership, contracts, torts etc.), i.e. to develop systematics, content, internal reasoning mechanisms etc. The difference is that norms that are primarily value-carriers are cross-sectional, i.e. they permeate all (or at least more than one) sector regulations. That is why their form must be more flexible in order to enable applicability in all conceivable situations.

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[5] E.g. art 6: 'Exercise of rights and obligations resulting from civil law relationships shall conform to the rules of socialist coexistence.' The concept of 'rules of socialist coexistence' replaced the traditional 'good morals,' but its meaning was unclear; if anything, its content was designated arbitrarily according to needs of the regime. Similarly art VII: 'No one shall misuse his or her rights against the interests of the society or other citizens' (i.e. 'interests of the society' should have gone first).

[6] Subject to some exceptions. The far-reaching amendment that recast the original wording of the Code in 1991 (Act no 509/1991 Coll.) e.g. returned 'good morals' instead of the principle of 'socialist coexistence.'

[7] E.g. the principle of proportionality (reasonableness) in assessing spheres of responsibility of contractual parties – Czech Supreme Court: 25 Cdo 2516/2009 (information duties of suppliers *vis-à-vis* consumers).

[8] Illustratively, various aspects of protection of ownership according to art 11 of the Charter of Fundamental Rights and Basic Freedoms (which forms a part of the constitutional order of the Czech Republic), such as breaking through old law giving tenants a strong position against landlords regarding termination of lease of flats, setting rent etc. (e.g. Constitutional Court: Pl. ÚS 20/05).

[9] See the explanatory memorandum to § 2 of the new Civil Code: 'It is provided that law is not autotelic but sticks to certain value framework expressed in accordance with our constitutional order and especially with principles of natural law.'

III The Principle of Legitimate Expectations: Background

Now let's come back to the very principle of 'legitimate expectations'. The concept is well known in constitutional and administrative law.[10] It has to do with the idea of rule of law *(Rechtsstaat)* and legal certainty. It sets requirements for law-making so that basic standards of foreseeability are to be respected – a ban on retroactivity,[11] respect for acquired rights *(iura quaesita),*[12] matching the title and content of law regulations,[13] etc. may be derived from the tenet. Similarly, the administrative branch should observe a certain logical continuity of action and not to change its practice, on which its addressees rely, unexpectedly and without sufficient reasons.[14] This applies in large part also to retroactive effect case law.[15]

In civil law, the position of the principle of 'legitimate expectations' is more ambiguous. 'Legitimate expectations' are not aimed at public bodies but at all conceivable subjects of the law (contractual partners, tortfeasors, shareholders, family members, etc). It does not relate primarily to law (in the objective meaning) and its practical implementation, but to (subjective) rights and obligations. Moreover, the rule is basically reciprocal, so not only the legitimate expectations of one party, but those of both of them must be taken into account in order to evaluate respective legal consequences.

The category of 'legitimate expectations' started to appear on the European level in the first consumer directives from the 1980s and 1990s. Art 6 of Directive 85/374/EEC concerning liability for defective products[16] provides that 'a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including *(a)* the presentation of the product, *(b)* the use to which it could reasonably be expected that the product would be put, *(c)* the time when the product was put into circulation'. Directive 1999/44/EC on certain aspects of the sale of consumer goods[17] states that 'the seller must deliver goods to the consumer which are in conformity with the contract of sale. Consumer goods are presumed to be in conformity with the contract if they […] show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect,

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[10] For English law *see R v North and East Devon Health Authority,* ex p Coughlan [2001] QB 213. Jonathan Moffett 'Resiling from Legitimate Expectations' (2008) 13 Judicial Review 219–231, 219 summarises that 'where a public authority represents (either by way of an express promise or implicitly by way of past practice) that it will conduct itself in a particular way, that representation may give rise to a legitimate expectation on the part of the representee that the public authority will so act, and the public authority may have to give effect to that expectation.'

[11] Czech Constitutional Court: IV. ÚS 251/94.

[12] Czech Constitutional Court: I. ÚS 3296/12 (parties cannot suffer adverse financial consequences from an amendment of procedural law which entered into force in course of running a civil proceeding).

[13] Czech Constitutional Court: Pl. ÚS 77/06 (the title of a statute which confuses its addressees as to the content of the statute may lead to an unconstitutional result).

[14] Czech Constitutional Court: IV. ÚS 525/02.

[15] Czech Constitutional Court: III ÚS 3221/11.

[16] Council Directive (EEC) 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210.

[17] Directive (EC) 1999/44 of the European Parliament and of the Council of 25 May 1999 on certain aspect of the sale of consumer goods and associated guarantees [1999] OJ L171.

given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling' (art 2). Art 3(3) of Directive 2001/95/EC on general product safety[18] speaks of 'reasonable consumer expectations concerning safety'.[19]

Hans-W. Micklitz in his paper *Legitime Erwartungen als Gerechtigkeitsprinzip des europäischen Privatrechts*[20] sees the trend – as I understand it – as an attempt to escape national concepts of good faith *(Treu und Glauben, bonne foi, bona fides),* the interpretation and application of which is extremely variable among the Member States but, at the same time, to institute an equity category which would be easily compatible with national legal orders and, thus, implementable into them (so that the concept will rest not only in European law).[21]

Nevertheless, it may be questionable whether the cited provisions of European directives alone would be able to give rise to a normative principle of European law or Member States' civil laws, respectively[22] (and, moreover, the provisions are not reciprocal as the model rule, but protective of consumers only), but it is clear that the mentions of 'legitimate expectations' in the EU legislation head deeper. The provisions indeed do not establish a distinct (independent) legal obligation, but seem to refer to a standard of behaviour of the supplier which would have to be applied anyway (irrespective of its legal grounds). It can be claimed that the existing instances of application of the rule of 'legitimate expectations' in EU law refer exactly to the principle of good faith which Prof. Micklitz hinted at, but which he did not follow due to its controversial nature.

'Legitimate expectations' mean to take into account and respect the mental and factual position of those with whom legal (or, more generally, social) relations are entered into or exercised. It does not mean that one must make concessions to the interests of others, but abusive

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[18] Directive (EC) 2001/95 of the European Parliament and of the Council of 3 September 2001 on general product safety [2002] OJ L11.

[19] Also Council Directive (EEC) 86/653 of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382 contains a mention of expectations of the agent [art 4(2)(b)]. See also the Acquis Principles (Principles of the Existing EC Contract Law) by the Acquis Group (Research Group on the Existing EC Private Law) published in 2007, in particular art 7:101(2): 'A business must perform its obligations with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of consumers.' Protection of the 'expectation interest' is acknowledged also in common law; for England see Ewan McKendrick, *Contract Law* (Macmillan 1997, Houndmills, London) 371 et seq. ('there are a number of doctrines and rules which weaken the commitment of the law of contract to the protection of the expectation interest'). After all, the theory of implied contractual terms, especially terms implied in fact, is very close to 'legitimate expectations', e.g. Guenter H Treitel, *The Law of Contract* (Sweet & Maxwell 1995, London) 185 et seq.

[20] Hans-W. Micklitz, 'Legitime Erwartungen als Gerechtigkeitsprinzip des europäischen Privatrechts' in Ludwig Krämer, Hans-W. Micklitz, Klaus Tonner (eds), *Law and Diffuse Interests in the European Legal Order: Liber amicorum Norbert Reich* (Nomos Verlag 1997, Baden-Baden, 245–278) 271.

[21] Micklitz (n 20) 271: *'Ein supranationaler Konkretisierungsversuch von Treu und Glauben berührt nationale Rechtstraditionen und Rechtsentwicklungen.'*

[22] See Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (De Gruyter Recht 2003, Berlin) 570. For somewhat different reasoning see Norbert Reich, Hans-W. Micklitz, *Europäisches Verbraucherrecht* (Nomos Verlag 2003, Baden-Baden) 29: the principle functions as *'Abwägung der Interessen des Unternehmens [an möglichst ungehindertem] Marktzugang und des Verbrauchers an einer Durchsetzung berechtigter Interessen andererseits'.*

and inconsiderate actions must be avoided (such as profiting from an information deficit).[23] The rule of 'legitimate expectations' definitely requires certain level of empathy and communicative attitude. But this is no difference from social intercourse in general – it is just a legal reflection of normal (sound) social activity.

IV Concept of Legitimate Expectations in Civil Law

That is why it may be tricky to present 'legitimate expectations' as a separate issue, as an independent principle or value. It is one of several sides (aspects) of the legal concept of good faith and fair dealing[24] *(Treu und Glauben)*.[25] Nevertheless, I am convinced at the same time that it is useful to discuss 'legitimate expectations' as such. I have at least two reasons for it: The first is the example of European law – we see that if no consensus can be reached in regard to more complex concepts (such as *Treu und Glauben*), 'legitimate expectations' may be the common ground. The second reason is that 'good faith' is too broad (voluminous) a category and its particular effects must be studied on its components anyway – such as 'legitimate expectations', or even subcategories of 'legitimate expectations', such as the principle *'venire contra factum proprium'* (No-one may set themself in contradiction to their own previous conduct).

'Legitimate expectations' as a legal concept is a combination (interplay) of subjective and objective factors.[26] 'Expectations' is a subjective mental element which is corrected by the requirement of 'legitimacy' (as the objective element). Not all expectations are therefore protected, but only those which can be generally perceived as legitimate (or reasonable) in the given situation, that is, provided that a reasonable (ordinary, mindful) person would have similar expectations under given conditions. At the same time, we must be aware that the expectations are not judged in an isolated manner but in context of the entire interaction of the expecting party and the party to which the expectations relate. Especially if a kind of privity relation exists, such as in a contract, one can expect closer interaction between the parties and a higher level of cooperation (and not doing so, the party would have to be estopped from making the argument of illegitimacy, in most cases).

Another important problem is when and how the 'legitimate expectations' rule can be applied (in abstraction). It is clear that – as a legal principle – it cannot give rise to rights and

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[23] The philosophy of 'legitimate expectations' more or less corresponds to the classical *exceptio doli*, see Reinhard Zimmermann, Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000, Cambridge) 16 et seq.

[24] The term 'good faith and fair dealing' is used in line with the Principles, Definitions and Model Rules of European Private law: Draft Common Frame of Reference (DCFR) by the Study Group on a European Civil Code and the Acquis Group (Research Group on the Existing EC Private Law), published in 2009, to underscore 'good faith' as objective standard of behavior and not just a subjective state of mind (DCFR, Annex 1).

[25] Taking into account all facets of *'Treu und Glauben'* developed by German legal doctrine, i.e. *Treu-, Schutz-, Mitwirkungs- & Aufklärungspflichten*, see e.g. Eugen Klunzinger, *Einführung in das Bürgerliche Recht* (Verlag Vahlen 2004, München) 183–185.

[26] Micklitz (n 20) 269.

obligations per se.[27] It cannot be held that if somebody expects something from another person, this person must comply with it – of course, unless a legal title exists (such as contract, duty of care etc). However, the law may provide otherwise (e.g. apparent authority according to the law of agency). There are in principle three possibilities on how to apply 'legitimate expectations' within the framework of positive law (not taking into account 'legitimate expectations' as a factor for considerations de lege ferenda 'with a view to the future law' – which would be the fourth eventuality):

1. as an interpretation rule: this is the most natural context. In course of interpretation of contracts (and legal positions), regard should be paid to whether the legitimate expectations of a party were observed or ignored,[28]

2. as a component of the standard of care (especially in tort law and fiduciary contract relationships): this aspect is about the objectivisation of subjective mental factors which constitute negligence (fault), i.e. the creation of various standards of care in tort law. There is no uniform standard of care, but particular standards depend on (possibly multiple) interactions between the parties. For example, if two people, who have met never before, come together, the standard of care in their mutual contact is defined by that which one can expect of an average mindful person. If the relationship gets more intimate, then all known specifics shall be included in the what-can-be-expected test (which reflects – in turn – in tightening the applicable standard of care). Naturally, professionals are, as a rule, burdened with a higher standard of care than laymen,

3. as a lead (guideline) to exercise discretionary powers (whether contractual or statutory): this function is similar, although not identical, to the interpretation task: in structurally unbalanced contracts, which are frequent nowadays, the weaker party often gives a right to the stronger party to exercise a right or measure at its sole discretion without any predefined terms (e.g. to place or not to place orders, to provide optional consideration, to terminate the contract, etc). The principle of 'legitimate expectations' can be a tool by which the actions of the dominant party can be sanctioned if they would lead to unreasonably severe consequences.[29]

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[27] For similar interpretation in case of the concept of 'good faith' in the Uniform Commercial Code, see the Official Comment to § 2:103(b) UCC.

[28] See DCFR (n 24) art II.-8:101(2): 'If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party's intention, the contract is to be interpreted in the way intended by the first party.' The theory of 'legitimate expectations' finds place also in art II.-8:102 on matters relevant for interpretation of contracts.

[29] DCFR in similar context does not speak of 'legitimate expectations,' but of 'gross unreasonableness.' See art II.-9:105: 'Where the price or any other contractual term is to be determined by one party and that party's determination is grossly unreasonable then, notwithstanding any provision in the contract to the contrary, a reasonable price or other term is substituted.' However, in general, the problem is not limited to determination of contractual terms; it refers to exercise of any contractual right of discretionary nature.

V Legitimate Expectations in Czech Civil Code

Although the term 'legitimate expectations' *(oprávněná očekávání)* is spread in several places in the new Czech Civil Code, no cover rule exists, but this is no surprise taking the quite confused situation with equity categories in the Code mentioned earlier into account. According to § 6, everybody shall act honestly in legal transactions. It can be argued that the formulation encompasses also respect for the 'legitimate expectations' of the other party (and it would be logical), but the wording itself is too vague.[30]

Unlike that, the new Code is more helpful in specifying the general (first-order) standard of care, the definition of which was absent in the previous Code. A series of rebuttable presumptions are used for that purpose. According to § 4, it is presumed that every legally competent person possesses the intellect of an average man and ability to use it with ordinary care and caution and that everybody may reasonably expect that. If 'knowledge' is relevant for some legal consequence, it should rely on the knowledge of a person knowledgeable of the case after taking all circumstances which must have been obvious to someone in their position into account.[31] According § 5, professionals who present themselves as such show that they are able to act with the knowledge and care connected with the profession.[32] Negligence (generally, not only of professionals) is presumed if one does not act in a way as can be expected from a person of average knowledge in private relations (§ 2912).[33]

However, as mentioned, the provisions define primarily the first-order standard of care. If the parties are knowledgeable of each other, of their background, expectations and interests, the standard of care will have to be refined to the actual situations. In that respect, the general rules are not ideal as they count mainly on the average person, which may not be the case. However – as indicated – the rules just set rebuttable presumptions, so adapting the standard of care should not be much of a problem.

Also, the interpretation of juridical acts rests (rightly) in large part on the 'legitimate expectations' rule. Pursuant to § 556, if a juridical act is not to be interpreted on the basis of the intention of the acting party, expressions shall be construed in accordance with the meaning which would be typically attributed to them by a person in the position of the addressee of the expression (i.e. which this person must have 'reasonably expected').

The 'legitimate expectations' standard is of course also used within the contract law, e.g. in case of culpa in contrahendo *(*fault in conclusion of a contract).[34] This is the best evidence that

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[30] This contrasts with the new Hungarian Civil Code (Act V of 2013) which provides (s 1:3) simply but aptly that 'in exercising rights and fulfilling obligations, the requirements of good faith and fair dealing should be observed,' and that 'the requirements of good faith and fair dealing shall be considered breached where a party's exercise of rights is contradictory to their previous actions which the other party had reason to rely on.' Hence, the concept of good faith in objective meaning is expressly referred to and accent is put on the principle *venire contra factum proprium.*

[31] This shall apply mutatis mutandis also to 'doubts' [§ 4(2)].

[32] Somewhat comparable rules can be found in s 1:4 of the Hungarian Civil Code (n 30).

[33] This rule applies within the tort law whereas the provisions cited before are of general applicability.

[34] Similarly the Acquis Principles (n 19) art 2:102: 'In pre-contractual dealings, a business must act with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of the consumers.'

'legitimate expectations' are nothing new in the civil law. If one party expects the conclusion of a contract and relies on it and the other party frustrates the negotiations for no legitimate reason, it shall be liable for the damage caused (§ 1729). But what is new is the rule that provisions of standard business terms which the other party could not have reasonably expected shall have no effect unless the other party expressly accepted them (§ 1753). This is an example of the proper implementation of the 'legitimate expectations' principle, which can be helpful in practice.

Aside from that, 'legitimate expectations' must not be necessarily examined only as a positive principle of law, but also as a piece of legal philosophy, a source of law. This would lead to a much broader analysis which would exceed the scope of this paper. It might be just worth mentioning that the new Czech Civil Code radically extended the possibilities of bona-fide acquisition of property (i.e. acquisition of property from a non-owner, provided that the acquirer is in good faith that they are acquiring property from the owner or another entitled person). The old Civil Code did not allow bona-fide acquisition except for some rather marginal cases (within inheritance law and certain business transactions),[35] which led to difficult situations if the line of bona fide owners departed from the formal sequence of legal titles (especially in the case of real property). Now, every purchaser who relies in good faith on public records in the Real Estate Cadastre shall acquire valid title to the purchased land (§ 984). Broad possibilities of bona fide acquisition are open also with regard to personal property.[36] It is clear that purpose of these regulations is to protect the acquirer who 'legitimately expects' to obtain title to the property.[37]

VI Conclusion

Instead of conclusions, it would be useful to underscore a question that should have been probably discussed at the beginning. Is it necessary at all to deal with concepts like 'legitimate expectations', 'good faith' and similar? They are hard to grasp, without clear content and scope of applicability and extremely conditional on factual circumstances. Practitioners would agree that one cannot rely on them before the courts, because their application depends very much

[35] The former situation concerned sale of inherited estate by a putative heir whom the inheritance had been affirmed by a probate court [§ 486 of the Act no 40/1964 Coll. (the old Civil Code)] and the later sale of personal property between businesses [§ 446 of the Act no 513/1991 Coll., the Commercial Code (which was abrogated along with the old Civil Code and replaced by the new Civil Code)]. Both situations were conditioned by good faith of the acquirer.

[36] § 1109ff (applicable to the following acquisitions: in public auctions, in stock or commodity exchanges, from businesses in the ordinary course of business, against payment from someone whom the property has been entrusted, from putative heirs whom the inheritance has been affirmed by a probate court; otherwise only if good faith of both the buyer and the seller is proven and the real owner was not deprived of the property by a crime).

[37] The principle of 'legitimate expectations' was invoked by Czech Constitutional Court in context of bona-fide acquisition even before the new Civil Court entered into force. E.g. in Pl. ÚS 78/06 of 16 October 2007 the Constitutional Court argues that cancellation (annulment) of legal title to immovable property which belonged to legal predecessor of the current owner cannot lead to loss of ownership by the current owner. The obligation to respect 'legitimate expectations' has been derived from the constitutional principle of legal certainty (rule of law, *Rechtsstaat*).

on the judge's discretion. Despite all of that, abstract equity concepts are necessary and I am convinced that, over time, they will be even more necessary. Civil law is normally conservative, which is not wrong, but it must take care not to lose touch with social reality (development). This can be most easily achieved by engaging dynamic legal concepts, such as 'legitimate expectations' or 'good faith', the content of which is variable depending on the actual situation (whether on a macro or micro social level). All we need is to learn to process and apply them so that they do not give the impression of legal scholars' whims but are perceived as a workable and useful element of law.

Stephan Heidenhain*

Harmonisation of the Czech Consumer Rights in the New Civil Code

I Reform of Consumer Rights 2014 in the NOZ (New Czech Civil Code)

Only some of the consumer rights are contained in Directive 83/2011/EU (hereinafter 'the Directive'). After highflying plans and a very controversial process of its enactment within the European institutions, the Directive was restricted to distance selling contracts, contracts out of business premises, sale contracts and unfair clauses. Outside the Directive remained timesharing, travel packaging, financial services and aggressive and unfair practices.

However, the Directive contains a new approach: the so-called maximum harmonisation in Art. 4 of the Directive. In this way the Directive departed from the principle of minimum harmonisation, which was until now common for European consumer law. According to the Directive, in the areas of consumer law, covered by the Directive, there is now so-called maximum harmonisation. In all other areas, there is still minimum harmonisation. Maximum harmonisation means that the member states are allowed neither to go under the level of the Directive, nor beyond the Directive. The Commission argued in favour of the Common Market, the functioning of which would be endangered – and is already endangered -, if different levels of consumer protection would be allowed in different countries.

The Directive contains new definitions of consumers and entrepreneurs (traders) – those are now contained in §§ 419, 420 NOZ.[1] However, the NOZ contains further a so-called 'weaker person': this person is not mentioned in the directive, but appears in § 433

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[1] Article of NOZ: § 419 [Definition of a consumer]
A consumer is a person who concludes a contract with an entrepreneur or in any other way negotiates with him and does not act in the framework of his trade activity or independent execution of his profession.
§ 420 [Definition of an entrepreneur]
(1) A person who independently carries on a gainful activity in his own name and at his own liability through a sole proprietorship or in a similar way with the intent to do so constantly for the purpose of making a profit is considered to be an entrepreneur.
(2) A person who concludes contracts related to his business, producing or similar activity or a person who concludes contracts while executing his profession, possibly a person who acts in the name and at the liability of an entrepreneur is for the purpose of consumers protection considered to be an entrepreneur.

cl. 2 NOZ.[2] What has to be understood as a 'weaker person' is quite unclear, but every consumer seems to be a weaker person, but not every weaker person seems to be a consumer (e.g. a weaker person who is not a legal entity). Consumer contracts are defined in § 1810[3] of the new Czech Civil Code and correspond to the § 51a of the old Czech Civil Code (1964). There are several stipulations in the new Czech Civil Code, where consumer related stipulations can be found, but consumers are not directly involved (e.g. § 2158 pp. of the new Czech Civil Code on 'sales in the shop').[4]

Basically, all consumer-related stipulations are contained in part 4 of the new Czech Civil Code (§ 1811 ff. – 1867 of the new Czech Civil Code): this section begins with general stipulations on consumer contracts (§ 1811–1819 of the new Czech Civil Code), including general clauses (§ 1814 of the new Czech Civil Code); for general clauses there are further rules in the general part of obligations of the new Czech Civil Code: § 1751–1753 (general clauses) and § 1799–1801 of the new Czech Civil Code (adhesive contracts) – see further.

Part 4 of the new Czech Civil Code regulates different kind of consumer contracts, thereby reiterating the stipulations of the old § 52 of the old Czech Civil Code, actualising them according to Directive 83/2011/EU:

– distance contracts and contracts negotiated away from business premises (§ 1820–1840 of the old Czech Civil Code);[5]
– financial services (§ 1841–1851 of the old Czech Civil Code);
– timesharing (§ 1852–1867 of the old Czech Civil Code).[6]

Stipulations on consumer credit were not contained in the old Czech Civil Code, but in a special law (Law Nr. 145/2010 Coll. on consumer credit).[7] There they have remained. Further, stipulations on aspects of public consumer law also remained in a special law (Law on consumer protection, Nr. 634/1992 Coll.). This law was not amended at all in 2012/2014, and in some points, which refer to the obligations of the entrepreneur to inform the consumer, its stipulations contradict §§ 1811 ff. of the new Czech Civil Code.

The new Czech Civil Code does not contain the system of several layers of general clauses (clauses which are invalid, clauses, which can be invalid, a general clause) as with § 305–310 BGB.

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[2] § 433 [Prohibition of abusing a dependence]
(1) A person, who acts as an entrepreneur towards other persons in business contacts, must not abuse his professional qualities or his economic position to create or use a dependence of a weaker party and to achieve an obvious and unreasonable imbalance in mutual rights and duties of parties.
(2) A person who acts towards an entrepreneur in business contacts without a connection to his own business shall be always presumed a weaker party.

[3] § 1810 of the new Czech Civil Code
The provisions of this title shall apply to a contract concluded by the business and the consumer (hereinafter referred to as "consumer contract") and obligations arising from them.

[4] Cf. to the stipulations of the 'sales in the shop' L. Tichý: 'The Sales Contract and the Consumer Sales Contract including the Liability for Faults' (in Czech: '*Kupní smlouva a spotřebitelská kupní smlouva, včetně odpovědnosti za vady*') (2014) 7–8 Bulletin Advokacie 23 et seq.

[5] The relevant stipulations can be found in the German BGB in §§ 312–312a BGB (contracts negotiated away from business premises) and §§ 312b–312i BGB (Distance contracts).

[6] The relevant stipulations can be found in the German BGB in §§ 481–487 BGB.

[7] The relevant stipulations can be found in §§ 491–512 of the German BGB *(Verbraucherdarlehensvertrag).*

The stipulations in the new Czech Civil Code are much shorter, and the main elements of the control of general clauses are missing, for example the system of § 307-309 BGB. As such, the new Czech Civil Code contains only some elements of this German system which are taken over from Directive 93/13/EC, now 83/2011/EU. However, the general parts of the new Czech Civil Code contain elements on the control of the content of general clauses.

A further complication derives from the fact, that after the conference in June 2014, but before the completion of this manuscript in October 2014, the Czech Ministry of Justice published a complete reform of the definitions in § 419 and § 420 NOZ in August 2014: according to this proposal, the whole chapter of the consumer law in § 1810 pp. NOZ shall be replaced by a completely new chapter.[8] However, it is quite unclear whether the Czech Parliament will adopt these changes. In this proposal, a further definition will be proposed, the so-called 'professional' or 'trader' (in Czech: *profesionál*) in a new § 1810 cl. 1 NOZ, which is obviously corresponding to the 'trader' in the Directive. However, whether it makes sense to define two layers on both sides – the consumer and the weak person on the one side, and the entrepreneur and the trader on the other side, has to be seen, but it is very doubtful, as the whole system becomes very complex.

In the current NOZ, the harmonisation of the EU directives, especially the Directive, can be found in § 1810 pp. NOZ. Their relationship to the 'sales in the shop' in § 2158 pp. NOZ[9] is quite unclear. However, these rules are not subject to change in the proposal of August 2014.

Further, I will not go into the details of the Directive, as I assume, that the main content of the Directive is known.[10]

II Consumer Rights in the NOZ

1 Transformation of Consumer Directives in the NOZ

The transposition of the consumer directives in the new Czech Civil Code seems to be complete; however, there are several problems in the transposition. A catalogue of the transposed directives can be found in the official footnote to No. 1 § 3015 of the new Czech Civil Code;[11] however, it

[8] The proposal was published by the Czech Ministry of Justice in August 2014 on www.justice.cz.

[9] L. Tichý (n 4).

[10] Concerning the directive 83/2011/EU see from the German literature: Andreas Schwab, Amelie Giesemann, 'Die Verbraucherrechte-Richtlinie: Ein wichtiger Schritt zur Vollharmonisierung im Binnenmarkt' [2012] EuZW 253–257 (mainly on German law); further concerning the drafts of this directive: Brigitte Zypries, 'Der Vorschlag für eine Richtlinie über Verbraucherrechte' [2009] ZEuP, 225–229; Hans-W. Micklitz, Norbert Reich, 'Der Kommissionsvorschlag vom 8.10.2008 für eine Richtlinie über „Rechte der Verbraucher", oder „der Beginn des Endes einer Ära"' [2009] EuZW, 279–286, Hans-W. Micklitz, Norbert Reich, '„Und es bewegt sich doch"? – Neues zum Unionsrecht der missbräuchlichen Klauseln in Verbraucherverträgen' [2012] EuZW 126 ff., Carsten Herresthal, 'Die Ablehnung einer primärrechtlichen Perpetuierung des sekundär-rechtlichen Verbraucherschutzniveaus' [2011] EuZW 328–333.

[11] § 3015 [Law of the European Union]This law contains appropriate legal regulations of the EU. (All directives are listed in an official footnote.)

is not really understandable that Directive 83/2011/EU is not listed in the official footnote No. 1, although this directive has been partly fulfilled[12] (translations of the New Czech Civil Code are given in the footnotes to this article) and had been adopted when the NOZ was passed in February 2012. However, there is a proposal to change the NOZ of summer 2014 (see further in the text).

The transformation of the directive on certain aspects of the sale of consumer goods 1999/44/EC) is quite problematic, as these stipulations are contained now in the chapter on the 'Sales in the shop' (§ 2158 pp. of the new Czech Civil Code), which is basically a remodelled chapter of the old Civil Code of 1964. It can be stated that the transposition of the EU consumer legislative is only partly fulfilled in the NOZ. A further problem remains its heterogeneous and only sporadic application in practice.

2 The System of the Control of General Terms (Unfair Terms in Consumer Contracts, General Terms in other Contracts) according § 1813 p. NOZ

The NOZ contains an enlarged section on general terms and on adhesive contracts. On the one hand, there are rules on general terms which have some peculiarities, but which contain the basic set of rules which are known from the European Directives (93/13/EEC and 83/2011/EU), and the BGB. However, there are also peculiarities (e.g. unilateral changes of general clauses; § 1752 NOZ).

On the other side, the NOZ contains special rules on the invalidity of the content of so-called adhesive contracts (§ 1801 NOZ).[13] However, in this respect it has to be stated that a clear definition of adhesive contracts ('contracts executed by adhesion') is missing. What is meant by

[12] See Stephan Heidenhain, 'Verbraucherschutz und Produkthaftung in Tschechien' [2013] WiRO 200 pp. (with references, in German).

[13] § 1798 [One sided clauses]
(1) Clauses in contracts, executed by adhesion are valid for every contract, which basic terms were decided by one of the contractual parties or on the basis of an order of one of them, when the weaker parte did not have a real possibility to influence the content of those basic terms.
(2) If a contractual form is used for the execution of a contract with the weaker party, which is used in commercial transactions, or a similar mean, the contract is regarded to be executed by adhesion.
§ 1799 [Clause in an adhesion contract]
A clause in a contract executed by adhesion, which refers to the conditions set outside the text of the contract, is valid if the weaker party was familiar with the clause and its significance, or if it is proven that the party had to know the meaning of the clause.
§ 1800 [Defect of clause]
(1) If a contract executed by adhesion contains a clause which could be read only with special difficulty, or clause which was for a person of an average intellect incomprehensible, this clause is valid, unless it harms the weaker party or if the other party proves that the meaning of the clause was sufficiently explained to the weaker party.
(2) If a contract executed by adhesion contains a clause which is particularly disadvantageous for the weaker side without an adequate reason, especially if the contract diverges seriously and without serious reason from the usual terms concluded in similar cases, the clause is invalid. If a fair arrangement of rights and obligations between the parties is needed, the court will decide according to § 577.

contracts executed by adhesion? Further, the rules on adhesive contracts affect only so-called 'weaker parties'; the 'weaker parties' are not defined in the NOZ, either, but under certain circumstances the rules on adhesive contracts also affect contracts between entrepreneurs (§ 1801 2nd sentence NOZ) in cases where there is a gross contradiction between commercial customs and the principles of fair commercial relations.

But the question is why there is a different set of rules for general clauses and adhesive contracts. The reasons are historical, not legal ones. Historically, there were similar rules in the former Czech Civil Code (Law No. 40/1964 Coll.) and the Czech Commercial Code (Law No. 513/1991 Coll.), which were replaced on 1.1.2014 with the New Czech Civil Code. There was a similar situation in Poland (in the *Kodeks cywilny* the so-called *umowa adhezyjna*). Using adhesive contracts was a different technique (separate forms to be filled in). Apart from using general forms (a set of general rules, to be attached to a contract), this differentiation should no longer have played any role since the PC revolution, which is at least since the beginning of this millennium. Nevertheless, in the NOZ, there are two kinds of stipulations for general forms and pre-formulated rules, although in both situations the party who formulates the forms or the rules in advance has an advantage by standardising their contracts and thus by drafting the forms or the rules – which is advantageous for them. On the other side, the other party only has limited possibilities to influence the set of rules. It has to accept them (and the contract under those conditions), or refuse the contract altogether ('take it or leave it'), as in most cases the party who is using the general forms or general rules will not enter into negotiations on different clauses. Thus, it is quite obvious that this situation is the same for adhesive contracts and for general terms. For this reason the different approaches of the NOZ are not convincing.

In the BGB, there is no such differentiation, but the application of the rules for general terms (§ 307 – 309 BGB) was widened by the courts towards standard forms and formulations which are contained in the contract (even if the contract is executed by a notary).

Because of this, the rules for adhesive contracts and general clauses should be read together and applied to both, thus *per analogiam.*

Whether it makes sense or not, the current system of regulating general clauses and of adhesive contracts in the NOZ is the following:

a) The regulation of general clauses

There are rules on the question of how to agree on general clauses in § 1751 NOZ[14] and to include them into the content of a contract. If the general clauses become the content of a contract there

§ 1801 [Invalidity of a deviating clause]
If the parties deviate from the §§ 1799 or 1800 or if they exclude some of these clauses, this will be disregarded. This does not apply to a contract executed between entrepreneurs, unless a party proves that the clause, which is beyond the text of a contract as such and which was proposed by the other party, grossly contradicts commercial customs and the principle of fair commercial relations.

[14] § 1751 [Reference to Trading terms]
(1) A part of the content of a contract can be determined by reference to general terms, that the offeror attaches to the offer or which are known to the parties. Different stipulations in a contract prevail over the general terms.

is, in principle, no control of the content apart from general reasons such as fraud, illegality etc. A new stipulation makes clear that, in the event of contradicting general terms, the contract is validly executed but that only those general terms that do not contradict each other become content of the contract for both users (§ 1751 cl. 2 NOZ). An exception from the inability to control the content of general clauses is a surprising term in § 1753 NOZ.[15] This is a new provision in the NOZ, and § 1753 NOZ sets certain conditions: 'a party could not expect reasonably (a clause) […], unless this party has agreed to it explicitly; a contrary agreement is invalid'. It is clear that stipulations which exclude this are not possible, but it is possible for the party to agree to the clause 'explicitly'. The question of whether there is such a surprising clause shall not only be decided 'as to its content, but also in the manner of its expression'. Whether the explicit agreement means that it is sufficient to let the party sign additionally all possibly 'surprising' clauses remains to be seen. But, from the point of view of the protection of the weaker party, this circumvention in practice is not likely to work.

A problem will be how the expectations of a party will be understood by the Czech courts. Will it be a subjective criterion, or an objective one? There is more reason to ask for an objective criterion. Furthermore, the possibility of explicitly agreeing to such a clause will certainly be abused (such a possibility does not exist under § 305c cl. 1 BGB; so-called *überraschende Klauseln*). This possibility also exists in Art. 2.1.20 of the Unidroit-principles. Not only will the content influence the surprising character of such a clause, but also the 'way it is expressed'. Unfortunately, the materials of the NOZ ('Reasoned report') do not help to explain this meaning (notwithstanding the fact, that the historical interpretation has priority in the New Czech Civil Code, see § 2 cl. 1 NOZ),[16] but these materials explain that the legislator wanted to refer to Art. 2.20 (obviously meant: Art. 2.1.20)[17] of the Unidroit-principles which contain the stipulations on surprising rules.

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(2) If the parties refer in the offer and the acceptance of the offer on general terms that are contradictory, the contract is still closed with the content specified in the extent to which general terms and conditions are not in conflict; this applies even in the case that the general terms exclude that. If one of the parties excludes that at the latest without undue delay after the exchange of the expression of will, the contract will not be concluded.

(3) When a contract between entrepreneurs is concluded, there is a possibility that part of the contract can be determined by a mere reference to general terms which are prepared by professional and interest organizations.

[15] § 1753 [Invalid stipulations of general clauses]

A general clause, which a party could not expect reasonably, is invalid, unless this party has agreed to it explicitly; a contrary agreement is invalid. Whether there is such a clause shall not only be decided as to its content, but also as to the way of its expression.

[16] For this reason, it is very surprising, that the 'Reasoned report' ('Důvodová správa'), which contains basically the considerations of the authors of the NOZ, but not so much the discussions in Parliament, is partly so slim and basically not saying anything substantial to many norms; various information on the NOZ can be found on the official Czech website of the Ministry of Justice: <http://obcanskyzakonik.justice.cz/>; the 'Reasoned report' can be found in its consolidated version (of beginning of 2012) on <://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf> (only in Czech language).

[17] See so-called 'Důvodová správa' concerning § 1753 NOZ (page 437).

b) The control of general clauses in consumer contracts

The regime of § 1814 NOZ applies to the regulation of the content of consumer contracts; § 1814 NOZ contains a list of banned clauses from Directives 93/13/EC resp. 2011/83/EU). However, the NOZ does not contain the differentiated system of § 307 pp. BGB. Further, the NOZ does not contain in § 1814 NOZ any system information on how these decisions on general clauses will impact not only inter partes, but erga omnes. As such every consumer stands alone and the decisions in other cases have no validity for other consumers who have signed the same contracts with the same users of the general forms. In the end, the system of § 1814 NOZ is minimalistic, but in line with the *acquis communautaire.*

c) The regulation of the content of adhesive contracts

§ 1798-1801 NOZ apply to all adhesive contracts with a 'weaker party'. A clause in those contractual forms is invalid, if - according to § 1800 cl. 2 NOZ – 'this clause is for a weaker party extremely disadvantageous and does not have a reasonable reason, especially if the clause deviates seriously and without a special reason from usual conditions, which are agreed upon in comparable situations.' The result is invalidity of the particular clause in the contractual form, but 'if a just settlement of the rights and duties of the parties requires it, the court decides according to § 577 NOZ.' However, this is a procedure where the content can be decided by the court 'in such a way that (the content) confirms to a just settlement of the rights and duties of the parties.' Basically, the court decides on the content of the rights and duties of the parties. This is the court's own decision on the basis of justice for the parties.

In the BGB, there is general regulation of the content of general clauses. However, there is neither a differentiation between general clauses and adhesive contracts, nor any notion of a 'weaker party' as a category between consumers and entrepreneurs or professionals.

3 Unilateral Changes to General Terms (§ 1752 NOZ)

The NOZ introduces the new rules for unilateral changes to general terms in § 1752 cl. 1 and cl. 2 NOZ.[18] According to the legislative materials, this was a compromise found at the last moment. However, it is an exception to the rule that contracts can only be changed on the basis

[18] § 1814 [Forbidden terms]
In particular, terms are prohibited which
a) exclude or restrict the consumer's rights in asserting the liability for defects or compensation for injury,
b) oblige the consumer to undertake to fulfill, while the entrepreneur becomes liable to fulfill after fulfillment of a condition, which depends on his will,
c) allow the entrepreneur not to give the consumer the performance provided by him even if the consumer does not conclude the agreement with the supplier or if he withdraws from it,
d) entitle the entrepreneur to withdraw from the agreement without any contractual or legal reason without entitling the consumer to the same,
e) entitle the entrepreneur to renounce the obligation without an adequate period of notice without having a special reason for this,

of consensus. Hence, in all other cases, except the one described in § 1752 NOZ, unilateral changes of general terms are not allowed (there is a similar rule in § 11a cl. 2 Energy Law since 2011).[19]

Unilateral changes of general terms according to § 1752 NOZ demand the fulfilment of a set of complicated conditions and rules:

– contracts in usual commercial relations with a larger number of customers,
– contracts with long-term services of the same kind which are rendered repeatedly (e.g.: services for submitting energy, telecommunication services); and
– a reasonable requirement for later changes to the contract, which derives from the character of the obligation already at the time of the negotiation of the contract.

If those conditions are cumulatively met, there can be an agreement upon the following: the party which uses the general terms can change them in an appropriate manner. However, this agreement is only valid if the following conditions are met:

– the change will be announced to the other party in advance, and
– this party has the right to reject the changes and the obligation to cancel the obligation in order to get new services within the time of notice, and
– if such a cancellation is not connected with an obligation which is disadvantageous for the cancelling party.

All these conditions are cumulative, which means they have to be fulfilled at the same time.[20] § 1752 cl. 2 NOZ contains a further restriction for unilateral changes of general terms: if the content of the changes of the general clauses was not agreed upon, a change does not play a role

f) oblige the consumer to fulfill conditions he was not enabled to learn of before the conclusion of the agreement,
g) allow the entrepreneur to change the rights or obligations of the parties,
h) defer the price determination to due date,
i) allow the entrepreneur to raise the price, without giving the consumer the right to withdraw from the contract in case of a major increase in price,
j) deny the consumer the right to take legal action or to exercise any other legal remedy, or to require the consumer to take disputes exclusively to an alternative dispute court or to arbitration not covered by legal provisions which are oriented to the protection of consumers,
k) transferring to the consumer the burden of proof of the fulfillment of an obligation of the entrepreneur, which a stipulation of a contract of financial services obliges him to do that, or
l) denying the consumer his right to decide, which obligation shall be fulfilled at the first place by a fulfillment by the consumer.

[19] § 11 cl. 3 Energy Law (Law No. 458/2000 Coll.)
If an owner of the licence to trade in electricity, to trade in gas, to produce electricity or to produce gas raises the price of electricity or gas supply or if he changes other conditions of a contract, a customer is entitled to withdraw from the contract within 3 months from the date of the price raise or the date of the change of other conditions of a contract without giving a reason. This doesn´t apply if the owner of the licence informs the customer of the price raise or the change of other conditions of a contract at least 30 days before the its day of coming into effect and at the same time informs the customer on his right to withdraw from the contract. In such a case the customer is entitled to withdraw from the contract at least 10 days before the price raise or the change of other conditions of a contract without giving a reason.

[20] This was as well confirmed by the results of an expert group, statement Nr. 6 of 19. April 2013, published on the official Czech website of the Ministry of Justice: http://obcanskyzakonik.justice.cz/.

which was evident at the time of the execution of the contract; further, a change does not play a role which is caused by personal or material changes.

It is difficult to evaluate § 1752 NOZ without any practical experience; however, it can be stated that § 1752 NOZ has become a very complicated stipulation (possibly as a result of a compromise), not taking account of the not very promising experiences with § 11a cl. 2 Energy Law (which operates similarly). As such, it has to be seen whether § 1752 NOZ can be applied accordingly by the Czech entrepreneurs and the Czech courts. A challenge is the complicated structure of § 1752 NOZ and, further, the use of terms like 'a reasonable reason', 'an appropriate change' etc.

In the BGB, there is no special stipulation for this situation, but there is a very intensive discussion, especially because of § 307, 308 Nr. 4 and Nr. 5 BGB, which limit clauses which allow unilateral changes to general clauses.

4 Law of Sale

On sales contracts, three different layers of regulations are applicable:
– § 1811 pp. NOZ (consumer contracts) – this set of rules applies to distance contracts and contracts out of business premises;
– further, according to § 2158 cl. 1 NOZ, § 2158 pp. NOZ are to be applied if the seller is an entrepreneur. However, § 1811 pp. NOZ is applicable, too, which is not reflected in § 2158 pp. NOZ, as there is no reference to 'consumers' – except in § 2169 cl. 3 in fine NOZ; and § 2158 pp. NOZ are to be applied together with
– the general rules for sale contracts (§ 2079 pp. NOZ).

This makes the sales contract law quite complex, and, unfortunately, there are several questions, which cannot be answered easily, such as whether the rules on 'sales in the shop' are applicable to distance selling or selling outside business premises. In my opinion, they should be applicable, although the wording 'sales in the shop' seems to exclude this. However, there is neither a definition of the 'sales in the shop' in NOZ, nor a definition of business premises (for contracts out of business premises according to § 1828 pp. NOZ). Thus, if consumers are buying goods by distance selling and outside business premises, they should also have the rights of the 'sales in the shop' stipulations, and further the general rules for sale contracts (§ 2079 pp. NOZ).

Initially, the rules on 'sales in the shop' were contained in the 1964 Civil Law Codex as a socialist-style protection of workers´ needs (in §§ 239 of the original Civil Codex of 1964; later they became §§ 612-627 in the old Civil Codex); in 2000, they were reformulated, which should have served the harmonisation of Directive 44/99/EU in the old Civil Codex – now they became part of the NOZ. For example, § 2165 NOZ stipulates a two year time for actions due to bad fulfilment. However, the NOZ did not change the rules on 'sales in the shop' in substance and took them over *in toto* to the NOZ. Unfortunately, this not very well reflected reception of the 'rule in the shop' rules creates a number of problems.[21]

[21] See the article of L. Tichý (n 4).

5 Parallel Structure: Administrative Procedures according to the Law on Consumer Protection (Law 634/1992 Coll.; ZOS)

Stipulations on aspects of public law have remained in a special law: the law on consumer protection, Nr. 634/1992 Coll. This law dates from 1992 and addresses consumer issues from an administrative angle. This law is partly outdated, as it was not changed after 2012, although the NOZ contains related stipulations, for example dealing with the obligations of an entrepreneur to inform consumers. Unfortunately, there are now contradictions between the NOZ and the ZOS (e.g.: in which language the contract has to be executed: in NOZ, the language of the contract (§ 1811 of the new Czech Civil Code); in § 9 of the ZOS, only the Czech language).

6 Procedural Rights

In this respect, there were practically no changes for consumers in the Civil Czech Procedural Law after the enactment of NOZ. Law 99/1963 Coll. was amended widely with effect by 1.1.2014, but for other purposes. For example, there is still the problem of the limitation for the right of appeal – the current limit is 10,000 CZK (c. 350 EUR), and there is no possibility at all for a review of de minimis issues and not by higher courts (except the Constitutional Court) either. In the meantime, this has become a big problem for bank customers claiming back banking fees, as these claims were only up to 10,000 CZK (ca. 2,500 CZK per year; after four years, the claims are statue-barred.

The regulations on Private International Law are now contained in the new Law 91/2012 Coll., apart from the ROM I-regulation (593/2008/EU), which contains special rules on consumers in its Art. 6, and the ROM II-regulation (864/2007/EU), which deals with non-contractual matters.

Further, there are no changes to the procedural rights of consumer organisations, which are contained in § 25 and § 26 of the ZOS of 1992 (in this respect, the ZOS had been amended already in 2006). These organisations have the right to bring applications to courts in their own name, but they do not use this right very often.

III Several Types of Consumer Rights

1 Withdrawal from Contracts – in § 1829 pp. NOZ

The main right for consumers is the right to withdrawal from business and distance selling contracts [*in extenso* regulated in § 1829 pp. NOZ, for sale contracts in § 2106 cl. 1 lit. *d)* NOZ (withdrawal) and § 2001 pp. NOZ – general rules for withdrawal from contracts in the general part of obligations]. The consumer has this right for 14 days after finalising the contract, if they were informed correctly about their right to withdraw from the contract. Otherwise, they have this right for a maximum of one year within 14 days after they were informed.

Further, the consumer has rights for information before and after the execution of the contracts; those rights are stipulated in § 1811, § 1820 NOZ. Forms for withdrawal from

consumer contracts (out of business and distance selling contracts), mentioned in § 1820 cl. 1 lit. *f*, cl. 2 and § 1830 NOZ, have been put into the regulation No. 363/2013 Coll. which is basically a translation from Annex I A and B of Directive 83/2011/EU). Further, this directive has direct effect for contracts executed after 13 June 2014.

One of the additional rights of a consumer are their possible actions because of culpa in contrahendo, i.e. the withdrawal from negotiations on contracts, cf. § 1728, § 1729 NOZ. This is a right not only for consumers, but for all legal subjects.

2 Rights of Consumers in E-business

Unfortunately, the NOZ is not completely harmonised, the following rights for consumers are missing in the current version of the NOZ:

– ban on excessive credit card fees (Art. 19 of the Directive)
– ban on excessive phone charges (Art. 21 of the Directive)
– ban of preselection of services (Art. 22 of the Directive).

Arts. 19, 21 and 22 are possibly harmonized by § 1817 NOZ: An entrepreneur is not entitled to ask from the consumer further payments, but only those which the consumer must pay on the basis of the main contractual duty, unless the consumer has given their explicit approval to these further payments.

Art. 19, 21 and 22 could be directly applicable after 13 June 2014 without transposition to national law - according to the principles of the ECJ which are mainly three reasons: the deadline for their transposition is over, the rules are self-executable and no further actions of the member states are necessary. Because of this reason, Art. 19, 21 and 22 are directly applicable after 13 June 2014.

A reaction to these shortcomings is the proposal of the Ministry of Justice, published in summer 2014, which contains several new rights of the consumers:

– § 1843 of this proposal: the 'professional' is not allowed to ask from the consumer higher costs for the use of the form of payment which he pays himself;
– § 1845 of this proposal: the 'professional' has to make sure that the consumer shall not pay excessive phone charges. However, the telephone operator can charge such phone calls, but the consumer is not obliged to pay them; they can ask the 'professional' to pay such bills for them.
– § 1846 and § 1847: these stipulations shall deal with the preselection of services. In this respect, preselection is not sufficient, as it is not regarded as an explicit agreement with the consumer. Such additional services shall not be paid for by the consumer.

Thus, by amending the NOZ in such a way as planned as in the proposal, the directive can be regarded as transposed into Czech law. However, for the time being, it is quite unsure whether the new chapter on consumer contracts (§ 1810 – 1867n NOZ) will come into force before 1.1.2016. This means that, in the meantime, Art. 19, 21 and 22 of the directive will be applicable directly.

IV Resume

The harmonisation of the consumer legislation in the NOZ is in some respects still necessary, as the harmonisation of the NOZ with the Consumer Rights Directive is not complete. However, the new proposal of summer 2014 addresses some of the shortcoming of the current version of the NOZ.

Further, the central part of the contract of sale in the New Civil Code contains a confusing system of general rules, consumer related rules and rules for 'Sales in a shop', which refers to the 'weaker person' and not the consumer. Unfortunately, the proposal of summer 2014 will complicate this system further by introducing a fourth category of a 'professional' – in addition to the existing entrepreneur, consumer and the 'weaker person'.

The current rules on regulating the content of general clauses are not convincing; unfortunately, the proposal for amendments of the NOZ does not address this issue at all. For general application, there is an unconvincing differentiation between general rules and adhesive (formulary) contracts; regulation of the content is very rudimentary (in the current NOZ, these rules apply only to adhesive contracts, but this should be used *per analogiam* as well for general clauses). For consumers, the main elements of the directive 93/13/EC are contained in the NOZ.

Last but not least, a better interrelation between civil law and administrative law would be helpful, and a reform of the procedural law would be necessary to make the protection of consumers more effective in the application of the law before the courts.

Law of Persons, Family Law, Law of Succession

Eva Ondřejová*

Protection of Personal Rights in the Czech New Civil Code

I Introduction – the New Civil Code Structure

The New Civil Code[1] (hereinafter 'NCC') is based on the principles arising out of the ius naturalis approach. Natural rights are protected under the Czech Charter of fundamental rights and basic freedoms[2] following the Universal Declaration of Human rights and European Convention of Human Rights.[3] The protection of dignity and freedom of an individual and their natural right to pursue their own happiness and the happiness of their family or people close to them in a way that does not unjustifiably harm others is the proclamation of the aim, purpose and basis of interpretation of the Civil Code. Demonstratively, the main principle is that everyone has the right to protect their life and health, as well as freedom, honour, dignity and privacy.[4]

In comparison to the previous Civil Code, Act No. 40/1964 Coll., the NCC, in respect of personal rights, does not constitute a diversion from the basis of protection. The NCC continues the established rules and follows case law. It provides a comprehensive overview of personal rights, exemptions and remedies in much more detail. The scope of the provisions compared to previous act has been significantly increased, from four articles to almost sixty.

The protection of personal rights is regulated in the General Provisions of Art. 81 – 117 NCC. One's name is protected in Art. 77 – 80 NCC. Remedies are stated in the part related to obligations arising from the tort in Art. 2951 – 2971 NCC.[5]

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1 Act No. 89/2012 Coll. in force 1.1.2014.

2 Act No. 2/1993 Coll.

3 The explanatory memorandum of NCC, p. 34.

4 S. 3 NCC.

5 Complementary protection is to be found in the Press Act, Act No. 46/2000 Coll., the Radio and Broadcasting Act No. 231/2001 Coll. and the Data protection Act No. 101/2000 Coll. The liability of Internet service providers is stated in the Information society services Act No. 480/2004 Coll. Defamation is subject to the public law as well. Criminal libel is a crime under the s 184 of the Czech Criminal Code, Act No. 40/2009 Coll.

II General Clause with Demonstrative Listing of Personal Rights

The Czech Charter of Fundamental Rights and Freedoms provides for privacy rights protection. It provides for the general protection of the inviolability of the person and of their privacy, which may be limited only in cases specified by law. Article 10 states, '(1) everybody is entitled to the protection of his or her human dignity, personal integrity, good reputation, and his or her name. (2) Everybody is entitled to protection against unauthorised interference in his or her personal and family life. (3) Everybody is entitled to protection against unauthorised gathering, publication or other misuse of his or her personal data.' Article 13 states, 'Nobody may violate the secrecy of letters and other papers and records, whether privately kept or sent by post or in another manner, except in cases and in a manner specified by law. Similar protection is extended to messages communicated by telephone, telegraph or other such facilities.' These fundamental rights are subject to specification in the Civil Code. The previous Act provided a general clause in Article 11, which states, 'An individual shall have the right to the protection of his or her personality, in particular of his or her life and health, civic honour and human dignity as well as of its privacy, name and expressions of personal nature.' It is followed by Article 12, which described specific cases in respect of those records with a depiction of the person. The NCC created minor changes to the principle but followed a new pattern derived from the case law. The NCC states[6] that the human personality including all its natural rights, is protected. Everyone is obliged to respect the free decision of man to live on their own. Life and dignity, health and the right to life in a comfortable environment, esteem, honour, privacy and expressions of a personal nature are the main items protected.[7] The expressions used are more vague and the demonstrative listing of personal rights has been slightly amended. However, rights that European Court of Human Rights constantly emphasised are missing, specifically the right to family life.

1 Right to Name[8]

The name of an individual is composed of his given name and surname and his other names, where applicable, and surname at birth which pertain to them by law. Every individual has the right to use their name in legal transactions, as well as the right to the protection of and respect for their name. The NCC newly provides protection for pseudonyms[9] on the condition that the assumed name becomes widely known.

If the individual whose rights have been infringed is absent or lacking legal capacity, the right to bring the claim to protect the right to name must be by their spouse, descendant, ancestor or partner, unless they made their intention to the contrary expressly clear.

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[6] S 81 NCC.

[7] J. Švestka, J. Dvořák, J. Fiala a kol.: r. *Občanský zákoník. Komentář. Svazek I.* (Wolters Kluwer, a. S. 2014 Praha) 285.

[8] S 77–79 NCC.

[9] So far protected only by provisions of the Copyright Act, Act No. 121/2000 Coll. and the Trademark Act, Act No. 441/2003.

The new institution is the family name. In the event of an infringement of the family name and the family interest, protection may be individually claimed by the spouse or another close relative.

The finally innovation in the area of right to name is the entitlement of legal entities[10] to bring a claim in the event of an infringement related to the person whose activities are connected with the company.[11]

2 Image Rights[12]

The concept of protection is based on the autonomy of will and freedom to decide whether one allows a picture to be taken and consents to the images to be distributed. If anyone consents to having their image captured under circumstances which make it evident that the image will be distributed, they are conclusively presumed to also consent to its reproduction and distribution in the usual way, as they could reasonably expect under the circumstances; however, they may withdraw their consent anytime, even when granted for a definite period.

According to the ECHR case law, the image right is protected even outside the intimate sphere.

In accordance with established principles in the previous Civil Code, the NCC stipulates legal licences and exemptions from the required consent.[13]

Consent shall not be required if the documents of a personal nature, pictures and image and sound recordings are to be used for official purposes on the basis of a law. The official purpose is also the situation when a person acts in a public interest matter.

Image, pictures and sound recordings may be taken or used without the proper consent of the individual also for purposes of science or art and for the purposes of press, motion picture, radio, television or other similar news services (Internet).

However, such use must be in accordance with the lawful interests of the person and must be proportionate.

The NCC creates a new legal licence for the purpose of use or to defend the rights of the perpetrator if they have a lawful interest.[14] It aims in particular at unbalanced possibilities to use evidence in civil and criminal procedures, while in civil proceedings the parties cannot use illicitly gathered evidence, despite it showing the wrongful act, in court hearings.

3 Right to Privacy[15]

The private and intimate sphere is protected from all infringements without legal justification for such infringement. The Act provides a demonstrative listing of possible infringements.

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[10] S 83 par. 1 NCC.
[11] Švestka, Dvořák, Fiala a kol. (n 7) 305.
[12] Right to own image S 84–85, 87–90 NCC.
[13] S 88–89 NCC.
[14] S 90 NCC.
[15] S 86, 90 NCC.

– disturb the private places of a person without their consent;
– monitor their private life;
– take an audio or video recording of their private life;
– use such a private recording or other recording of the intimate life made by a third party or to distribute such a personal recording to the public.

The NCC, liked the previous Code, does not differentiate between ordinary individuals and public figures. It is up to case law to apply the borders of the concurrent fundamental right of the right to speech. If there is interference into someone's private life, the legal justification and the act has to be proportionate and not in contrary to the legitimate interest of the person.[16]

4 Right to Family Life

As mentioned above, the general clause does not include the right to family life. The Constitutional Court however several times stated that family life is part of privacy and therefore is subject to the same protection. The right to privacy encompasses the protection of family life.[17] From the subjective public rights perspective, it is also protected by the Article 8 of the European Convention on Human Rights and by Article 10 par. 2 of the Czech Charter of fundamental rights and freedoms. Article 32 par 4 of the Czech Charter guarantees parents the right to take care of their children and the right to raise them. The child is guaranteed by the same provision the right to be given parental custody and care. Article 8 of the ECHR primarily aims to protect the individual against the wilful infringement of the state, but it also imposes on the state the positive obligation of effective respect for family life. The Czech Republic was subject to eight ECHR decisions regarding cases when the parent who was entrusted with custody unreasonably denies the other parent the access to child infringes the personal rights of the other parent, particularly their right to family life and privacy.[18] The European Court of Human rights emphasised that, after the end of the coexistence of the biological parents, the rights of the other parent (who does not provide full parental care) do not come to end. The parent has the right of access to their children. If the state does not ensure this right, the state violates the personal rights of the infringed parent.

III Post-mortem Protection of Personal Rights

Post-mortem protection in the previous Code was stated in Art. 15 of the Civil code and was asserted by their spouse (registered partner) or children or, if there is no spouse or children, to their parents. Those entitled person could bring their own claim if the statement or activity

[16] Švestka, Dvořák, Fiala a kol. (n 7) 321.
[17] *Niemitz v. Germany,* no. 13710/88, 16. December 1992. Similarly The Czech Constitutional Court finding No. II. ÚS 517/99 from 1. 3 2000 (N 32/17 SbNU 229).
[18] *Pedovic v. the Czech Republic,* no. 27145/03, 18 July 2006; *Zawadka v. Poland,* no. 48542/99, 23 June 2005; *Koudelka v. Czech Republic,* no. 1633/05, 20 July 2006.

reflects on their own reputation and causes harm; it was possible to ask for a non-pecuniary damages. The NCC broadens the scope of the entitled person according to the German concept of close relatives (not only spouse or registered partner, children and, parents, but also grandchildren, siblings, brothers/sisters-in-law, and other close persons). The executor or the successors will be allowed to continue in action that has been raised by the claimant prior to his death. Monetary compensation will be inheritable.[19]

If the personal features of the Deceased are exploited for commercial use, according to Art. 3004, the plaintiff may recover twice the value of the plaintiff's profits that are usual in these circumstances (a similar legal basis as in the Copyright law).

IV Remedies

The substantial conditions for the civil remedy for damage caused by a violation of personal rights are set in Art. 2951–2971 NCC. The liability for the protection of personal right arises under three conditions. First, the unjustified infringement capable of causing moral damage must exist; second, the moral damages caused to the natural person must exist and, third, there is a causal connection between the infringement and damage to the personal rights.[20] Even if only one of the conditions is not met then liability does not occur. In each situation, one has to consider the severity of the declared infringement and whether the infringement oversteps what is admissible in such a way that it is no longer acceptable in democratic society. The Act does not specify the intervention nor serve the forms of infringement; the form might be passive or active, or even the omission of some duties might be considered as an infringement of personal rights. The infringement of personal rights is unjustified if it is contrary to the objective law. The violation must be assessed objectively with the consideration of the concrete situation, as well as of the person concerned.

In respect of non-material harm, there was a significant change in the legislation in terms of awarding damages. The previous Act preferred moral satisfaction as a primary remedy; pecuniary satisfaction was awarded if the moral form was not satisfactory. The NCC set a new rule that satisfaction must be provided in money unless real and sufficiently effective satisfaction for the harm incurred can otherwise provide satisfaction.[21] Non-material harm newly includes mental suffering as well.[22]

The NCC lacks the demonstrative listing of what constitutes moral satisfaction. In comparison to the previous code, it is however detailed in respect of the conditions that have to be considered by the court when determining adequate damages and, not expressively but in fact, establishes *aggravated damages* in the Czech legal system. The manner and amount of adequate satisfaction

[19] S 83 par 2 NCC.
[20] Jiří Švestka, Jiří Spáčil, Marta Škárová, Milan Hulmák, a kol., *Občanský zákoník I, II. 2.* (CH Beck 2009, Prague) 186.
[21] S 2951 par 2 NCC.
[22] S 2956 NCC.

must be determined so as to compensate for the circumstances deserving special consideration, too. These circumstances shall mean causing intentional harm, including, without limitation, causing harm by trickery, threat, abuse of the victim's dependence on the tortfeasor, multiplying the effects of the interference by making it publicly known or as a result of discriminating against the victim with regard to the victim's sex, health condition, ethnicity, creed, or other similarly serious factors. Account is also taken of the victim's fear of loss of life or serious damage to health if such fears were caused by the threat or other causes.[23]

The secondary victims principle, derived from case law, has been adapted into the NCC. Under special circumstances of an unlawful act, gross negligence, breach of an important legal obligation or damage caused intentionally from a desire to destroy, the perpetrator is obliged to pay pecuniary damages to any person who suffers due to the infringement of those in close proximity.[24]

To present a complete overview of the possible remedies in the event of an infringement, a restraining order could be released as an additional means to both satisfactions. In the case of severe breach that is anticipated by the victim or has to be stopped, the court, prior to the trial, may issue a preliminary injunction if the situation of the parties must be temporarily adjusted or if there is a fear that the enforcement of the judgement could be endangered. In the interim injunction, the Court may order something to be done, that someone refrains from delays or continues doing something, or not to manipulate, according to the situation that is the subject of the application and serves the purpose the best. If required by the circumstances of the case, or if there is danger in delay, the presiding judge immediately announces the party to whom the obligation is made in the interim order. If a third party is obliged by the interim injunction, this party also has to be informed. A copy of the resolution ordering interim measures shall be sent to the participants, or their representatives, and to those who had been ordered to the preliminary injunction, within three days from the date of publication of the order or, if not published, within three days from the date of issue. The resolution ordering the preliminary injunction is enforceable upon publication. If it was not published, it is enforceable as soon as it was delivered to the obliged party.

An interim injunction expires if *a)* the petitioner did not file within the statutory period or within the period specified by the court the claim to initiate proceedings; *b)* the claim was rejected on the merits; *c)* the claim was rejected on the merits and fifteen days passed from making a decision on the matter; *d)* specified elapsed time that would take. The interim injunction may be revoked if the reasons for which it was ordered no longer exist.[25]

With the New Civil Code and strengthening of personal rights, there is a clear way how interim injunctions might be widely used, first, for example, to prevent the publication of private images, images taken without consent or the dissemination of private information.

[23] S 2957 NCC.
[24] S 2971 NCC.
[25] S 74, the Civil Procedure Code, Act No. 99/1963 Coll.

V Unjust Enrichment and Publicity Right

Image rights, the right to use and protect one's own image, is the core of those fundamental personal rights creating the notion of the personality. It is a personal right but as well a property right if its use serves commercial exploitation. The subjects of protection are not only celebrities, for whom their picture is a valuable asset, but it is a right of every human being to control the commercial use of their identity: this protects the individual's identity from being misappropriated by another for commercial use.

To establish that the use is unauthorised, the plaintiff must show four conditions: (1) the defendant's use of the plaintiff's image [or the above-mentioned other personal aspects (name, voice, likeness, signature, photos)]; (2) the appropriation of the plaintiff's image for the defendant's commercial advantage (3) the lack of consent; and (4) resulting damage/injury/loss. If the conditions are met, the appropriate remedy for the breach of the image right (exploitative use) is to claim moral remedy, injunction and damages.

According to the NCC, a person who is enriched at the expense of another without just cause must, to the extent of their enrichment, make restitution to the impoverished person.[26] The NCC expressively states that if there is an infringement of personal values, the plaintiff may recover twice the value of the plaintiff's profits usual in these circumstances (a similar legal basis as in copyright law).[27]

VI International Liability

The New Act on International Private Law, Act. No. 91/2012 Coll.[28] deals with the applicable law and jurisdiction (forum). This Act stipulates, in relations with a cross-border element, the law of which state shall govern private-law relations, including the application of other laws than the designated applicable law and legal status of foreigners and foreign legal entities in a private law relationship.

In respect of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, the law of the state to be followed is the one in which the violation occurred. Nevertheless, the affected (injured) person may choose the law of the state in which

a) the affected person has their habitual residence or company offices registered office),
b) the perpetrator has their habitual residence or company offices, or
c) the result of the conduct in violation appeared, if the perpetrator could predict it.[29]

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[26] S 2991 NCC.
[27] The explanatory memorandum of NCC, 586.
[28] In force since 1.1.2014 as a part of new civil legislation.
[29] S 101 PLC.

The Czech adaptation is fully compliant with the ECJ case law. According to *Olivier Martinez v MGN*[30] 'In the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the presiding court.'

VII Conclusion

The New Civil Code follows the established case law in respect of the protection of personal rights and is in compliance with the binding treaties and European Court of Human Right case law. While it has strengthened protection and sanctions for infringements, it did not fully use the chance to provide modern and comprehensive legislation.

However, much more significant change has been made in the Civil Procedure Code due to the amendment to provide new accompanying legislation for the NCC. From 1.1.2014 the court of first instance in cases dealing with the protection of personal rights are the lower courts instead of the regional courts, which are now the Courts of Appeal. The substantial change has brought many side-effects, not predicted by the New Civil Code. First, the judges dealing with personal rights protection cases are no longer specialised; second, the case law from the lower courts is not publicly available and therefore we might be missing unification, which is always very important with new codes.

[30] Joined cases C-509/9 *eDate Advertising GmbH v X* [2009] and C-161/10 *Olivier and Robert Martinez v MGN Limited* [2011].

Gábor Faludi*

Trade Secrets in the New Civil Code of Hungary

I Introduction – Summary of the Changes

The new Hungarian Civil Code[1] does not devote too much room to the provisions that create a connection between civil law and the intellectual property codes.[2] Altogether, only one section deals directly with the connection between intellectual property (IP) and the NHCC.

However, the topic still deserves a presentation, since significant change has occurred in the theoretical approach to this connection. It may have an impact on jurisprudence and legal education. Paradoxically, practising lawyers will not be affected too much by the changes.[3] The provision in question reads as follows:

'§ 2:55 NHCC [Subsidiary application]

This Act shall be applicable to subject-matters falling within the scope of this Act that are not covered by the acts on copyright and industrial property rights.'

In addition to this general rule connecting IP law and civil law,[4] a number of provisions have to be mentioned that have an effect on IP protection and, in particular, on IP contracts.

First, there is the subject-matter of this presentation, the modified rules on trade secret and know-how in § 2:47 NHCC, which determine know-how protection - correctly - as a subtype of the protection of a trade secret. This approach – which conforms with Article 39 (2) of the TRIPS Agreement[5] – replaces the traditional approach used by the former Hungarian Civil Code

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1 *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 the Civil Code, or NHCC).

2 It is not worth citing all the copyright and industrial property codes. It is sufficient to say that Hungary provides, in special acts, for all protected subject-matters that are listed in the relevant global copyright and industrial property conventions and treaties.

3 E. g. a miscellaneous intellectual creation that does not fall within the scope of the protection afforded by the copyright and industrial property codes ceases to be a protected subject-matter.

4 See. Gabor Faludi, *Intellectual property in the new Civil Code of Hungary. Edited version of the presentation held at the seminar titled "The New Civil Codes in Hungary and Romania I"* on 24 May 2013, Cluj-Napoca (Kolozsvár, Klausenburg).

5 Annex 1C titled 'Trade-Related Aspects of Intellectual Property Rights' attached to the 'Agreement Establishing the World Trade Organization,' <http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement> accessed 25. October 2014 is the first international instrument to define and protect trade secrets including know-how against

(Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC), which regarded know-how as a type of intellectual creation and provided for an exclusive right, without any exceptions and limitations, to prohibit all unlicensed exploitations of the know-how.

The rules of § 6:175 and § 6:176 of the NHCC, as general rules of breach of contract, provide for the title warranty and non-conformity liability that are also applicable with regard to the transfer (assignment) of economic IP rights, while § 6:178 provides for title warranty and contractual liability that are suitable to cover the remedies for defective performance of copyright, trademark, commercial name and other industrial property licensing agreements.

A provision in § 6:331 paragraph (2) of the NHCC on the definition of the lease agreement unfortunately expands the scope of rules of property leases to the temporary use of rights in consideration for a fee. The application of this rule to IP licensing agreements is dubious, since the subject-matter of the IP licensing agreements is never the use of the IP right holder's economic rights, but rather the usage/exploitation of the protected subject-matter (protected work in copyright licensing agreements, patented or patent-pending inventions in patent licensing agreements, registered or to-be registered signs in trademark licensing agreements, and trade names in trade name licensing agreements).

II Importance of Trade Secret Law - the Economic Rationale of the Protection

1 The Draft Trade Secret Directive

Proof of the importance of this topic at the moment is that the attention of the European legislator has been turned to the harmonisation of trade secret (undisclosed business information) protection, which will also include know-how. Since the Hungarian legislator just finished reconsidering the framework of the legal protection of know-how under the umbrella of trade secret protection in the NHCC, it is worth mentioning that a new instrument is in preparation and envisaging whether a review of the new Hungarian approach will be necessary.

The Trade Secret EU Directive on some aspects of the protection of trade secrets is looming. It will be put on the agenda of the EU Parliament, since the member states seem to have reached a consensus over the draft[6] and also the European Economic and Social Committee

the unlawful (unlicensed) acquisition, disclosure, publication or exploitation if committed as an unfair commercial behaviour (hereafter: TRIPS Agreement). The TRIPS Agreement is promulgated in Hungary by *1998. évi IX. törvény az Általános Vám- és Kereskedelmi Egyezmény (GATT) keretében kialakított, a Kereskedelmi Világszervezetet létrehozó Marrakesh-i Egyezmény és mellékleteinek kihirdetéséről* [Act IX of 1998 on the promulgation of the Marrakesh Treaty and its Annexes formed in the framework of the General Treaty on Trade and Tariffs (GATT) to establish the World Trade Organization].

[6] See the press release. http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/intm/142780.pdf.

supported the instrument with some remarks.[7] The first opinions on the draft have been published.[8]The Trade Secret Draft Directive will not provide for a complete legal framework. It will focus on the civil law protection against unlawful acquisition, use and disclosure of and the preservation of trade secrets during court and administrative procedures.

Although this paper – due to time constraints – cannot cover the draft directive in its entirety, one element should nevertheless be highlighted. The instrument plans to introduce 'internal' exceptions to the protection. Such exceptions will include, for example, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers' representatives to information, the acquisition or disclosure of a trade secret in the context of statutory audits performed in accordance with Union or national law, and the legitimate exercise of the freedom of expression and information.[9] The preamble (10b) of the last available version of the Draft Trade Secret Directive[10] reads as follows:

> Media often make public data or information considered to be a trade secret by another party but the publication of which could be of public interest. As a result, it is important that measures and remedies provided for should not restrict the exercise of the freedom of expression and information (which encompasses media freedom and pluralism as reflected in Article 11 of the Charter of Fundamental Rights of the European Union) whenever legitimate.

In our view, it is a serious mistake to include the free speech exception into the directive and may lead to the frustration of the exploitation of valuable know-how and, thereby, of investments. Offended former contractual partners and employees who have various disputes with the holder of the right to the know-how may wish 'simply' to criticise the technological solution embedded in the know-how in public and thereby influence the dispute resolution. This exception already exists at the appropriate constitutional level in the various national laws and in the consolidated version of the Treaty on European Union (Art 6), as referred to by the above-cited preamble. Instead of directing the evaluation of the conflicting fundamental rights against each other (right to property against the right to free speech) before various constitutional fora on a case by case basis, the exception simply excludes the exercise of a legal right and puts the

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[7] Commission's Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure' (the Trade Secret Draft Directive).
COM (2013) 0813 final – procedure number: COD (2013) 0402, the last available version: 26 May 2014, (9870/14) Inter-institutional File: 2013/0402, details on the procedure http://eur-lex.europa.eu/procedure/EN/1041456 #documentView, accessed 25, October 2014, details on the opinion of the European Economic and Social Council http://eescopinions.eesc.europa.eu/eescopiniondocument.aspx?language=en&docnr=8066&year=2013 accessed 25, October 2014.

[8] See, for example. Stellungnahme des Max-Planck-Instituts für Innovation und Wettbewerb zum Vorschlag der Europäischen Kommission für eine Richtlinie über den Schutz vertraulichen Know-hows und vertraulicher Geschäftsinformationen (Geschäftsgeheimnisse) vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung vom 28.11.2013, COM (2013) 813 final. <http://www.ip.mpg.de/files/pdf3/Stellungnahme-Geschaeftsgeheimnisse_2014-05-12_final_7.pdf> accessed 25, October 2014.

[9] Art 4 para (2) item *a)* of the Trade Secret Draft Directive.

[10] Council of the European Union, Brussels 19, May, 2014, 9870/14, Interinstitutional file: 2013/0402 (COD), PI 67, CODEC 1295.

holder of the trade secret into a seriously prejudiced position. Furthermore, the weighing of the conflicting fundamental rights is ensured without any special references to them in the relevant special legislation, both on European and on national levels. The European framework of copyright law, for example, does not include special references to certain 'external' fundamental rights that can come into conflict with the legal rights afforded to the copyright owner. Still, the CJEU can pass decisions in all sensitive matters that involve the conflict of the various fundamental rights, and weigh the relevant rights against each other.[11]

We can envisage that, if the Draft Trade Secret Directive is adopted, the Hungarian law which rules for trade secret protection on an excellent abstract level – both in the substantive and procedural law – will need an amendment to go into the detailed exceptions. It will not do any good for the clarity and applicability of the provisions, nor will the seriously disturbing impact of the incorporation of constitutional fundamental rights into the special substantive law.

2 Trade Secret as an Object for Protection

The trade secret is an enigmatic object of legal protection. It is a type of extremely intangible asset, since the object of protection is not homogeneous. It may range from simple data, facts, or factual information included in business concepts, business cases or plans regarding undisclosed technology know-how that in addition may stand alone or be inseparably connected to a patented product or process. The protection is free from any formalities. It comes into existence as of the creation of the undisclosed information on condition that the information can be regarded as secret and it is kept confidential.

Even to find a textbook definition is not easy: trade secret is all information that pertains to economic (for profit or not for profit) activity that is kept (that one attempts to keep) secret. The economic value of the information can either be added to the definition or it can be claimed that this value stems from the confidentiality of the information that is already included in the definition via the obligation to maintain secrecy. Trade secrets go hand in hand with all types of business, no matter whether the business is the training people to sing, the organisation of a game, the concept for a mobile application or the manufacture of human medicine. One can say that there is no for- profit and on the whole no non-profit business without trade secrets.

[11] See for example. Case C-479/*04 Laserdisken ApS v Kulturministeriet* [2005] OJ C 31, 05.02.2005., Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, [2006] OJ C 212., 2.9.2006., Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs* SCRL (SABAM) [2010] OJ C 113, 1.5.2010. Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* [2012] OJ C 303, 6.10.2012. The EUCJ interprets the applicable copyright directives in the light of the conflicting property right and right to a legal remedy of the right owners on the one hand with the right of free speech, the right to privacy and the right to conduct business on the other hand on the grounds of weighing the relevant fundamental rights without having such right incorporated into the applicable copyright directives.

3 The Economic Rationale of Protection in the Light of the Draft Trade Secret Directive

The EU Commission (being true to its name) commissioned a study on the economic rationale of trade secret protection.[12]

The protection of a trade secret is significant and justified from an economic perspective, states the study. Trade secret policy influences innovation and business performance in a number of aspects. Without such effective protection, undertakings are unable to ensure the returns from innovative activity, in particular from R&D agreements that frequently do not produce results that can be protected by the traditional registered forms of protection. The most important economic benefit of such protection is that it offers incentives to exploit new innovations that qualify as trade secrets in conjunction with the necessary measures taken to keep the information secret. Without protection, such information would be buried.

Legal protection may contribute to the reimbursement of costs incurred by firms to protect undisclosed information from unlawful disclosure and exploitation. The protection is beneficial in labour relations as well. Without the appropriate contractual arrangements to ensure that former employees keep trade secrets in consideration for a fair compensation, underwritten by appropriate contractual securities (e.g. penalties), the risks of disclosure and exploitation of trade secrets by third parties employing the former employee or by the former employee in their own undertaking would be higher. It is stated and supported by surveys that effective and harmonised trade secret protection may effectively fill the gap between copyright and patent protection, the two traditional pillars of intellectual property.[13]

The EU expects from the harmonisation that 'the EU would qualify as a safe harbour for firms to develop, exchange and use innovative knowledge. This would result in a competitive advantage for the EU economic system at large in its global challenge with aggressively competing areas'.[14]

III International Instruments – the Paris Convention

The legal protection of trade secrets is deeply rooted in the Paris Convention.[15] Under Article 10 bis: 'Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition'. This general rule is supplemented in paragraph (3) with an exemplificative list of acts, such as

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[12] Study on Trade Secrets and Confidential Business Information in the Internal Market Final Study April 2013. Prepared for the European Commission Contract number: MARKT/2011/128/D <http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf> accessed on 25 October 2014.

[13] Ibid 16.

[14] Ibid 15.

[15] *Paris Convention for the Protection of Industrial Property of March 20, 1883*, as revised at Brussels on December 14 1900, at Washington on June 2 1911, at The Hague on November 6 1925, at London on June 2 1934, at Lisbon on October 31 1958, and at Stockholm on July 1, 1967, and as amended on September 28 1979 (The Paris Convention). <http://www.wipo.int/treaties/en/text.jsp?file_id=288514> accessed on 26 October 2014, promulgated by *1970. évi*

'(i) acts (…) to create confusion with the establishment, the goods, or the industrial or commercial activities of a competitor;

(ii) false allegations (…) to discredit the establishment, the goods, or the industrial or commercial activities of a competitor;

(iii) indications or allegations (…) to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.'

As one can see, the disclosure of trade secrets is not mentioned among the examples. However, the list is not only exemplificative but provides for a minimum only.[16] Since such unlawful disclosure, publication and exploitation of trade secrets may in the first place jeopardise the competitors' business, it is obvious that the various national laws, while transposing the Paris Convention into their legal systems, included the protection of business (trade) secrets into their laws on unfair competition.[17] The example of Hungary can be mentioned.

IV Protection of Trade Secrets in the Competition Acts of Hungary

The first act on unfair competition was Act 5 of 1923.[18] § 15 of this Act provided that the disclosure or unauthorised use of trade or company secrets is prohibited. Similar but more detailed provisions could be found in the subsequent unfair competition legislation, such as § 5 and 6 of Act IV of 1984[19] and § 5 and 6 of Act LXXXVI of 1990.[20] The provisions of the law in effect[21] will be described in detail below.

In 1923 Hungary had no written Civil Code. Furthermore, the 1923 Unfair Competition Act did not define what a trade secret is. The courts had to cope with this problem.[22] The act merely explained in brackets what a company secret is. Such a secret could relate to a process, or to

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18. törvényerejű rendelet az ipari tulajdon oltalmára létesült uniós egyezmények 1967. július 14-én Stockholmban felülvizsgált, illetve létrehozott szövegének kihirdetéséről (Law-decree 18 of 1970 on the promulgation of the text of conventions to protect industrial property as revised and enacted in Stockholm on 14 July 1967).

16 Prof. G.H.C. Bodenhousen, *Guide to the Application of the Paris Convention for the protection of industrial property as revised at Stockholm in 1967,* reprint 2007, 145. <http://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf> accessed on 26.10. 2014.

17 There is no room in this presentation to deal with the issue of the various approaches to unfair competition law and the reason why a number of legal systems do not have special legislation on the behaviours that amount to unfair competition.

18 *1923. évi V. törvénycikk a tisztességtelen versenyről* (Act 5 of 1923 on unfair competition).

19 *1984. évi IV. törvény a tisztességtelen gazdasági tevékenység tilalmáról* (Act IV of 1984 on the prohibition of the unfair conduct of business).

20 *1990. évi LXXXVI. törvény a tisztességtelen piaci magatartás tilalmáról* (Act LXXXVI of 1990 on the prohibition of the unfair conduct of business).

21 § 4 of *1996. évi LVII törvény a tisztességtelen piaci magatartás és versenykorlátozás tilalmáról* (Act LVII of 1996 on the prohibition of the unfair conduct of business and the limitation of competition) (hereafter the Competition Act).

22 See for example. Meszlény Artúr (ed), *A tisztességtelen versenyről szóló törvény (1923. évi v. törvénycikk) magyarázata* (Athenaeum irodalmi és nyomdai részvénytársulat 1923, Budapest), György Ernő, *A gazdasági verseny jogi kérdései* (Közgazdasági és Jogi Könyvkiadó 1976, Budapest).

manufacturing. We can say that the factual information was regarded as a trade secret and the technological information was a company secret. Furthermore, the act gave examples of dishonest acts that were prohibited between competitors, beyond the general prohibition of disclosure and exploitation of protected objects.

The subsequent statutes on the prohibition of unfair competition included a definition of a trade secret, which showed a considerable improvement as time went on. First, from 1984 until 1990, a trade secret was merely 'any solution or data that pertained to any business, if the holder of that information had an equitable interest to keep them confidential.'[23] Under Act LXXXVI of 1990, the definition was broadened. The object of a trade secret was supplemented with facts, and information.[24] The same definition was used by the 1996 Unfair Competition Act with a further supplement.[25] This advanced term already also included the obligation of the holder of the confidential information to take the necessary measures to keep it confidential. This broad definition embraced all the necessary elements: the "trade secret shall be any fact, information, solution or data that pertains to any business, if the holder of that information has an equitable interest to and takes the necessary steps to keep them confidential.'[26] This term remained part of the competition law until 2003, when the legislator relocated the definition into the FHCC, which was replaced by the NHCC as of March 15 2014.

The relocation of the definition into the FHCC had nothing to do with the TRIPS Agreement that will be dealt with in the next chapter. It was not justified[27] with any economic or theoretical reasoning. It referred to the transparency of the use of public funds, the amendment of the relevant act on the protection of personal data and the publicity of public data and also introduced an exception to the legal protection of trade secret with regards to information pertaining to the use of any public funds that had to be published. The exception did not cover technology know-how.[28] In conjunction with the relocation, the term was refined, but we omit the analysis of this version. It is not worth discussing here, since this paper will go into the details of the definition used by the NHCC in a separate chapter.

The relocation of the term involved an unobvious, hidden change in the approach to the protection of a trade secret. The legislator found a new place for the term, namely immediately after the provision on the protection of private confidential information and private correspondence, in the Chapter on the protection of personality rights. The objects of privacy protection were supplemented with a reference to the trade secret: 'that person who infringes upon the privacy of correspondence; furthermore, that person who comes into the possession of private or trade secrets, and unlawfully makes them public or abuses them in any other way,

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[23] § 5 para (2) of *1984. évi IV. törvény a tisztességtelen gazdasági tevékenység tilalmáról* (Act IV of 1984 on the prohibition of the unfair conduction of business).

[24] § 5 para (3) of *1990. évi LXXXVI. törvény a tisztességtelen piaci magatartás tilalmáról* (Act LXXXVI of 1990 on the prohibition of the unfair conduction of business).

[25] S 4 para (3) item *a)* of the Competition Act.

[26] Ibid.

[27] Justification (Explanatory memorandum) to Act XXIV of 2003, the reasoning of §. 16 *Complex electronic legal database, subdatabase: explanatory memoranda to acts* accessed on DVD on 27. October 2014.

[28] § 81 para (3) and (4) of the FHCC.

shall be deemed to infringe personality rights.'[29] By this supplement, the approach to trade secret protection has broadened. It has gone beyond the boundaries of competition law. A trade secret has become an object of personality rights. At first sight this solution may seem strange, but it is true that a number of trade secret infringements have no connection to competition.[30]

While the term of the trade secret has been moved from competition law into civil law, the legal protection under competition law has remained as it was – with an important change in the system of sanctions.

The protection under the competition rules can be invoked against any unfair acquisition, disclosure or making public or use of the trade secret. The Competition Act offers an exemplificative list of behaviours that qualify as unfair acquisitions. This is unlicensed/unlawful acquisition by breach of confidence (employee, member or stakeholder) or breach of contract/business partnership. The system of sanctions under the Competition Act offers the entire menu of sanctions as introduced by the implementation of the IP Enforcement Directive.[31] Hungary specifically opted for the extended transposition of the directive.

It is worth highlighting the sui generis unjust enrichment claim that serves for the recovery of profit or, in the event of a loss, a license analogy claim and the claim to provide information on the chain of commerce about the 'infringing' product/service. Such a claim serves as a logical precondition for an unjust enrichment or compensation for damages claim.[32]

The last mentioned claim – namely the provision of information on the business connections regarding the infringement – is missing from the NHCC. Therefore, if the trade secret infringement is committed among competitors or at least among market players, it is advisable to rely on a lawsuit based on the Competition Act.

V The Protection of Know-how under the FHCC

Before the TRIPS Agreement introduced the general term of undisclosed information (see the next chapter), it was not so obvious how know-how should be protected. In Hungary, know-how was regarded from 1978 as a category of intellectual creation. The FHCC devoted a subchapter to the protection of intellectual creations within the chapter on the protection of personality rights.[33]

The law afforded protection against all unlicensed exploitations. The sanctions of infringement embraced a claim to profit sharing, and, on a subsidiary basis, were applicable to the violation

[29] § 81 para (1) of the FHCC .

[30] If a former, dismissed employee wishes to take revenge for their dismissal and discloses a trade secret of his/her former employer to the press, or makes it public on the internet without any intent to sell it to anybody or to use it in business, such an act is not committed by a competitor or with the purpose of gaining a competition advantage. It may have an impact on the position of the former employer in the competition, but the act is closer to a pure infringement of personality rights rather than to an act of unfair competition.

[31] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. [2004] OJ L157/45.

[32] S 86 para (2) items *e)* and *g),* para (3) item *a)* of the Competition Act.

[33] S 86, 87 of the FHCC.

of personality rights in the event of infringement (e.g. injunction). The jurisprudence showed interest in particular in the preparatory phase of the NHCC.[34]

VI International Instruments – the TRIPS Agreement

The TRIPS Agreement – although its subject matter is intellectual property and it thereby reinforces the Paris Convention – uses the umbrella of the establishment of the WTO to supplement it. This is clear from Article 39 (1), which reads: 'In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967)'. It invents the term 'undisclosed information', which can embrace any type of information from pure facts to technological know-how. Undisclosed information is secret. This secrecy is not an absolute notion, but rather a relative one: the information is secret, 'if it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.'[35] In other words: the circle of persons should be that of professionals who work with the type of information that is subject to protection. The commercial value of the information is the consequence of the secrecy. A piece of information which is in the public domain or readily accessible to professionals has no commercial value. It is cheaper to get access to such information than it is to pay a license fee for its exploitation or to pay a purchase price for its assignment. Due to the relative secrecy, it is expected from the person who has control over the information to take reasonable steps under the circumstances to keep it secret. This element is part of the adjective 'undisclosed'.

The protection of such information can be claimed by both legal and natural persons. Such protection is a limited exclusive (preventive) right that protects the holder of the information against unlicensed disclosure, acquisition or use of the information by any third parties in conditions where such acts are committed in way that is contrary to honest (fair) commercial practices. Furthermore, a footnote[36] offers examples, such as breach of contract, breach of confidence and inducement to breach, and the acquisition by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.[37] To date

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[34] See, for example, BacherVilmos, 'A szellemi tulajdon jogi védelme és a Ptk' (2000) 3 Polgári Jogi Kodifikáció 23–32., Bobrovszky Jenő, 'Rejtélyek és fortélyok' (2006) 4 Polgári Jogi Kodifikáció 22–38., Boytha György, 'A szellemi alkotások joga és az új Ptk.' (2000) 2 Polgári Jogi Kodifikáció 46–56., (2000) 3 Polgári Jogi Kodifikáció 13–23., Ficsor Mihály Zoltán, 'A szellemi tulajdon és a Ptk' (2001) 2 Polgári Jogi Kodifikáció 27–30., Faludi Gábor, 'Megjegyzések az új Ptk. tervezet know-how-ra vonatkozó szabályaihoz.' (2006) 5 Polgári Jogi Kodifikáció 27–32., Görög Márta, *A know-how jogi védelmének alapvető kérdései* (HVG-ORAC Budapest, 2012).

[35] Article 39 para (2) (a) of the TRIPS Agreement.

[36] N 10 to Article 39 para (2) of the TRIPS Agreement.

[37] See Article 39 paras (1) and (2) of the TRIPS Agreement, as well as 'Implications of the TRIPS Agreement on Treaties administered by WIPO, WIPO PUBLICATION No 464' http://www.wipo.int/export/sites/www/freepublication/en/intproperty/464/wipo_pub_464.pdf; furthermore http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_03_e.htm#article39 both websites accessed 27 October 2014.

there is no available jurisprudence or decision of a competent WTO body on the protection of undisclosed information.

Under Article 1 paragraph (1) of the TRIPS Agreement, Member States are free to select the method of implementation[38] and may – but shall not be obliged to – implement more extensive protection. Due to the national treatment, however, such higher level protection will be afforded to all legal subjects of other WTO member states. [39]

This authorisation opens the room for various approaches to trade secret protection.

Under the TRIPS Agreement, the term 'undisclosed information' comprises trade secrets and know-how, but other systemisations are also in harmony with the international instrument.

VII The Hungarian Implementation –Trade Secret and Know-how in Civil Law

The basis for the Hungarian implementation is that the fundamental protection is to be accorded in the NHCC. Trade secrets can be regarded as a subcategory of private secrets, i.e. the most general protection may further be afforded within the legal framework of the protection of personality rights in the NHCC. Know-how – called protected knowledge in the NHCC – can be construed as a subcategory of trade secrets. As a result, the Hungarian legislation does not use the term 'undisclosed information' and does not subsume trade secrets and know-how under this definition. Instead, it follows the logic of the protection of personality rights from the general protection of all personality rights, no matter whether they are listed in the NHCC or not, via the most frequent named personality rights, such as the right to privacy (private secret) to the protection of the trade secrets and, within the category of trade secrets, as far as to the protection of know-how (protected knowledge).

The general legal framework of protection does not exclude the protection of trade secrets under the Competition Act. Moreover, it is clear that protection in relation to market players is afforded by the Competition Act.

The Patent Act[40] also contains relevant provisions. The employer as patent holder is obliged to pay compensation to inventors of service inventions, even in the event of the exploitation of the patentable service invention as technology know-how. The employer is free to handle the invention as a trade secret, and not to file a patent application or to withdraw such an application, but may not avoid the payment of compensation in the event of exploitation.[41]

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[38] 'Members, therefore, are free to determine how best to meet their obligations under the TRIPS Agreement within the context of their own legal systems.' Para 57 of the Appellate Body decision passed in the India – Patents (US) case, cited at Interpretation and Application of Article 1 item 7. http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_03_e.htm#article39 accessed 27 October 2014.

[39] Article 1 par (3) of the TRIPS Agreement.

[40] *1995. évi XXXIII. törvény a találmányok szabadalmi oltalmáról* [(Act XXXIII of 1995 on the patent protection of inventions (The Patent Act)].

[41] S 13 para (1) item *c)* of the Patent Act.

In addition, industrial property contract law refers also to know-how. Patent licensing agreements do not automatically include a licence to use any know-how pertaining to the invention. In other words, only a separate, express licence may authorise the patent licensee to use any know-how pertaining to the patent if held by the patent holder.[42]

Finally, a short reference should be made to the block exemption granted to technology transfer agreements, which covers know-how licensing agreements as well.[43]

The Hungarian law also provides for the relationship between public data and trade secrets, in the way that trade secret protection may not be invoked if government or EU budgetary sources are used and the audit (the control over the use of sources) or the transparency of such uses require the disclosure of the data.[44] The provision allows for an exception for know-how, but the exception cannot be used if the public data may not be made known without the disclosure of the know-how. In certain cases, this unclear solution may lead to the total devaluation of know-how.

VIII Comparisons – Conclusion

In the NHCC, the Hungarian legislator adapted the legal protection of trade secret and that of know-how to the TRIPS Agreement. It is useful to compare the civil law protection of a trade secret and know-how from more aspects to learn how the adaption succeeded. Below comes a general comparison between the solutions of the FHCC and the NHCC. A list of the identical and the different features of the legal protection of the factual trade secrets and of know-how then follows, bearing in mind that the latter constitutes a subcategory of the former.

In our view, the adaptation can be called a success. The freedom of implementation renders it possible to constitute a legal protection in the NHCC by not using the term undisclosed information and by subsuming know-how under the term of trade secret within the chapter on personality rights.

This solution meets the TRIPS requirements since the infringement of personality rights can be sanctioned beyond the ordinary cease and resist sanctions with the recovery of unjust enrichment, compensation of damages and, last but not least, *solatium doloris.*[45]

The previous protection went too far. Know-how enjoyed an unlimited exclusive (preventive) protection that was afforded to all nationals of all WTO member states, while the Hungarian right holders could not enjoy reciprocal protection. This absolute right therefore had to be narrowed to remedies against unfair/dishonest acts. Unfairness, in terms of the TRIPS agreement,

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[42] S 28 para (5) of the Patent Act.

[43] *86/1999. (VI. 11.) Korm. rendelet a technológia-átadási megállapodások egyes csoportjainak a versenykorlátozás tilalma alól történő mentesítéséről* (Government Regulation 86/1999 on the exemption of certain groups of technology transfer agreements from the prohibition to restrict competition).

[44] S 27 para (3) of the *2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról* (Act CXII of 2011 on the right to autonomy of and the freedom of information).

[45] S 2:51. para (1) item *e)* (unjust enrichment), s 2:52. *(solatium doloris),* s 2:53.(compensation of damages) NHCC.

is however not a principle set out in the NHCC. Unfairness therefore had to be 'translated' into *Treu und Glauben* (bona fide and fair behaviour), which is a leading principle of the NHCC.

Chart 1

1. General comparison between the legal solutions of the FHCC and those of the NHCC	
FHCC	NHCC
A trade secret is a subcategory of private secrets – the protection of personality rights applies.	A trade secret is a subcategory of private secrets – the protection of personality rights applies. The term of the trade secret is adapted to the TRIPS Agreement.
Know-how is a subcategory of intellectual creations. The protection is provided for in a special subchapter of the chapter on the protection of personality rights	Know-how, now called protected knowledge, is a subcategory of trade secret.
Know-how protection is afforded against all unlicensed exploitations	Know-how is protected against unfair acts only; 'unfair' is an act that violates the principle of the NHCC of bona fide and fair behaviour.
In the event of know-how infringement, there is a special claim to profit sharing and subsidiary application of the sanctions for the violation of personality rights	Both trade secrets and know-how are protected by the system of sanctions of personality rights, which also includes an unjust enrichment claim.
2. Identical elements of the definition of factual trade secrets and of know-how (protected knowledge) in the NHCC	
Factual trade secrets	Know-how (protected knowledge)
Substantial information or a set of information pertaining to the economic activity of a person that is not public or not readily accessible for 'professionals' which is kept secret under the general principle of attributable (reasonable) behaviour	Technological, economic or organisational knowledge or a set of knowledge, if it meets the requirements of trade secret
3. Different elements in the protection of factual secrets and protected knowledge	
Factual trade secret	Protected knowledge
Protection against all unlicensed acquisition, disclosure, making public or use (exploitation)	Protection against unlicensed acquisition, disclosure, making public or use (exploitation), if the act is committed in violation of the *Treu und Glauben* principle (≈dishonest/unfair commercial practice in the TRIPS Agreement)
Exception: bona fide acquisition by third parties for consideration	Exceptions: – Independent development of know-how – Reverse engineering of the product or service incorporating the know-how Bona fide acquisition by third parties for consideration.

The protection of know-how had to be weakened by the exceptions that followed from the approach of the TRIPS Agreement (independent elaboration, reverse engineering, bona fide acquisition for consideration).

The protection of factual trade secrets should have been at first sight weakened by the same exceptions. However, the reverse engineering and independent elaboration – in view of the

Hungarian legislator – may not in practice occur with regards to simple facts that are kept confidential. As such, the only exception that weakens the legal protection of factual trade secrets is the bona fide acquisition for consideration. At this point, the Hungarian legal protection exceeds the level of protection of the TRIPS agreement. This is not a violation. The practice will show whether this element of protection will need correction or not. In a few years from now, when the EU Trade Secret Directive will be implemented – on condition that the draft will be adopted – the legislator will again have to deal with the protection of trade secrets.

Orsolya Szeibert*

Solidarity and Maintenance Obligations in the Family – Old and New Elements in the New Hungarian Civil Code

I Principle of Solidarity

Solidarity is a principle which governs several regulations in the field of family law as is self evident. *Family members are* normally *expected to support each other* according to the new Hungarian Civil Code,[1] namely Act No. V. 2013 (NHCC), as they were expected to do so in the frames of the Family Act, as well. The Fourth Book of NHCC gives detailed rules on family law which was regulated in an independent Act, the Family Act, namely Act No. IV 1952 on marriage, family and guardianship before the NHCC.

Family members' solidarity may be interpreted both *vertically and horizontally.* Vertical family relationships are generally those between relatives in a direct lineal way, namely parents and children, grandparents and grandchildren. Horizontality occurs between partners, whether spouses or partners outside marriage. There are two legitimate partnerships without marriage in the Hungarian law, cohabitation and registered partnership.

The paper examines solidarity in vertical and horizontal family relationships and briefly provides a rather wider aspect to the whole issue. As solidarity exists or is presumed to be exist as a moral intention and not only as a legal obligation, this paper is intended to give a snapshot of the demographic background both from the European and Hungarian viewpoint. The aim of the introduction and analysis of maintenance regulations in the NHCC is to point out the close connection between the maintenance rules in the NHCC and those in the Family Act while emphasising some new elements. The main types of family law maintenance are considered as maintenance between relatives, former spouses and child maintenance, including the maintenance of a grown-up child who pursues further studies. Finally, one issue with regard to the Principles of European Family Law is mentioned. Although this contribution is limited to very few other-than-law aspects, the issue of family maintenance is an *interdisciplinary* one as, for

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[1] *2013. évi V. törvény a Polgári Törvénykönyvről,* (Act V of 2013 on Civil Code, NHCC).

example, labour force participation, the state management of invalided and/or aged persons, gender issues and the wealth of several layers of society are to be evaluated when dealing with maintenance obligations of family members from a legal viewpoint.

II Solidarity in Vertical and Horizontal Family Relationships

1 Solidarity in Verticality

Concerning solidarity in vertical family relationships, the *maintenance of children* has to be emphasised. Although the *Convention on the Rights of the Child 1989* does not deal with maintenance obligations as a civil law or family law obligation, this international document (while being the most important such convention on children's rights) contains several articles which reinforce the parents' and the families' responsibility along with the state's responsibility for child maintenance. According to Article 3(1), in all actions concerning children the *best interest of the child* shall be of primary consideration. States have to undertake to ensure the child receives the protection which is necessary for their well-being, taking the rights and duties of their parents, legal guardians, or other individuals legally responsible for them into account and, besides, take all appropriate legislative and administrative measures, as it states in Article 3(2). The *parents have joint responsibility* for the upbringing and development of the child according to Article 18(1) and, in the background of this common responsibility, there is the *obligation of the state* to ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, etc. as per Article 3(3). It is to be emphasised that both partners have responsibility towards their child and it does not mean only their joint parental responsibilities but also their joint maintenance obligation. The state is also an obligor behind the parents; it is better to state that their maintenance obligations exist beside each other. It is only to be mentioned that, in several situations, the responsibility of the state comes to the foreground e.g. in the case of a child being deprived temporarily or permanently of their family environment which leads to the alternative care of the state or in the event of the amounts of maintenance being totally unenforceable.

2 Solidarity in Horizontality

Concerning partnerships, solidarity is connected *primarily to marriage* as society regards it as the most prestigious institution among the forms of partnership. Spouses are responsible for each other, even if marriages do not by all means last until the death of either spouse. This mutual responsibility may precede the principle of self-sufficiency after divorce and win over self-sufficiency as shown also by the NHCC, according to which the responsibility may remain even after divorce in form of maintenance of one's former spouse.

Although marriage creates a homogenous category, this homogeneity has been questioned across Europe because of the very high rate of *divorce.* The consequence of that has been drawn

also in the NHCC. If the spouses' community of life lasted less than one year and they are without a common child, maintenance may in principle be demanded for as long as their community of life.[2]

While spouses' right to maintenance after divorce is unquestioned, the issue whether cohabitants should be responsible for each other in a legally supported, normative way is really a controversial one. Regarding the other *non-marital partnership,* registered partnership, the registered partners' maintenance obligation is analogous to that of spouses according to Act XXIX of 2009, which has been in force for more than five years now.

III Solidarity upon Moral Intention vs. Normative Rules on Maintenance

Although solidarity is expected by legal rules primarily in the form of maintenance, family members *generally support* one another without referring to an exact rule. In many families, maintaining each other exists as a moral obligation without their awareness of the concrete legal rules. Sometimes the performance of maintenance obligations is based upon the concerned parties' agreement, e.g. the spouses or former spouses may agree on maintenance or parents may agree on child maintenance. As maintenance is often performed without any legal pressure, it is important to study how solidarity as a social attitude or *attitude of family members* functions in societies.

Intergenerational bonds are rather strong in Europe nowadays too, according to some European research. Intergenerational solidarity is measured by so-called 'spatial closeness' in a study which was undertaken in western societies in 2008.[3] *Spatial closeness* means the distance between adult family generations' households.

Although different generations of adult family members residing together seems to have decreased, their households are mostly in each other's neighbourhood. That result has led the researchers to a conclusion which is in favour of solidarity, namely that adult family members live within a relatively small distance, which provides the opportunity for them to support each other.

With regard to Hungarian demographic and sociological research, some results in connection with the issue of solidarity were published in the early 2000s.[4] These studies analysed social integration and family solidarity and dealt with the influence of social changes on family solidarity. In the 1980s, *family cooperation* seemed to be strong in Hungary and that continuity

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[2] NHCC, s 4:29 para 3.

[3] Bea Verschraegen, 'Intergenerational Solidarity' in Hugues Fulchiron (ed), *Les Solidarités entre generations. Solidarities between Generations* (Bruylant 2013, Bruxelles, 35–46) 35–36. Consider also Jordi Ribot, 'Refamilialisation of Care and Support: Scope and Limits of Family Solidarity in Ageing Societies' in Hugues Fulchiron (ed), *Les Solidarités entre generations. Solidarities between Generations* (Bruylant 2013, Bruxelles, 35–46).

[4] See, for example, Utasi Ágnes, 'A társadalmi integráció és szolidaritás alapjai: a bizalmas kapcsolatok' (2002) 24 Századvég 3–25.

and stability of family solidarity has remained. The overwhelming majority of people questioned during the research reported that they turned to one of their family members in case of need. It is another issue that the *circle of family members* who might be requested to provide help or support *has changed* between the 1980s and the early 2000s. While spouses were the first who were expected to provide support earlier, the stability of marriages has decreased subsequently and *child-parent relationships have become more important* with the result that parents tend to hope for solidarity and support from their child and children, especially when these are unmarried.[5]

The *increase in the number of single persons,* which could be seen and measured already in the early 2000s, has reduced the circle of those providing support for their family members.[6] According to the sociologists, the family has preserved its character as a consuming unit, in the context of which mutual everyday support still functioning but in case of real need this unit does not work particularly satisfactorily.[7]

IV Maintenance Regulation in the NHCC

Maintenance was regulated in the Family Act and is regulated now in the Fourth Book – Family Law Book – of the NHCC. There are elements which are quite familiar from the earlier family law maintenance. The amount of these elements is rather great, as *no huge change* has happened in the *concept* of maintenance regulation. There are new elements but these are coming from the new structure of maintenance regulations or mean the codification of crystallised judicial practice.

The *structural modification* is a rational one. The Family Act contained spousal maintenance and the maintenance of relatives containing child maintenance in a detailed way. The NHCC has preserved the regulation of the maintenance of relatives and also spousal maintenance but has tended to *bridge a gap* between the different maintenance forms. This connection seemed to be necessary as new forms of maintenance have been introduced, namely maintenance of former cohabitants and maintenance of grown-up children who pursue further studies. Maintenance of a grown-up child who pursues studying was not unknown in Hungary, as these claims were adjudged, but no independent legal rule was applied. The same cannot be said about maintenance of former cohabitants as this is a completely new legal institution in Hungary. According to the regulations of the new structure of family maintenance, there are *general rules* and *some special regulations.* There are special maintenance rules for spouses, former spouses, former cohabitants, children and grown-up children pursuing further studying. The general background rules on family maintenance are contained under the title of maintenance of relatives.

[5] Utasi Ágnes, 'Társadalmi integráció és családi szolidaritás' (2002) 3 Educatio 384–403, 388–389.
[6] Utasi (n 5) 391.
[7] Utasi (n 5) 398.

It has to be emphasised that, although maintenance of children is regulated in the framework of maintenance of relatives by special regulations, this kind of maintenance is the one which induces *many legal suits.* The *extreme character* of child maintenance is shown not only by the fact of being the subject of the overwhelming majority of judicial cases on maintenance but also by the fact that the child's best interests is the governing principle in this field. While there are more or less the same, or at least similar, requirements for the maintenance of partners and relatives, child maintenance is regulated in a unique way.

1 Preserved Elements Concerning Maintenance of Relatives

As NHCC mentions the maintenance of relatives[8] it is necessary to make it clear who belongs within the circle of relatives. Family law and civil law deal with different circles of people as relatives, and the circle of next of kin is to be distinguished. The NHCC specifies who belongs to the latter category. Being a relative is defined in the Family Law Book and covers a relationship which comes into being *via affiliation or adoption.* The maintenance of relatives may relate to people who are relatives via affiliation or adoption as *direct line relatives. Collateral relatives* are not obliged to support each other except in one situation, namely if the minor has no parents and only their brother or sister, who is not a minor, can maintain this child. Neither the Family Act nor the NHCC made this support obligation wider and even this obligation of the older brother or sister to maintain their minor brother or sister depends upon the fact of whether the older brother or sister is able to pay.[9]

As the minor child's right to be maintained is regulated by special rules, just as with those children who pursue their further studies, the general regulations on relatives' maintenance *primarily affect parents and grandparents and children over 18.* Concerning parents, the Family Act already contained a support obligation falling on step-parents. The definition of *step-parent* has been preserved in the NHCC. According to its attitude, a step-parent is a person whose spouse has a minor child and they live together in one household.[10] The child's parent's cohabitant cannot fill the status of step-parent as it can be only their spouse, and living together with the child is a necessary requirement as well. The step-child also has a maintenance obligation towards their step-parent according to the principle of mutuality.

a) Requirements of maintenance between relatives

The requirements of maintenance have been also preserved in the NHCC, as these *requirements* are known in the Hungarian family law regulations and judiciary for several decades. The requirements are partly on the claimant's side and partly on the debtor's side. The *lack of means,* a situation *which has been brought about through no fault of the claimant's own* and the *lack of unworthiness* have to exist on the claimant's side. The debtor has to be in a situation to *be*

[8] NHCC, s 4:194–4:222.
[9] NHCC, s 4:197.
[10] NHCC, s 4:198.

able to pay. If a family member is intended to claim for maintenance from their relative, and in this general situation this person is a parent or grandparent or an adult child, he or she has to prove the lack of means and the lack of having no fault. Unworthiness has to be proved by the debtor as like as the fact that she or he is unable to pay.

Of course, claiming for maintenance before court is the last step in the absence of an agreement. As has already been mentioned, family members often support each other without any legal agreement or legal title. Even if they make their maintenance formal, the *judicial route can be preceded by an agreement on maintenance.* Although this agreement is a contract, the Hungarian commentary literature does not use the *word 'contract'* but 'agreement', with the aim of making a sharper differentiation between a contract on maintenance regulated within the regulation on obligations and a contract in the NHCC, and an agreement between family members on their default maintenance obligations.

b) Lack of means and faultiness on the claimant's side

As family law maintenance is based upon the law and such an obligation is not created by the parties' contract, lack of means is a basic condition for being able to claim successfully for maintenance. Concerning the regulation method of the requirements of maintenance, no important change has been codified. A main feature of this method seems to be a laconic form, as the NHCC does not go into further details but only fixes *the lack of means as a basic condition.* This requirement is not a detailed one but has been *crystallised in the judiciary.* Some factors can be underlined, such as the age of the claimant, their state of health and illness. Being elderly is not a fact in itself upon which maintenance can be successfully required but being unable to work due to chronicle illness may be grounds for that and gives in general a basis for maintenance for an indefinite period of time. The claimant's *unemployment* is a debated issue as, according to some viewpoints, solidarity is a strong obligation even in that situation while others state that supporting the jobseeker is not a family member's task but that of the state. The complex character may be seen well at this point. Later on, when studying spousal maintenance, this problem will be presented in more detail as the judiciary has not dealt with the issue only in general terms.

It is a cornerstone in judicial practice that lack of means has to be assessed in an *objective way.* The requirement of lacking means which has been *brought about through no fault of the claimant's own* is a *subjective factor* in close connection with other requirements. 'No fault' is analysed on the basis of the claimant's behaviour. It is ascertained whether the claimant has exhausted all their resources, i.e. they have done everything which may be expected. The exact level of expectation, which means *social expectation,* cannot be fixed as it depends on the special circumstances of each case. If the family member requiring maintenance does everything to find a new job after their working ability has changed it may lead to a lack of their own fault.

c) Lack of unworthiness on the claimant's side

Another *rather subjective requirement* is the lack of unworthiness on the claimant's side, which has to be adjudicated in an objective way as well. In the course of taking the claimant's behaviour into consideration, a general social adjudication serves as guidance. It is mentioned consistently

in the commentary literature that unworthiness *does not mean fault* as, according to the traditional attitude to being at fault, only the behaviour of one party is to be examined. When unworthiness is dealt with, unambiguously *both parties' behaviours* are to be analysed with the aim of drawing conclusions regarding the mutual influence of both behaviours. The NHCC, in line with the rules in the Family Act, contains a direct rule concerning the unworthiness of the claimant if they are a parent. If the *parent* fulfilled their obligation to maintain and care for the child and provided for their upbringing, the child can refer to the unworthiness of the parent only in the event of the parent's *extreme misconduct* against the child.[11]

d) Ability to pay on the debtor's side and ranking of maintenance claims

Even if all requirements are fulfilled, the court cannot order maintenance if the debtor is unable to pay. The principle of *self-sufficiency* functions even if family law maintenance is regulated in a rather broad way. Although this principle is not a governing one where the claimant is a child or a child over 18 pursuing further studies, in case of adults, whether in the status of parent or (adult) child, maintenance *cannot be detrimental to the debtor's own standard of living* excepted only for child maintenance relating to minors. The court takes into consideration the debtor's ability to work, their real earning capacity and their assets. Whether the debtor is expected to use their assets to fulfil the maintenance obligation depends on the type of tangible assets.

The ability to pay is in close connection with the *ranking of maintenance claims.* The debtor can prove that another person has priority of claims for maintenance. Moral obligations are not taken into attention but a legal obligation to maintain a family member may serve as a basis for avoiding maintaining a family member who stands further down the ranking. The debtor's *minor child has ranking priority.* Adult children who are able to earn their living rank ahead of a claim of a divorced spouse or parent if they pursue further studies. The spouse and the former spouse follow the child in second place. Relatives, such as a parent or adult child who lack means follow only the partners. Nevertheless, if there is not only one adult family member lacking means and neither of them has agreed with the debtor on maintenance, the court has some *discrete power* on whether the former spouse or the parent should be the first to be supported by the debtor.

2 Preserved Elements Concerning the Maintenance of Spouses and Former Spouses

In the event of marriage, not only the spouse with whom the community of life is maintained who has to be supported but also a spouse with whom community of life has ceased but they are not divorced yet and, besides, the former spouse.[12] Spousal maintenance means *mutual obligation* in the NHCC, just as it was regulated in the Family Act. As with the maintenance of

[11] NHCC, s 4:194 para 3.

[12] NHCC, s 4:29–4:33. Consider Orsolya Szeibert, 'Family Solidarity in Partnerships: Maintenance of Former Spouses, Registered Partners and Cohabitants in Hungary according to the Effective Rules and in the new Civil Code' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing Ltd. 2010, Bristol, 179–187).

relatives, the *agreement* of the claimant and debtor plays an important role also in the field of spousal maintenance. If the spouses *divorce upon mutual consent* they have to agree on spousal maintenance as an ancillary issue. The Family Act also required an agreement on maintenance of the former spouse in the event of divorce upon mutual consent and it has not changed in the NHCC. In the course of the codification, the question emerged whether the requirement of agreeing on maintenance is really so important but later on the ancillary issues remained intact in relation to this element. Nevertheless, according to the exact text of the NHCC, the spouses have to agree on whether there is a claim for that on the side of either spouse.[13]

With regard to the requirements detailed above, the *same requirements* have to be fulfilled also with regard to a spouse's claim. As spousal maintenance cases *occur more often* before the court than maintenance of relatives, the judiciary has developed much better in this field. The requirement of lack of means, the lack of 'faultiness' and lack of unworthiness just as the debtor's ability to pay have not changed. The text of the NHCC nevertheless reflects some developments in the judiciary. This is shown by the fact that, while the phenomenon of the spouse's unworthiness was not regulated in the Family Act but only detailed in guidance for court, the content of this guidance has been lifted into the NHCC.

3 Preserved Elements Concerning Maintenance of Children and Grown-up Children Pursuing Further Studies

Child maintenance has been traditionally regulated as a unique form of supporting a family member, as the child's best interests is the governing principle in these cases. The requirements have been preserved *basically unchanged.*[14] There is a *presumption* that a child below 18 lacks means and they are the first in the maintenance ranking. A *child cannot be unworthy* of maintenance. Concerning a child over 18 who pursues further studies, the NHCC has preserved many basic elements which have been crystallised in the judiciary. The importance of the *judicial practice* is explained by the fact that this kind of maintenance had not been regulated in a detailed way at all. However, the more children who began to study after 18, the more such cases emerged before the courts.[15]A directive of the Supreme Court had to be applied and, during the codification process, the main content of the directive was lifted into the NHCC.

This adult child's maintenance is legally *'between' the maintenance of adult family members and that of minors.* The requirement of lack of means is caused not by their incapability of working but by the fact that the *child continues their training and education,* providing skills and qualifications for the child's planned career. Training covers a wide range of education, such as university studies or post-secondary vocational education. The award of a Bachelor's degree is a legitimate reason to be maintained, as parents are expected to maintain their child during this

[13] NHCC, s 4:21 para 3.

[14] NHCC, s 4:213–4:218. and s 4:219–4:222.

[15] Consider Orsolya Szeibert, 'Maintenance of studying grown up children in Hungary' in Hugues Fulchiron (ed), *Les Solidarités entre generations. Solidarities between Generations* (Bruylant 2013, Bruxelles, 527–533).

period. The award of a Master's degree can also be a proper basis for being maintained but the same cannot be said about participation in a Doctoral programme. As a former spouse cannot demand maintenance upon the fact that their Doctoral programme makes it impossible to earn money, a grown-up child cannot do the same, either.

According to the NHCC and the judiciary, under the Family Act the child has to begin his or her further studies *without any delay* after secondary school. If the child leaves out a longer period before beginning these studies the right to be maintained depends upon special circumstances and acceptable reasons. The time which can be omitted is a limited period. In general, only maintenance during the course while acquiring the *first profession* may be requested. A special further requirement on the side of the claimant is that the adult child has to be able to study. If she or he proves *to be unfit* to study, the right to maintenance may even cease. The proof of being unfit may also be prolonged studies. The child has to study as well as they can with the aim of *getting a scholarship or a reduction of the tuition fees* which increase their parents' burden.

4 New Elements in Family Maintenance

In the following, *two elements* are emphasised as brand new possibilities, namely the *maintenance of a former cohabitant* and the appearance of the so-called *clean-break principle.*

a) Maintenance of former cohabitant

Neither the former Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC) nor the Family Act contained any rule on cohabitants' maintenance obligations. The Family Act even did not deal with this kind of partnership. The FHCC contained some laconic regulations, including the definition of cohabitation. The NHCC has taken over this *definition.* So, according to the Hungarian legal attitude, cohabitants are two people, either different or same-sex persons who live together, without entering into a marriage or a registered partnership, in a common household, in an emotional fellowship and economic partnership (community of life). They cannot be related to each other in direct line and cannot be siblings or half-siblings and neither of them can live at the same time in a marital community of life, a community of life within a registered partnership or in another cohabitation with a third person.[16]

The question whether cohabitation should be introduced into the new Civil Code was *hotly debated.*[17] At last cohabitation is regulated in the NHCC, however in a *unique structure.* Cohabitation itself is a contract regulated in the Sixth Book with some so-called family law consequences, which are in the Fourth Book. These are the maintenance of the former cohabitant

[16] NHCC, 6:514 para 1.

[17] Consider Orsolya Szeibert, 'Unmarried partnership in Hungary – Today and de lege ferenda' (2006) XLVII ANNALES UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS DE ROLANDO EÖTVÖS NOMINATAE – SECTIO IURIDICA 315–339.

and the possibility of claiming for the judicial arrangement of the use of the common flat. Family law impacts are limited, with two legal consequences which are basically possible only if the partners *have lived together for at least one year and they have a common child.* With regard to the maintenance of cohabitants it means that, even if the cohabitants have lived together for many years but childless, neither of them has a right to demand maintenance.

New rules on the maintenance of cohabitants are *modelled* upon the spousal maintenance rules. The requirements are just the same, nevertheless a bit more severe than with regard to spouses with the aim of preserving the primacy of marriage.

One aspect of living in cohabitation has to be mentioned in connection with spousal maintenance. According to the Family Act, one cause of *termination of spousal maintenance* was entering into a new marriage but formally entering into cohabitation did not result in the entitlement to maintenance ceasing. The NHCC has created a non-traditional solution, as the entitlement to spousal maintenance ceases not only when entering into a marriage but also if the claimant lives in cohabitation. The same is true for cohabitants, as the entitlement to cohabitants' maintenance ceases if the claimant marries or lives in cohabitation. There is no judicial practice concerning a situation when the former spouse as debtor refers to the fact that the claimant, their former spouse, lives in cohabitation, so terminating the debtor's supporting burden. If the claimant denies this statement the proof of an upholding cohabitation will be hard.[18]

b) Clean-break principle

Another new element is the regulation of the so-called clean-break principle. According to this solution, maintenance can be performed in a *lump sum or by delivering a special asset.* Although maintenance has a character of *alimentation,* namely providing the claimant with subsistence, the newly introduced opportunity shows another trend. When paying in a lump sum, the family members as claimant and debtor are no longer connected to each other via regular payments. It seems to be positive for former spouses and cohabitants, especially if their partnership is really broken. The *court cannot order* this kind of payment ex officio so the decision on whether the parties wish a lump sum payment is up to them. However, if either former spouses or former cohabitants agree on that, this agreement has a rigid consequence, namely it is excludes the possibility of demanding maintenance later on. By contrast, when there is a periodic payment, either the claimant or the debtor may even turn to court to change the conditions of payment.

Lump-sum payment for child maintenance is regulated differently. The *parents can agree* on the measure of child maintenance and the method of payment and, if they divorce by mutual consent, they have to agree on it even if they have joint parental responsibilities after divorce. Lump-sum payment was not regulated before and the NHCC allows that, however, in a *rather strict way.* As with spousal maintenance, either a lump sum payment or the delivery of a special asset may replace regular payments. Such an agreement is only valid if the *period* for which the

[18] Consider about the judiciary concerning cohabitation in Hungary Orsolya Szeibert, 'Unmarried Partnerships in Hungary' in Katharina Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Intersentia Publishing 2005, Antwerp, 313–333).

maintenance of the child is covered by the amount of money or asset is fixed in the agreement and the *guardianship authority or court approves it.* Although the main principle is that no maintenance may be claimed later on, there is an exception in the child's best interests. Although there is a valid agreement, the court may order periodic payments of maintenance *later* if the circumstances have substantially changed in an unforeseeable way and either the child's interests or either parent's interests are seriously damaged.

The lump sum payment as the manifestation of the clean-break principle is hardly interpretable concerning *child maintenance.* While it has a rational value for former spouses and cohabitants, in that they are no longer connected with each other by regular payments, this cannot be an aim where the parents are to pay maintenance for a child to whom they remain parents and also their continuous contact with the child and the separately living parent is expected. This solution of paying maintenance does not encourage the parents or either of them to 'get rid of' the child. Nevertheless, there seems to be a demand for such a possibility in reality, especially when there is one family asset, namely an immoveable which is the family home. If this immoveable is the joint property of the spouses and one of them remains there with the child or children, they usually do not have enough other assets to buy the leaving spouse's share of the property.

5 Lump Sum Payment in the Principles of European Family Law Regarding Maintenance Between Former Spouses

The first *Principles of European Family Law, Principles regarding divorce and the maintenance obligation of former spouses* were published in 2004.[19] The Organizing Committee of the Commission on European Family Law, which is responsible for writing these principles upon wide and deep empirical research in several European legal regimes, drew the conclusion that a lump sum payment is possible in *most of the national systems* which were examined.[20]According to *Principle 2:5 (2)* about the method of maintenance provision, they established that the competent authority may order a lump sum payment upon request of either or both spouses, taking the circumstances of the case into account. The court will order, as can be read in the comment to the Principle, the lump sum payment if it is reasonable. Although at that time the examined European jurisdictions made this solution possible, the Principles have gone further as, according to them, the court should order lump sum payment not only upon the parties' common request but also upon either party's request. There seemed to be a *European trend* towards an attitude that either the claimant or the debtor might wish to terminate their connection with the other. The Hungarian attitude has not gone so far concerning the regulation of spouses' maintenance, as the NHCC provides the opportunity of a clean break only if the parties agree on that.

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[19] Katharina Boele-Woelki, Frédérique Ferrand, Cristina González Beilfuss, Maarit Jantera-Jareborg, Nigel Lowe, Dieter Martiny, Walter Pintens, *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (Intersentia 2004, Antwerp).

[20] See notes 19, 97, 99.

Hella Molnár*

The Position of the Surviving Spouse in the Hungarian Law of Succession

> 'There is no lonelier man in death, except the suicide, than that man who has lived many years with a good wife and then outlived her. If two people love each other there can be no happy end to it.'
>
> *Ernest Hemingway*

I Introduction

After a person's death, the property and debts of this person will pass to those who survive. Such passing (or transfer) of property and debts belongs to the area of property law. Traditionally, however, in succession matters the general rules of property law are supplemented by special rules concerning to whom and how a person's property passes upon their death: the law of succession.[1]

As the saying goes, the law of succession is one of the most durable parts of civil law. If this statement were true then I could not tell you anything new; I should write about the unchanged succession rules. However, in the new Hungarian Civil Code there are many important changes in this area. On March 15th 2014, the new Book Seven of the Hungarian Civil Code, containing the new law of succession, entered into force.

These rules are influenced by socio-cultural, socio-economic and sometimes also religious factors. Generally, succession law does not develop by rapid and radical changes, as for example, does contract law. This may be due to the fact that succession law does not have to respond to the more usual and more rapid changes of business and economic practices and necessities. Its roots reach deeper into the fundamental concepts of justice, morals and society.[2]

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1 Sjef van Erp, 'New Developments in Succession Law' Electronic Journal of Comparative Law, vol. 11.3 December, http://www.ejcl.org/113/article113-5.pdf 1.

2 Urve Liin, 'Laws of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading' (2001) VI Juridica International 114.

The former Hungarian Civil Code (Act IV of 1959 on the Civil Code of the Republic of Hungary, hereinafter referred to as FHCC) was enacted in the socialist era. Prior to that time there had been no private law codex in Hungary; there had been several acts in force, but it was fundamentally a case law system that had applied. The HCC was promulgated on 1st May 1960 and provided detailed rules for the private law of succession. Hungarian law is quite similar to German and Austrian law, but in the law of succession there are several rules that differ from those two systems. After 1989–1990, when the socialist system collapsed, the restrictions on private property were removed. Due to the social and economic changes, the role of the law of succession became more relevant. The range of assets that could be held by private individuals also expanded (shares in companies, intellectual property etc). Despite that, the civil law provisions on succession have remained basically unchanged; neither the provisions on intestacy nor the assets that can be inherited have changed. That part of the FHCC has been practically unchanged since its creation (i.e. since 1959). As a result, owing to the court practice of nearly fifty-five years, by now it has become a consistent and transparent area with a huge volume of case-law.[3]

The preliminary problem to be solved in succession matters is the question of how the estate of the deceased is transferred to their heirs.[4] The new Hungarian Civil Code (Act V of 2013 on the Civil Code of Hungary, hereinafter referred to as NHCC) does not change the definition of succession. The estate owned or controlled by a person at the time of decease shall pass in its entirety to the heir.[5] In Hungary there is no estate without a claimant; succession occurs automatically on the strength of law at the moment of the deceased's death.[6] The term 'universal succession' is of modern derivation, and is descriptive of the succession which occurs upon an individual's death. Universal succession means succession by an individual to the entirety of the estate, which includes all the rights and duties of the decedent.[7] The NHCC expressly states that the claim to inheritance is exempt from the statue of limitations; it is a perpetual claim to ownership.[8]

Succession can occur under the law or by testamentary disposition. If the deceased has left a testament, it determines the order of succession. If there is no testamentary disposition, the law provides for the order of succession.[9] In the NHCC, the structure of the succession law follows the logic of the legal titles of succession but this article will not. I suppose that, above

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[3] Csehi Zoltán, 'The Law of Succession in Hungary' in Miriam Anderson, Esther Arroyo i Amayuelas (ed), *The Law of Succession: Testamentary Freedom: European Perspectives* (CSIC Press 2011) 170.

[4] A brief discussion relating to terminology is inserted here to acquaint the reader with some of the vocabulary used throughout this article. The word 'heir' is generally used as descriptive of all persons who share in the estate either by testacy or intestacy.

[5] NHCC, section 7:1 [Succession] – FHCC, section 598.

[6] The fact that the succession is considered as having been passed over to the heir in its entirety on the death of the deceased person does not prevent the heir from disclaiming.

[7] George A. Pelletier Jr., Michael Roy Sonnenreich, 'A Comparative Analysis of Civil Law Succession' (1966) 11 (2) Villanova Law Review, Article 3. 324–325.

[8] Section 7:2 [Succession Claims].

[9] NHCC, section 7:3 [Titles of Succession] – FHCC, section 599 paras 1–2.

all, we need to talk about intestate succession because the testator makes a testament only if the rules of intestate succession do not live up to their expectations. At the end of this article I will spend a little time on the changes to the compulsory share rules as well.

II Intestate Succession

In the absence of a testament, the intestate succession will be transferred to the heirs, designated according to the legal principles on the devolution of succession. Basically, these principles are founded on consanguinity, with preference to descendants, excluding more distant relatives.[10] Rules of intestacy are regarded as subsidiary: they are applied only if the testator has made no testament or if the testament does not include provisions for the disposal of the whole estate.

1 The Surviving Spouse's Right to Succession

One of the main reforms concerns the position of the surviving spouse in cases of intestate succession. The need to protect the surviving spouse is a generally accepted rule. Although not a blood-relative, the spouse is recognised to have a legitimate claim towards the succession of their partner. In considering the position of the surviving spouse, one should also take into account what the surviving spouse receives through the liquidation of the marital property system.[11] Marriage in Hungarian law creates common ownership. A spouse may be considered as an owner of real property, even if he or she is not registered in the land registry, provided the property has been acquired during the marriage.

The family is no longer seen as a blood relationship, but rather as a community of life, to which the spouse belongs by nature. In considering the position of the surviving spouse, one should also take into account what the surviving spouse receives through the liquidation of the marital property system. It must generally be considered that the spouse, as a rule, is the person closest to the deceased and therefore, the protection and enhancement of the interests of the surviving spouse is fully understandable and entirely appropriate. In doing so, it is also necessary, however, to consider the perspective of surviving children and other close relatives, who likewise have an interest in having the inheritance estate remain in the family. Accordingly, several conflicting interests and perspectives converge in this question, and reaching a resolution fair to all parties is not an easy task.[12]

The surviving spouse's right to succession is fashioned in a number of different ways. First, there are countries where the spouse is limited to the rights of usufruct over the fruits and revenues of the succession. If there are descendants, in Belgium the spouse receives usufruct of

[10] Alain-Laurent Verbeke, Yves-Henri Leleu, 'Harmonization of the Law of Succession in Europe' in Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud H. Hondius, Chantal Mak, C. Edgar du Perron (eds), *Towards a European Civil Code, Fourth Revised and Expanded Edition* (Kluwer Law International BV 2011, The Netherlands) 459.

[11] Verbeke, Leleu (n 10) 466.

[12] Liin (n 2) 119.

the entire estate, while in France, since the Act 2 December 2001, the surviving spouse can choose between such usufruct over the entire estate or a share in full ownership of one quarter of the succession.[13] In several countries, e.g., in Germany, Austria, Denmark, Sweden, Italy, Portugal and Greece, the surviving spouse invariably receives a share of the succession in full ownership. The size of this share varies according to the number of other heirs. In England and Wales, the surviving spouse receives the personal chattels and an amount of money, smaller or larger according to the number of other heirs. In the US Uniform Probate Code the entire succession is awarded to the surviving spouse if there are common descendants or blood relatives other than parents.[14]

An interesting intestate system has been introduced in the Netherlands by the Acts of 3 June 1999 and 18 April 2002, which came into force as of 1 January 2003. All assets and debts are awarded by virtue of law to the surviving spouse, leaving the children with a claim towards that spouse, to be paid in principle upon the death of that spouse. In the Netherlands, the rules of intestate succession were seen as giving inadequate protection to the rights of the surviving spouse. This led to a situation where, in a large number of cases, the surviving spouse was given as complete a right to the deceased's estate as possible by deviating from these intestate rules under a last will. The changes in Dutch succession law were in part aimed at creating a law of intestate succession that was in accordance with the existing legal practice, thus obviating the need to make a last will.[15] The new code is in accordance with the tendencies in the rest of Europe, where the strong position of the surviving spouse to the detriment of the position of the children of the deceased, the equality of all children whether born inside or outside a marriage, the reduction of the rights of the forced heirs away from a substantive share in goods to a less substantive share in value, and the protection of the rights of a surviving partner who was not married or registered to the deceased can also be seen.[16]

2 The General Order of Intestate Succession under the FHCC

The general order of intestate succession under the FHCC was as follows.[17] The child of the deceased was the priority heir under intestate succession.[18] Two or more children succeeded in equal shares. In the place of a child or a more distant descendant disinherited from succession,

[13] Brackets note: In the original version of the Code Civil, the surviving spouse hardly had any rights to succession – they only inherited when there were no relatives up to the twelfth degree.

[14] Verbeke, Leleu (n 10) 466.

[15] B. E. Reinhartz, 'Recent Changes in the Law of Succession in the Netherlands: On the Road towards a European Law of Succession?' Electronic Journal of Comparative Law, vol. 11.1 (May 2007) 1. http://www.ejcl.org/111/article111-17.pdf.

[16] B. E. Reinhartz (n 15) 15.

[17] The hierarchy of the legal heirs is very strict: a person who is 'lower' in the order can only be regarded as a legal heir if all persons standing higher in the hierarchy disqualify. At each level, the estate is divided equally between those entitled.

[18] The NHCC states that all persons have legal capacity (the ability to have rights and obligations) from the day of conception. Even an embryo has the ability to inherit property if the child is born alive. Minors have no legal

the children of a disinherited person succeeded in equal shares.[19] The spouse inherited only the usufruct of the estate, which is called the right of survivorship (widow's right).[20] Only the descendants may have requested restricting (limiting) the usufruct at any time; however, it can only be limited to the extent of securing the needs of the spouse, with a view to the items of property inherited by them as well as their own property and the gains of their occupation. Both the spouse and the heirs may have requested the redemption of the usufruct. No redemption may have been requested with regard to the usufruct of the apartment shared with the deceased with its furniture and equipment. The spouse was entitled to a share of the redeemed property equalling – in kind or money – the share they would inherit intestate as the deceased's child, together with the other descendants. Redemption may have been requested during the probate procedure, or in the absence of it, no later than one year upon opening succession at the notary public otherwise having jurisdiction to conduct the probate procedure.[21] In the absence of any descendant, the spouse or the registered partner inherited the estate.[22] Act XXIX of 2009 on Registered Partnership and the Modification of Rules in connection with Registered Partnership and the Facilitation of Cohabitation allows same-sex couples to register their relationships so they can claim the same rights, benefits and entitlements as opposite-sex couples. These changes to the law of succession have given registered partners of the same sex the same legal status as spouses.

From that point, the FHCC utilises the system called Parentelen (statutory heirs), under which blood relatives are grouped into classes corresponding to their relationship to common ancestors.[23] The first Parentelen consists of the parents of the deceased and their descendants; the second, the grandparents of the deceased and their descendents, and the third is an incomplete Parentelen. In the absence of any descendant, a spouse or a registered partner and both parents of the deceased inherit the estate in equal shares. The descendants of a disinherited parent replace the parent in the order of succession in the same manner as the descendants of a disinherited child replace that child. If the disinherited parent has no children, the other parent or their descendants are the sole heir(s).[24] If there are no descendants, spouse or registered partner, parents, or descendants of parents; the grandparents of the deceased and their descendants become the legal heirs.[25] If neither the grandparents of the deceased nor their descendants

competency (if less than 18 years of age) or limited legal competency (if 14 years of age or more) and need the legal assistance of a guardian (e.g. one of their parents or another relative) in all legal issues of importance, including succession.

19 FHCC, section 607 paras 1–3.

20 FHCC, section 615 para 1.

21 FHCC, section 616. Courts in Hungary normally do not process succession proceedings. The probate procedure belongs to the scope of activities of the Notary Public in whose territory of competence the last residence of the deceased person was found. If no legal disputes concerning the inheritance arise and no relevant questions remain unanswered, the Notary Public closes the procedure with a decision that hands the inheritance over to the heirs.

22 FHCC, section 607, para 4.

23 Pelletier Jr., Sonnenreich (n 7) 336.

24 FHCC, section 608.

25 FHCC, section 609.

are eligible for inheritance, more distant ancestors of the deceased become legal heirs in equal shares.[26] In the absence of any other heir, the estate will be obtained by the state.[27]

3 The General Order of Intestate Succession under the NHCC

As one can see, contrary to many other European legal systems, a Hungarian spouse does not inherit property from the deceased if the descendants are still alive. The spouse only inherits property as a legal heir in the absence of descendants. The existence of only one child of the deceased, regardless of whether from the present or a previous marriage, or born out of wedlock, leaves the spouse with 'empty hands'. The FHCC solves this problem by declaring that the spouse inherits usufruct in all property not otherwise inherited by the spouse. This legal right is created automatically for the benefit of the deceased's spouse, and provides an unlimited right to use the property. This may create difficult legal situations, e.g. the children of the deceased inherit property which is of no value to them because of restrictions arising from the usufruct of the spouse.

According to the NHCC, the child of the deceased is the priority heir under intestate succession only if the deceased has no surviving spouse or registered partner.[28] Act XXIX of 2009 on Registered Partnership invariably states that the rules for the widow of the deceased shall apply to registered partners.[29] On the other hand, the law still does not apply to the succession of non-registered partnerships, in which case the partner cannot therefore inherit.

If the deceased has a surviving spouse or a registered partner, we have to divide the estate into two parts. The heirs of the apartment shared with the deceased and of the furniture and equipment used in common are the children of the deceased, and the spouse inherits only the usufruct of it. From the rest of the estate, the spouse is entitled to the share they would inherit intestate as the deceased's child, together with the other descendants.[30] So, if the deceased has two children, the spouse is entitled to usufruct on the apartment shared with the deceased (on its furniture and equipment) and the ownership of one third of the rest of the estate. However, under an allocation agreement[31], instead of a child share, the spouse may be granted usufruct in respect of the entire estate.[32] If the spouse of the deceased has the right of survivorship on a property as an heir, such property will be released after the right of survivorship is terminated.[33]

The matrimonial home and its contents are used by the entire family, though they undoubtedly have particular importance to the surviving spouse as a major asset that may largely

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[26] FHCC, section 610.

[27] FHCC, section 599 para 3.

[28] NHCC, section 7:55 [Succession by descendants] para 1.

[29] See section 3 para 1, item *c).*

[30] NHCC, section 7:58 [Spouse's share from the estate contemporaneously with a descendant] para 1.

[31] Heirs are entitled to share the estate – pertaining to succession property exclusively – by agreement concluded within the framework of probate proceedings. In the case of an allocation agreement the estate shall be delivered under the title of succession according to the agreement. See NHCC, section 7:93 [Allocation agreement].

[32] NHCC, section 7:58 [Spouse's share from the estate contemporaneously with a descendant] para 3.

[33] NHCC, section 7:88 [Delivery of specific property from the estate encumbered by right of survivorship].

determine their standard of living in widowhood. Thus, to the extent that the application of succession law and the preferences it provides to the surviving spouse help to ensure the perpetuation of the same living conditions as those that existed prior to the death of the intestate spouse, they provide stability and security; not only in the financial sense, but also spiritually and emotionally. Average life expectancy has increased substantially, which has also meant that, in most instances, the death of the intestate occurs when their children are largely middle-aged and financially secure with their own homes and families. As such, surviving children are not likely to depend on the matrimonial home and contents for their own habitation, which will, however, continue to be of vital importance to the surviving spouse.[34]

If a spouse or registered partner remarries or enters into another registered partnership, their usufruct will not cease to exist.[35] The usufruct cannot be limited and only the spouse has the right of redemption at any time for future consideration. Redemption of usufruct shall be carried out in due consideration of the spouse's and the descendant's reasonable interests. It is unchanged that the spouse is entitled to a share of the redeemed property equalling the share they would inherit intestate as the deceased's child, together with the other descendants.[36]

In the absence of any descendant, the spouse or the registered partner inherits the estate only if the deceased has no surviving parents.[37] If the deceased has parents, we have to divide the estate into two parts. The heir of the apartment shared with the deceased and of the furniture and equipment used in common is the spouse with no beneficiary ownership by the parents. The spouse inherits half of the rest and the other half goes to the parents. If one of the parents is disinherited, the other parent and the spouse take the disinherited parent's place.[38] So, for example, if the father of the deceased is deprived of his inheritance, the spouse inherits the apartment shared by the deceased (with its furniture and equipment) and five eighths of the rest (half plus one eighth) and the mother of the deceased inherits three eighths of it (one quarter plus one eighth).

It is unchanged that the spouse of the deceased is not entitled to inherit if they were separated at the time of the opening of the succession and it is manifestly evident from the circumstances that there was no reasonable expectation of reconciliation. Disinheritance of the deceased's spouse can only be alleged by a person who, as the result of the disqualification of the spouse, would themself inherit or would be exempted from an obligation or other burden to which they are bound by virtue of the testamentary disposition.[39]

In the absence of any descendant, spouse or registered partner, the heirs are the parents of the deceased and their descendants.[40] If there are no descendants, spouse or registered partner,

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[34] Liin (n 2) 121.

[35] On the other hand, the FHCC put an end to usufruct if a spouse or registered partner remarried or entered into another registered partnership. FHCC, section 615 para 2.

[36] NHCC, section 7:59 [Spouse's right to redemption].

[37] NHCC, section 7:61 [Spouse as the sole heir].

[38] NHCC, section 7:60 [Spouse's share from the estate over parent].

[39] NHCC, section 7:62 [Spouse's debarment from intestate succession] – FHCC, section 601 paras 1, 3.

[40] NHCC, section 7:63 [Succession by parent and parent's descendant].

parents, or descendants of parents; the grandparents of the deceased and their descendants become the legal heirs.[41] However, the NHCC introduces one more Parental with the great-grandparents of the deceased and their descendants. According to the new rules, if neither the grandparents of the deceased nor their descendants are eligible for inheritance, not the more distant ancestors of the deceased become legal heirs in equal shares but before them the great-grandparents of the deceased and their descendants.[42] It was a great need in practice to expand inheritance by collateral heirs.

4 Lineal Succession

The NHCC does not abolish lineal succession, which substantially means that certain properties are returned to the deceased's family if the deceased leaves no children or descendants, instead of going to the spouse. This is a special form of succession, originally made to replace feudal restrictions to the principle of the freedom of inheritance. Linear succession ensures that any assets belonging to the family of the deceased are returned to their family and not to another person, particularly the spouse of the deceased. Assets falling under the rules of linear inheritance are an independent sub-category of the estate.

If the legal heir is not a descendant of the deceased,[43] a property that has come down to the deceased from an ancestor by inheritance or by donation is subject to lineal inheritance. Property inherited or donated from a brother or sister or his or her descendant is also subject to lineal inheritance if the property had been inherited or donated by the brother or sister or their descendant from their and the deceased's common ancestor. Whosoever would inherit under the title of lineal succession shall prove the lineal nature of the property.[44]

A parent shall succeed to property that has come down to the deceased from them or one of their ancestors. Descendants of a disinherited parent shall succeed in his or her place according to the general provisions on intestate succession. If there is neither a parent who is entitled to succeed to a lineal property nor a parental descendant, the grandparent, and if there is no grandparent, a more distant ancestor of the deceased shall inherit the property that has come down to the deceased from them or one of their ancestors.[45] The spouse inherits the usufruct of the linear property and, after redemption, the spouse receives one third of it. The usufruct cannot be limited and both the spouse and the lineal heir have the right to request the redemption of usufruct at any time for future considerations with one exception: redemption from the spouse

[41] NHCC, section 7:64 [Succession by grandparent and grandparent's descendant].

[42] NHCC, section 7:65 [Succession by great-grandparent and great-grandparent's descendant]. According to section 7:66 [Succession by distant relatives] if there are no great-grandparents and descendants of great-grandparents, or if they are excluded from succession, the distant relatives of the decedent shall become legal heirs in equal shares. In the absence of legal heirs the estate shall revert to the State. NHCC, section 7:74 [Succession by the State of necessity] para 1.

[43] The total absence or disinheritance of descendants who could be regarded as legal heirs (particularly children, grandchildren, and great-grandchildren) is the first criteria necessary to qualify for linear succession.

[44] NHCC, section 7:67 [Lineal property] – FHCC, section 611.

[45] NHCC, section 7:68 [Lineal heirs] paras 1–2. – FHCC, section 612 paras 1–2.

relating to usufruct on the apartment used together with the deceased, including its furniture and equipment, may not be requested.[46] Redemption of the usufruct shall be carried out in due consideration of the reasonable interests of the holder of usufruct and the heir to the property.[47] If there is no lineal heir, lineal property shall be treated the same as the deceased's other property.[48] Lineal property shall be inherited in kind. If succession in kind appears to be impossible or impractical, the court may – at the request of either of the parties affected – order payment of the monetary value of the lineal property.[49]

Under the FHCC, provisions relating to lineal succession cannot be applied to lineal property that no longer exists at the time of the decedent's death, or to property that replaced lineal property, or to property purchased for the value of lineal property.[50] The judicial practice exceeded this rule and allowed lineal inheritance when the donation was money in order to buy something, for example a house. The practice said that the real donation was the house; the donor just simplified the transaction.[51] However, it should be remembered that the donor could not have bought the house because of the restrictions on obtaining property in the era of socialism. After lifting the controls the reason for this practice ended but it still exists. The NHCC incorporates into law that a property that has replaced lineal property or was purchased for the value of the lineal property can be the subject of the lineal inheritance.[52] I think this rule will result in many evidence problems.

III Testate Succession

In Hungarian law, the types of testament are the last will, contract of inheritance (contract of succession) and testamentary gift[53] *(donatio mortis causa).* The minimal requirements for a testament are proof that: the declaration was made by the testator and contains their testament

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[46] Under the FHCC no inheritance, under the title of lineal succession, may be claimed with regard to furniture and equipment of the apartment used in common from the surviving spouse after fifteen years of marriage. Section 613 para 3.

[47] NHCC, section 7:69 [Spouse's usufruct on lineal property] – FHCC, section 615 para 1 and section 616 para 4.

[48] NHCC, section 7:68 [Lineal heirs] para 3. – FHCC, Section 612 para 3.

[49] NHCC, section 7:71 [Lineal estate] – FHCC, section 614.

[50] FHCC, section 613 para 1. Gifts of common value are also exempt from these provisions. Substitution or compensation for the value of lineal property that does not exist at the time of the deceased's death (e.g. property that was transferred, consumed, or has perished) is not affected according to paragraph 2.

[51] PK No. 81, item *a).*

[52] NHCC, section 7:70 [Property excluded from lineal succession]. The provisions on lineal succession shall not apply to gifts of ordinary value. The provisions on lineal succession shall not apply to any property that no longer exists at the time of the testator's death, however, they shall apply to any substitute property or a property purchased from the proceeds received for such property. No claim can be filed, on the grounds of lineal succession, for furnishings and/or household accessories of common value against the deceased's spouse.

[53] Testamentary gift is a special testament. If a gift has been given under the condition that the donee outlives the donor, the regulations governing gifts shall apply to the contract, with the exception that the formal requirements to be applied shall be the same as those for contract of inheritance. A testamentary gift shall be deemed valid only for a bequest that would qualify as a specific legacy in a will. NHCC, Section 7:53 [Testamentary gift].

(i.e. a testament cannot be made by an agent) and it contains a declaration that makes it obvious the testament has the character of a 'real' testament. A declaration lacking one of these two characteristics is not regarded as a testament and is treated by law as a 'non-existing testament'. The notary public who is in charge of the procedure is obliged to verify ex officio the existence of the minimal requirements.[54]

1 Formal Requirements

In Europe, four types of will may be distinguished: the holographic, the witnessed, the closed and international will and the public or notarial will. The holographic will must be written and signed personally by the testator. This type of will exists in most European countries, although the formal requirements are not as strictly applied in all of them. It does not exist in the Netherlands and Portugal, where the intervention of a notary is always required. Such a will is also unknown in Common Law jurisdictions, e.g. England and Ireland. Typical for these Common Law jurisdictions is the witnessed will. It may be written personally, but also typed or even written by a third person. Essential here is the simultaneous presence of witnesses at the moment of signing the will, their confirmation of this signature and their signing of the will. A similar type of will is known in Austria and Denmark. The closed will, written or typed by the testator or a third party and signed by the testator, must be put in a closed envelope and presented to a notary and several witnesses. Such a will is known in the Netherlands, France, Denmark, Italy, Spain, Portugal and Greece. Some of these countries also recognize the international will created by the Treaty of Washington of 26 October 1973.[55] Other countries, such as Belgium, have replaced the closed will with this international will. A public will in most countries is drafted by a notary but signed personally by the testator. In Austria, a public will can also be made by a judge. Under Belgian and French law, the will must be dictated by the testator to the notary. In other countries, such as Germany and Austria, delivery of a document confirmed by the testator to be their will, is sufficient. Generally, the presence of witnesses is required.[56]

The basic form of will in Hungarian law is the written will. Oral wills are only regarded as valid if they were made under life-threatening conditions and the lack of an ability to write.[57] According to the FHCC, written wills can be divided into public wills (made with the aid of a notary public or before a court),[58] private wills (are made in three different forms: holographic wills, allographic wills and wills deposited at a notary public). A private will can only be written in a language that the testator can understand, read and write, not exclusively in Hungarian.[59] Non-standard forms of writing (e.g. shorthand, cryptography, Cyrillic or Arabic characters) are

[54] Vékás Lajos, *Öröklési jog (Law of Succession)* (Eötvös József Könyvkiadó 2013, Budapest) 39.

[55] The 1973 Treaty of Washington regarding international wills is a very valuable attempt to unify one aspect in the area of succession law.

[56] Verbeke, Leleu (n 10) 467.

[57] FHCC, section 634 – NHCC, section 7:20 [Exceptional nature of oral wills].

[58] FHCC, section 625 para 1.

[59] FHCC, section 627.

not valid, even if the person using them is capable of writing and reading such characters.[60] The document must be identified as a last will, specify the date of creation and the place where it was made, and include the signature of the testator. If composed of more than one sheet, every sheet (not page) has to be numbered and signed by the testator and witnesses. A holographic will is hand-written and signed by the testator. An allographic will is valid if signed by the testator in the presence of two witnesses or, if previously signed, the signature is declared to be his or her own before two witnesses. The witnesses´ knowledge of the contents of the will and their awareness that the testator has drafted a will are not conditions for the validity of the will. A will is regarded as invalid if a witness cannot verify the testator's identity, or if the testator is a minor or legally incompetent or illiterate. Private wills do not have to be written by the hand of the testator; however, the testator must sign the will and may deposit it personally with a notary public, either as an open document or a sealed document, specifically marked as a will.[61]

According to the new rules, a public will must be drafted with the cooperation of a notary public and cannot be taken before a court.[62] The formal requirements for a valid last will are simplified in the NHCC, in order to give more weight to substance (the deceased's intent) than to form (validity rules). For example, the NHCC does not require the testator to indicate on the last will the place where it has been made. It is all the same that the testator writes a last will on a fascinating mountain-top or get bored with their life reading my article. In order to the last not cannot happen to you, let's take look at the most important changes in testate succession related to spouses.

2 Joint Wills

A last will made in any form by two or more persons within the same deed is invalid in order to prevent abuses.[63] However, under the NHCC, spouses can make joint wills at the time of their coexistence if they meet several formal requirements. A written joint testament is valid if one testator writes it with their own hand from the beginning to the end, and signs it; and the other testator declares with their hand in the same deed that the document includes also their testament. If the testament consists of several separate sheets, it is valid only if all of its sheets are numbered in a continuous order and all sheets are signed by the other testator as well. A joint testament written by another person is valid if both testators sign it in the joint presence of two witnesses, or – if it had been signed by them before – acknowledge in the presence of two witnesses the signatures as their own signature. A testament written by another person consisting of several separate sheets is only valid if all of its sheets are numbered in a continuous order, and all sheets are signed by the testators and by both witnesses. The joint will is also valid if it is a public will drafted before a notary public.[64]

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60 FHCC, section 628 para 3.
61 FHCC, sections 629–630.
62 NHCC, section 7:14 [Notarial will] para 1.
63 NHCC, section 7:23 [Joint will] para 1. – FHCC, section 644.
64 NHCC, section 7:23 [Joint will] paras 2–3.

The joint will is inoperative if they live in legal separation after the time of making the will and they do not reconcile the marriage before opening succession. The joint will become inoperative if, after making the will, both or one of them has a baby (including adoption), except if there is other provision in the contract.[65] In some countries (for example, in France) joint wills are not permitted due to the belief that there is a difficulty in revoking such wills.[66] In Germany spouses are permitted to execute joint wills, and frequently do so. Any revocation during the lifetime of both spouses requires a publicly certified declaration addressed to the other spouse. After the death of one spouse, the surviving spouse can only affect a revocation by first renouncing all rights under the will of the deceased spouse. About this problem, our new codex says that the unilateral revocation (withdrawal) is invalid if the testament excludes it or it happens without the other testator's notification. The valid unilateral revocation (withdrawal) makes the other testator testament inoperative only if neither of them would have made the testament without the other.[67] It is remarkable that our legislator treats spouses as they were one soul in two bodies, but needless to say that unfortunately most of the time it is not true to life, so I am afraid that joint wills will be breeding grounds for abuses.

3 Reversionary Succession

Another important change is connected with reversionary (substitute) succession. Any testamentary disposition according to which the original heir is replaced by another heir with regard to the estate or a part of that from a given date or in the case a certain event would happen is invalid. However, in the event of the death of the heir named as the primary heir, an heir enters as an alternate heir if the conditions thereof have been satisfied.[68] In the FHCC, the rules are completed here but the NHCC rules are continued. The appointment of a reversionary heir, naming an heir for the case of the decease of the spouse, is valid and does not affect the spouse's contingent right of disposition and their right of donation no more than the gift of common value. The appointment of a reversionary heir is also lawful in cases of *substitutio pupillaris* (for a child who has no testamentary capacity at the time of the descent and distribution and dies without getting it).[69]

4 A Last Will Made For The Benefit of a Spouse before Separation

There is a new section in the Hungarian Civil Code about revocation of a last will made for the benefit of a spouse or domestic partner. In the FHCC, it was reason for disqualification but only for spouses and registered partners. A decedent's spouse or registered partner was not entitled to inherit by virtue of a last will dated prior to their separation if they were already separated at

[65] NHCC, section 7:43 [Annulment and revocation of joint wills] paras 1–2.
[66] Pelletier Jr., Sonnenreich (n 7) 348.
[67] NHCC, section 7:43 [Annulment and revocation of joint wills] paras 3–4.
[68] FHCC, section 645 para 1. – NHCC, Section 7:28 [Reversionary heir] paras 1–2.
[69] NHCC, section 7:28 [Reversionary heir] paras 3–4.

the time of descent and distribution, unless the circumstances suggest that the decedent had not revoked their testamentary disposition because they had intended to bequeath a disposition to his spouse or registered partner regardless of their separation. If the spouses or registered partners were separated at the time of descent and distribution, disinheritance of the deceased's spouse or registered partner could only be alleged by a person who, as the result of the disqualification of the spouse or registered partner, would themself inherit or would be exempted from an obligation or other burden to which they are bound by virtue of the testamentary disposition.[70]

According to the NHCC, a last will made for the benefit of the spouse or domestic partner during the period of matrimonial relationship or cohabitation is inoperative if the marriage or partnership no longer exists at the time of opening the succession, and it is manifestly evident from the circumstances that there was no reasonable expectation of reconciliation and that the testator did not wish to leave any property to their spouse or domestic partner.[71] The reason for this change is simply dogmatically that it has no practical influence.

5 Contract of Inheritance

After discussing the joint will and reversionary succession, let's see another type of testament – the contract of inheritance.

According to the FHCC, in a contract of inheritance the deceased undertakes to make the other contracting party their heir against receiving maintenance or life annuity.[72] The obligation to provide maintenance includes general care, medical treatment, nursing, and burial.[73] Life annuity is a specific sum of money or a specific quantity of agricultural produce periodically.[74] In an inheritance contract, the testator may also make other testamentary disposition; the other party has no such right.[75] That's why its formal requirements follow those of a last will with two exceptions. The provisions on private wills shall be applied regarding the validity of contracts of inheritance, with the exception that the consent of the legal representative and the approval of the guardian shall be required for the validity of a contract of inheritance made by a person of limited capacity and, furthermore, that the formal requirements of wills written by other persons shall apply to contracts of inheritance, even if they are drafted in the handwriting of one of the parties.[76] This contract has a fiduciary nature and continuous service must be provided; it must be concluded for a long term. If the provider pays a life annuity then the fiduciary, personal relationship is not that important.[77] The contract of inheritance

[70] FHCC, section 601 paras 2–3.
[71] NHCC, section 7:46 [Annulment of a will made for the benefit of a spouse or domestic partner].
[72] FHCC, section 655 para 1.
[73] FHCC, section 586 para 3.
[74] FHCC, section 591 para 1.
[75] FHCC, section 655 para 2.
[76] FHCC, section 656. – NHCC, section 7:49 [Validity of a contract of inheritance].
[77] BH 1996. 534. – Legf. Bír. Pfv. V. 22.148/1995. sz., BH 2000. 105. – Legf. Bír. Pfv. III. 20.539/1995. sz.

concluded by spouses as deceased with a third person is considered valid, even if it is drafted in the same deed.[78] The deceased may not dispose *inter vivos* or *mortis causa* over their property that has been made the subject of a contract of inheritance. With regard to real estate subject to a contract of inheritance, restraint on alienation and encumbrance must be recorded in the land registry for the benefit of the party who has concluded the contract with the deceased.[79] The prohibition on alienation and encumbrance is based on the law (on the FHCC provisions). Once it has been recorded in the land registry, the acquisition of the contractual heir is guaranteed with the effect of property rights. In exceptional cases, the courts acknowledge that the testator may make another last will, if they have already started the procedure or lawsuit with the purpose of ceasing or terminating the contract of inheritance.[80]

The definition of a contact of inheritance is much wider in NHCC. The contract can be concluded for a third person's (for example for spouse's) maintenance, life annuity or just for care. If the contracting party's obligation is a third person's maintenance, life annuity or care, after the deceased's death, the real estate subject to a contract or right of support must be recorded in the land registry for the benefit of the third person.[81] The contract of inheritance concluded by spouses as deceased with a third person is considered valid, even if it is drafted in the same deed. If there is no other contractual provision, the surviving spouse inherits usufruct on the flat shared with their wife or her husband with its furniture and equipment.[82] The contracting parties can exclude a restraint on alienation and encumbrance.[83]

IV Compulsory Share

And now a few words about the changes of compulsory share. Only a few, because I am prejudiced, being a great opponent of this legal institution and if I had been the legislator I would have cancelled it. The original function of the compulsory share can no longer be justified; its function of supporting the young generation with establishing an independent life has become obsolete by now, owing to the increase in life expectancy.

Compulsory share has existed in Hungarian law since 1852. The Hungarian rules upheld this institution, which was adopted from the Austrian ABGB. The compulsory share has become an integral part of the Hungarian private law culture; this cultural tradition practically survived the modifications of the Civil Code and it remains unaffected by re-codification.[84] The reason is that

[78] Section 73 of the Decree-Act No. 11 of 1960.
[79] FHCC, section 657 para 1.
[80] BH 1994. 80. – Legf Bír. Pfv. II. 20 791/1993. sz.
[81] NHCC, section 7:48 [Contract of inheritance] paras 1–2.
[82] NHCC, section 7:51 [Contract of inheritance concluded by spouses].
[83] NHCC, section 7:50 [Transfer of estate] para 1.
[84] The elimination of compulsory share has been raised in the Hungarian legal literature, see Besenyei Lajos, 'De lege ferenda gondolatok az öröklési jog köréből. *[De lege ferenda Reflections on the Law of Succession]*' (2008) LIII Acta Universitatis Szegediensis de Attila József Nominatae, 33–43.

the basis of society is the family and not the single individual. The basis of social coexistence is not the unrestricted and unconditional free will of the individual but rather the written and unwritten rules of social life. This situation of social coexistence is manifested in the compulsory share.[85] One should distinguish between the Anglo-American legal systems, where the freedom of will has traditionally been unlimited, and to a large extent still is.[86] As opposed to that, the civil law countries defend the notion of forced share, thereby stating that the estate does not exclusively belong to the deceased but at least partially also to their family, who may not be deprived of the entire estate.[87]

The institution of compulsory share reflects the attachment of the estate to the family; certain persons who were the closest to the testator are entitled to the minimum share to be taken primarily from the estate. The deceased's descendants, spouse, registered partner and the deceased's parents are entitled to a compulsory share if, at the time of the opening of succession, they are an intestate heir of the deceased or they would be an heir in the absence of testamentary disposition.[88] Under the FHCC, the descendants and the parents are entitled to a compulsory share equalling half of the share they would receive as an intestate heir – calculated according to the basis of the compulsory share.[89] The basis for the calculation of a compulsory share is the net value of the estate plus any donations granted by the testator during their lifetime at the time of their donation. However, if the net value of a donation at the time it is made is unjust to any person concerned, the court is entitled to determine the value of the donation in the light of the circumstances.[90] If the spouse would be entitled to usufruct as intestate heir, their compulsory share is the limited extent of the usufruct covering their needs, with account to the items of property inherited by them as well as their own property and the results of their work. The spouse would otherwise be entitled to a compulsory share equalling half of their share as an intestate heir.[91]

The extent of the compulsory share is changing in the NHCC. Those entitled to a compulsory share receive a compulsory share equalling one third of the share they would receive as intestate heir – calculated according to the basis of the compulsory share. If the spouse would be entitled to usufruct as intestate heir, their compulsory share is the limited extent of the usufruct covering their needs, with regard to the items of property inherited by them. The spouse who is entitled

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[85] Csehi (n 3) 177.

[86] In the Anglo-American jurisdictions, freedom of a will is not restricted, but those persons whom the deceased was bound legally or morally to support during their lifetime may claim a right of maintenance from the estate. The courts are given a discretionary power to award a so-called family provision.

[87] Verbeke, Leleu (n 10) 468.

[88] FHCC, section 661. – NHCC, section 7:75 [Compulsory heirs]. In Europe there is a tendency towards reducing the class of heirs entitled to a forced share. Descendants are invariably recognised as being entitled to a forced share. Often also the surviving spouse is protected through a reserved right. Forced share rights for ascendants have been limited or abandoned. Reserved rights for brothers and sisters are very rare and seem to have been increasingly excluded. Verbeke, Leleu (n 10) 468.

[89] FHCC, section 665 para 1.

[90] FHCC, section 666 paras 1–2.

[91] FHCC, section 665 para 2.

to usufruct as a legal heir is entitled to lay claim to his or her compulsory share as if his or her usufruct had been redeemed.[92]

It would only be proper to ask what the reason for this reduction is. I do not know what to say to you, because it was not a prepared and conscious modification, just a political one and every competent person was very surprised.[93]

Compulsory share is not a claim to inheritance: its term of limitation is five years.[94] The right to a compulsory share does not amount to succession, even if it is linked to the testator's death. It is, in fact, a claim under the law of obligations, which those entitled to the compulsory share must enforce. It must be filed at the probate proceedings and enforced against the obligors. Belgian law still applies, with few exceptions, the traditional Napoleonic forced share property right upon the assets of the succession. The German 'Pflichtteil' represents only a claim in money for the protected heir; he or she has no property rights upon the assets of the succession. Under the new Dutch legislation, since 2003, the protected heir is reduced to a creditor of the succession. In France, the entitlement of a protected heir to the assets of the succession was limited to the relationship towards third parties. In the internal relationship between heirs, the forced share right has been reduced since 1971 to a right in value. Under the new French legislation in force since 2007[95] the forced share right has been reduced to a right in value in all cases.[96]

V Conclusion

Although the law of succession is generally considered rather fixed and static, especially as compared to contract law or even family law, the last fifty years have seen many important changes in this body of law.[97] The social problem to be solved by the law of succession is the issue of transferring property after death, and how and to whom. Even considering all of Europe as part of the modern Western capitalist world, the social problem involved is of a morally and culturally more delicate nature than contract law. Perhaps the law of succession (even more than family law) is a field reserved to local rules and customs, a field in which the desire or need for unification seems to be moderate.[98]

In many European jurisdictions, the law of succession is currently undergoing reforms or has been reformed. From the perspective of contemporary comparative law, the law of succession constitutes part of a country's cultural heritage. It differs from all of the other branches of private

[92] NHCC, section 7:82 [Extent of compulsory share of inheritance].
[93] See further Vékás Lajos, 'Bírálat és jobbító észrevételek az új Ptk. Törvényjavaslatához (a zárószavazás előtt). [Comments, criticisms and improvements on the new Civil Code (before the final vote)]' (2013) 1 Magyar Jog, 1–7.
[94] NHCC, section 7:76 [Lapse of right to compulsory share].
[95] See Act of 23 June 2006.
[96] Verbeke, Leleu (n 10) 468.
[97] Liin (n 2) 124.
[98] Verbeke, Leleu (n 10) 462.

law in that it most closely reflects a given society's traditions, achievements, beliefs, practices, views and legal customs. The law of succession is to a large extent influenced by local rules, moral values and cultural conventions. For these reasons, a harmonised and unified law of succession is neither feasible nor desirable. However, were one to evaluate the current state of the law from the perspective of whether the Hungarian law of succession has considered the thrust of current developments throughout the world, one would have to answer affirmatively.

Contract Law

András Kisfaludi*

Transfer of Property, Claims, Rights and Contracts in the New Hungarian Civil Code

I Introduction

The topic of this paper is at the same time very old, and brand new in Hungarian private law. It is very old because, ever since the concept of private ownership appeared, the transfer of ownership rights had to be an inevitable subject matter of its regulation under civil law. Similarly, the transfer of claims has been a traditional element of civil law. Both institutions have their origin in Roman law, but they are also present in no Roman law based legal systems.

However, general regulations on the transfer of rights and contracts did not exist in Hungarian law until the new Civil Code[1] was adopted. The regulation in the new Code of these subject matters is new, but the problems the new regulations addressed were not unknown. There were some special rights, the transfer of which was regulated by special laws (for example, the transfer of patent rights). Nevertheless, these special regulations were not complete; they could not answer all the legal questions arising in connection with such transfers and, in the absence of a general regulatory system, the legal infrastructure remained incomplete. Why was it a problem to appeal for a well-grounded legal solution?

It was because in a modern market economy almost everything can be a product traded on the market, irrespective of the presence or absence of regulations. In business practice, for example, trading in tenements, i.e. selling the tenant's rights in rental property, was an everyday transaction without there being adequate legal regulation. Similarly, the transfer of contracts, i.e. transfer of all rights and obligations following from a certain contract as a whole, was also a typical business transaction not covered by any specific legal regulations. The lack of legal regulation, however, usually does not prevent business transactions. However, such transactions generate extra risks or costs comparing with a situation where the business transaction is regulated by legal rules designed to cover this specific transaction. The additional risks and costs come from the fact that, in the absence of adequate legal regulation, the contracting parties are expected to spend time and money on reaching an agreement on all terms and conditions of the

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[1] Act No. V of 2013 on the Civil Code (hereinafter referred to as Civil Code). The Civil Code came into force on 15th March 2014.

transaction. If they fail to do so then the enforcement of the contract and the balance between the rights and obligations of the parties can be jeopardized. Such dangers also create extra costs that must be borne by one or both parties.

The new Civil Code has regulations on the transfer of all types of subjects: property, claims, rights and contracts (contractual position), with the aim of avoiding unnecessary costs and risks. In this paper I cannot deal with all legal aspects of these transactions and their regulation. I will focus on the structure of these transactions as it was designed by the legal regulation. I shall

– describe the legal regulations and analyse the structure of the transfer in different subject matters;
– compare the structures, demonstrate the similarities and differences and try to explain these features;
– show the consequences of the regulation of transfer transactions on the regulations on sale contracts.

II The Regulation of Transfer Transactions in the Civil Code

The transfer of different subjects has no one and single set of regulations in the Civil Code. The reason for that could be not only tradition (i.e. the transfer of property and transfer of claims are traditional subject matters of regulation, while the others are new), but also the different nature of the subjects and, consequently, different needs for regulation. It could be enough only to refer to the fact that property law (including the regulation of property transfer) is a separate part of the civil law regulations (in the Code it is embodied in a separate book), while claims and contracts belong to another field of regulation, namely, to the law of obligation (again a separate book in the Code). Property law relationships and obligations are fundamentally different. Property law consists of absolute legal relationships, where the holder of the ownership right is determined in exclusivity and everybody else is obliged to refrain from violating the owner's rights. The law of obligations, however, regulates relative legal relationships, where all the participants (generally two participants are present in a contractual or tort case, but it is not uncommon to have more of them) are named, and they owe positive obligations to each other.

Such basic differences may explain the separate regulation of property law and the law of obligation, including the transfer of property or the transfer of subjects in the law of obligation. As a result, in the following I will describe the different regulations separately. However, it will be shown that, in spite of the differences, the structure of the transfer is designed similarly for all kinds of subject matters.

1 Transfer of Property

On the transfer of property, the Civil Code provides as follows:

'(1) The acquisition of ownership of movable property by way of transfer needs a contract or other title for the transfer and the transfer of possession based on this title.

(2) The acquisition of title to real estate property by way of transfer needs a contract or other title for transfer and the registration of the transfer in the land registry."[2]

In this respect, Hungarian law has not changed: the transfer is a transaction that consists of consecutive elements, and all these elements are needed for completing the transfer; none of them alone is sufficient for reaching the goal of the transaction. The transfer transaction, both for movables and real property, must be based on a title, i.e. it cannot be abstract.[3] The title of the transfer is most commonly a contract, but it can be any other legal fact from which the obligation to transfer the property is emerging (e.g. returning unjust enrichment or the obligation to compensate damage). If the legal title for the transfer is missing (for example, because it does not exist or it exists but is invalid for any reason) then the transfer is not complete, even if the other elements of the transfer transaction have been properly carried out.[4]

Furthermore, it is clear from the above cited rules that the title in itself is not enough for transmitting the ownership rights in a movable or real property. With regard to movables, the additional element to the transfer of property is the transfer of possession. Such a regulation, with Roman law origins[5], is not new to modern Hungarian law. The former Civil Code followed the same pattern. However, the possibility to change this system and shift to a regime where the mere agreement between the parties may transfer the property from the former owner to the new one (a so called consensual system of transfer) was considered,[6] but the Codification Committee decided to preserve the existing solution.

Although the structure of the transfer of property did not change, the legal regulations in the new code became more sophisticated than earlier. There is a new rule on transfer of possession[7]

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[2] S 5:38 of the Civil Code.

[3] There were no unquestionable rules in the course of the codification of the Civil Code. The possibility of changing the transfer of property into an abstract system was considered, and finally rejected. See Attila Menyhárd, 'A dologi jog szabályozásának sarokpontjai *(The Structural Key Points of Regulating Property Law in the New Civil Code)*' in Lajos Vékás, Imre Vörös (eds), *Tanulmányok az új Polgári Törvénykönyvhöz (Studies on the New Civil Code)* (Wolters Kluwer Complex Kiadó 2014, Budapest) 161; Attila Menyhárd in Lajos Vékás, Péter Gárdos (eds), *Kommentár a Polgári Törvénykönyhöz (Commentary to the Civil Code)* (Wolters Kluwer 2014, Budapest) Vol. 1. 980.

[4] Attila Menyhárd 'A dologi jog…' (n 3) 16.

[5] For the notion and importance of 'traditio' in Roman Law see Róbert Brósz, Elemér Pólay, *Római jog (Roman Law)* (Tankönyvkiadó 1974, Budapest) 228–229, András Földi, Gábor Hamza, *A római jog története és institúciói (History and Institutions of Roman Law)* (Nemzeti Tankönyvkiadó 1996, Budapest) 322–324.

[6] Attila Menyhárd, 'Észrevételek és javaslatok az új Polgári Törvénykönyv dologi jogi koncepciójának kiegészítéséhez *(Comments and Proposals to the Amendment of the Concept of the Regulation of Property Law in the New Civil Code)*' (2002) 5–6 Polgári Jogi Kodifikáció, 17–18; Attila Menyhárd 'A dologi jog…' (n 3) 159–161; Attila Menyhárd in *Kommentár a Polgári Törvénykönyhöz* (n 3) 980.

[7] S 5:3 of the Civil Code: *[Transfer of possession]*
(1) The transfer of possession shall materialize upon the conveyance of physical control of the thing on the basis of an agreement on this. Transfers of possession shall be governed by the provisions on contracting and on the validity of contracts.
(2) Transfer of possession shall be considered done by means of an agreement between the possessor and the acquirer of possession if:
a) the party acquiring possession already has physical possession of the thing as a secondary possessor; or
b) the transferor maintains physical possession of the thing as a secondary possessor.

that is different from the transfer of property. Such a difference is logical if transfer of possession is only one element of the transfer of property. Transfer of property includes additional elements, apart from the transfer of possession. The regulation of the transfer of possession was necessary for at least two reasons. First, there was a need for regulating the possible methods of transferring possession beyond the most simple and natural way of transferring the direct physical power over a thing. Second, the regulations make it clear that the transfer of possession is itself a transaction based on the will of the parties; as such, the transaction should have the characteristics of a contract. The transfer of possession is not simply a question of facts but it is a matter of the proper will of the parties to the transfer. If the transfer of possession does not comply with the requirements needed for a valid contract then the transfer will not take place, even if the thing itself comes into possession of the other party, and therefore the transfer of ownership will not be completed.

For giving a full picture it is worth mentioning that there are some special movable things which are registered in authorized registries (e.g. ships, aircraft) kept by state agencies, and the special rules on such registries requires the registration of the change in ownership rights for such changes to be accepted. With regard to such movables, the transfer of possession is not enough for the property to be transferred; it needs a third element, i.e. the registration of the transfer.

With regard to the transfer real estate property, the additional element to the title is not the transfer of possession, but the registration of the transfer in the land registry, i.e. in a public registry kept by a state organ and containing authentic data on the piece of land, the rights and obligations over the land, and the data of the right-holders. Because the transfer of land or buildings requires its registration in the land registry, which is an act of a state organ, the parties to the transaction themselves cannot complete the transfer. Even if they fulfil all their obligations in order to complete the transfer, the transfer itself cannot take place without the intervention of the state. The title (e.g. a contract in which the transferor undertakes to transfer the ownership) is not sufficient for the transfer but the additional element cannot be carried out by the transferor completely. The legal effect that the parties aim for will be completed only if the registration agency enters the transfer into the registry. The most that the transferor can do to this end is to give their consent to the registration of the transfer, what is a precondition for such a registration.

Taking all the elements mentioned above, the structure of the transfer of property is summarised in the *chart 1.*

(3) Transfer of possession shall be considered completed upon the possessor relinquishing physical possession of the thing, if so agreed by the possessor and the acquirer of possession.
(4) If the thing is held by a third party, transfer of possession shall be considered completed upon conveying the claim for the thing to the party acquiring possession, if so agreed by the possessor and the acquirer of possession.

Chart 1

Subject matter of the transfer	Title	Transaction of Transfer	Registration
Movable property – non registered – registered	E.g. an obligatory transaction (contract for sale, exchange etc.), tort liability, return of unjust enrichment	Transfer of possession	– Registration
Real estate property		Consent to registration	Registration in the land registry

2 Transfer of Claims

Like the transfer of property, the transfer of claims was also regulated by the old Civil Code. The legal institution used for such a transfer was and remains assignment. However, the wording and the content of the regulation has been changed in the new code. Now the Civil Code provides that

'(1) The obligee may transfer his claim against the obligor to a third party.

(2) The transfer of a claim needs a contract or other title for the transfer and the assignment of the claim. Assignment is a contract between the assignor and the assignee upon which the assignor takes the place of the assignee.'[8]

The old regulation was limited to allowing the transfer of a claim by an agreement, and it did not make a difference between the title of the transfer and the actual transfer.[9] Consequently, the structure of the transfer was not completely clear; there were theoretical and practical problems in this respect.[10] Some authors had the position that the transfer of possession *(traditio)* can take place only with regard to physical things, and therefore, if transferring any other items (such as claims or rights) the differentiation between the obligation to transfer and the transfer by transfer of possession is meaningless and so the transfer of claims or rights may take place by a mere agreement between the parties.[11] Although it was a requirement to give notice to the obligor of the assignment, this element did not belong to the transfer. It served only to protect the obligor. The assignee acquired the claim by the assignment agreement without any further notice. Furthermore, any defect in the agreement had no legal effect in the direction of the obligor. If, for example, the agreement on the assignment was invalid for any reason, this fact did not jeopardise the legal position of an obligor acting in good faith. An obligor who had

[8] S 6:193 (1) and (2) of the Civil Code.

[9] See S 328 of the old Civil Code (Act No. IV of 1959).

[10] Peter Gárdos, *Az engedményezés (Assignment)* (ELTE Eötvös Kiadó 2009, Budapest) 95.

[11] Norbert Csizmazia, 'Az engedményezésről de lege lata és de lege ferenda *(On the Assignment de lege lata and de lege ferenda)*' in Attila Harmathy (ed), *Jogi Tanulmányok 2002 (Legal Studies 2002),* (Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar 2002, Budapest) 39, 73; Attila Menyhárd, *Dologi Jog (Property Law)* (Osiris Kiadó 2007, Budapest) 46, 153.

due notice of the assignment did not need to examine whether the transfer of claim really happened or not and if it happened validly. If the contract of assignment was faulty, the parties to the contract had to rectify the situation in their internal legal relationship.

Under the new regime, the transfer of a claim is a compound transaction. It is not enough to agree upon the assignment of the claim. That assignment needs a legal title which can be – similarly to the transfer of property – a contract, compensation for damage, return of unjust enrichment, etc. Although there is no reference to this connection, it is clear that the assignment can result in the transfer of a claim only if the basis of the assignment is a valid title for that purpose. If there is no title, a mere assignment cannot transfer the claim, and if there is only an agreement upon establishing an obligation to transfer a claim without the actual assignment, the transfer is not complete and the claim is not transferred.

The assignment as the second element of the transaction also consists of different stages. The desired outcome of the whole transaction is that the assignee takes the position of the assignor, i.e. the assignee has the right to request the fulfilment of the assigned obligation. For understandable reasons, this cannot happen without the involvement of the obligor. As long as the transfer of the claim is an internal affair between the assignor and the assignee, the legal position of the obligor does not change, i.e. they have an obligation exclusively toward the assignor. This means that the assignee cannot be deemed as having acquired the claim, because the obligor has no obligation against them. For completing the change in the participants in the legal relationship, there must be a need to order the obligor to perform their obligations toward the new obligee, i.e. the assignee.

With regard to this regulation, the structure of the transfer of a claim is summarised in the *chart 2.*

Chart 2

<table>
<tr><th>Subject matter of the transfer</th><th>Title</th><th colspan="2">Transaction of transfer</th></tr>
<tr><td rowspan="2">Transferable claim</td><td rowspan="2">E.g. an obligatory transaction (contract for sale, exchange, etc.), tort liability, return of unjust enrichment</td><td colspan="2">Assignment</td></tr>
<tr><td>Contract of assignment</td><td>Notification + order to perform</td></tr>
</table>

3 Transfer of Rights

The regulation of the transfer of rights is a new element of the Civil Code.[12] However, the transfer of rights is not new. There was a market in transferable rights without any general legal regulation of such transfers. There were some rights with economic value, for which there were

[12] In this context the term „right" means any right except property rights, because the transfer of property has been regulated for a long time.

special legal regulations, including rules on the transfer of such rights (e.g. options or pre-emptive rights traded in the stock exchange). If such specific rights were the only subjects of transfer transactions then regulation under general civil law would not have been necessary. In fact, this type of limitation did not exist. Transfers of rights without any special regulation on their transfer did occur,[13] and the lack of legal regulations caused problems in legal disputes arising from such deals. Consequently, there was a need for general regulation applicable with regard to the transfer of any right.

The problem of such regulation is that rights can vary over a wide range. There are rights deriving from legal relationships regulated by the law of obligation. The main characteristic of such rights is that the participants in the legal relationship are specified on both side and the parties have obligations to each other. On the other hand, there can also be rights where only the right-holder is determined by name, and everybody else – without being specified – is obliged to refrain from violating these rights. Efficient legal regulation of the transfer of rights should cover all these different rights. The Civil Code has the following rule.

'(1) The obligee may transfer his right to another person, except where the transferability of the right is excluded by aw or when it follows from the nature of the right that it cannot be transferred.

(2) As far as this law does not provide otherwise, the transfer of a right by way of subrogation needs a contract or other title for the transfer and the transfer of the right. Subrogation is a contract between the subrogor and the new subrogee, under which the subrogor is replaced by the new subrogee.

(3) The provisions on assignment shall apply to subrogation *mutatis mutandis*.

(4) If the existence of the right is certified by an authentic registry, the subrogation needs, besides the assignment, the registration of the change in the identity of the subrogator to be effective.'[14]

The general character of the regulations is obvious from the fact that the first rule is about the determination of transferable rights. It shows that there is no presumption of the transferability of specifically regulated rights; instead, any right that meets the general requirements can be transferred. The reference to the exclusion of subrogation is a clear-cut regulation, while the 'nature of the right' is a highly flexible term, the interpretation of which must be clarified by the courts.[15]

From the point of view of the structure of the transfer transaction, the subject of the transfer has no primary importance. The rule does not make a difference on the basis of the nature of the right to be transferred. Being either absolute or relative, the right shall be transferred by a compound transaction – similarly to the transfer of property and the transfer of claims – consisting of a title and a performing transaction. The title can be again a contract or similar legal

[13] Attila Menyhárd, *Dologi Jog (Property Law)* (Osiris Kiadó 2007, Budapest) 154–155.

[14] S 6:202 of the Civil Code.

[15] There could be undisputed cases. For example a right to alimentation, which could be a right deriving from a specific contract, cannot be transferred, because this right is strongly connected to the person who is the right holder under the contract.

fact creating an obligation to perform a payment or any other conduct (tort liability, return of unjust enrichment, etc.). However, the existence of such a title in itself does not transmit the right to the other party. As was seen with regard to the transfer of property and the transfer of claims, the title must be supplemented by an implementing action, which in this instance is the transfer of the right. At this point, the regulation in the Civil Code is somewhat confusing, and perhaps violates the rules of logic. According to the wording of the Code, subrogation is defined as the title for such a transfer and the transfer of the right. Although the transfer of a right cannot be the transfer of a right plus anything else, the aim of the section in the Civil Code is traceable, and the confusion can be handled if we differentiate between the transfer of a right in a broader and in a narrower sense. The real meaning of the rule should be that a title in itself is not sufficient for the transfer (in a broader sense); it needs something more (the transfer in a narrower sense). The nature of the additional element is enlightened by the further rule stating that the transfer of a right (in its narrower sense) is a contract between the transferor and the new right holder. The content of the contract should be that the new right holder takes the place of the transferor in the legal relationship from which the right to be transferred is derived. This definition is quite similar to the concept of assignment, with the exception that the subject of the contract is not a claim but a right. It is not surprising then that the rules on assignment are applicable to a subrogation contract. However, at this point there could be serious doubts whether such a reference to the rules of assignment can cover all the problems of subrogation. The application of the rules on assignment will be especially troublesome with regard to absolute rights, since the assignment is a transaction where both the obligor and the obligee are known and, therefore, the rules (e.g. on notification or on the order to perform) have their function, because there is another person who can be notified and who can be given an order. However in the case of absolute rights there is no specific other party, therefore, these rules become meaningless.

Although whether the right is absolute or relative has no importance in the transfer transaction, there is another characteristic that could be relevant. Namely, there are some special rights which are registered in an authentic register. Normally these are absolute rights and one of the aims of the registration is just to make possible for anybody to have information on the existence and the contents of these rights. In the case of such right the transfer can take place only if the change of the right holder is registered. Since the registries are kept by authorised bodies, mostly state organs, the performance of the contract includes an element which is out of the control of the contracting parties. However, the most what can be expected from the transferor is to give his consent to the transfer in order to make possible to enter the transfer into the register. The legal solution in this respect is similar to the transfer of property in immovable.

Summing up the above rules and putting aside the potential troubles in application of these rules, the structure of subrogation can be visualised thus *(chart 3)*.

Chart 3

Subject matter of the transfer	Title	Transaction of transfer	Registration
Non-registered rights	E.g. an obligatory transaction (contract for sale, exchange etc.), tort liability, return of unjust enrichment	Transfer of right (a contract under the rules of assignment)	–
Rights registered in an authentic registry		Transfer of right + consent to registration	Registration in the registry

4 Transfer of Contracts

One of the greatest expectations against the Civil Code was that it would resolve the problem of the transfer of contractual positions.[16] It is true that regulations on the transfer of rights did not exist either, but the rules on assignment could have helped the transfers of rights, because in both cases the legal situation was similar: there was one party with a claim or the right and the other who was obliged to perform according to the claim or the right. However, with regard to contractual positions the case is much more complicated, because in the vast majority of contracts the parties are both obligors and obligees at the same time: they have rights and obligations deriving from the contract simultaneously. If they transfer only their rights or only their obligations (these transactions were regulated separately, or at least could have been handled under the old regulations) then the other elements of their contractual position remained with the original party and therefore the transfer could not take place. The transfer of contractual rights and contractual obligations cannot happen in the same way for the simple reason that the identity of the obligor is not neutral to the other party; to the contrary, it deeply affects their interests. As such, changing the obligor in a contractual relationship cannot be carried out without the involvement of the other party. In fact, sometimes even the change in the obligee can affect the interests of the obligor and therefore obtaining their consent could be an acceptable expectation. In the contractual practice this problem was attempted to be handled by applying the rules of assignment to the rights and the rules of the assumption of debt to the obligations under the contract. Since the regulations on the assumption of debt include the obligee's right to consent to the transfer of debt, the interest of the obligee could somehow be considered; however, most the analysts found this makeshift solution to be unsatisfactory.[17]

Instead of forcing the parties to apply a mixture of inadequate legal institutions, the Civil Code offers a specific regulation on the transfer of contracts as follows.

[16] Pál Lászlófi, László Leszkoven, 'Gondolatok a szerződés-engedményezés jogi természetéről *(On the Legal Nature of the Assignment of a Contract)*' (2004) 4 Polgári Jogi Kodifikáció 17; Péter Gárdos, 'Szerződésátruházás *(Transfer of Contract)*' (2005) 3 Polgári Jogi Kodifikáció 20.

[17] Pál Lászlófi, László Leszkoven (n 16) 22; Péter Gárdos (n 16) 20.

'The party exiting the contract, the party remaining in the contract and the party entering the contract may agree on transferring the entirety of the rights and obligations of the exiting party to the entering party.

The party entering into the contract is entitled to all the rights and he is burdened by all the obligations existing under the contract between the exiting and remaining parties. The party entering the contract is not entitled to set off any other claims of the exiting party against the remaining party. The remaining party is not entitled to set off any other claims against the exiting party.'[18]

The above cited provisions are different from the majority of those legal systems where the transfer of contractual position is regulated,[19] and also from the international instruments of contract law regulation.[20] The special feature is that the transfer is a trilateral transaction, not only a contract between the transferor and the transferee requiring the consent of the other party in the contract.

At the same time, it also differs from other transfer transactions in the Civil Code, because there is no reference to the separation of the obligatory and the performing transaction. It seems that the trilateral contract in itself is enough for transmitting the contractual position, notwithstanding whether the exiting and entering party has a valid contractual or other obligation to transfer the contract. That means that the Code does not require a separate title, or alternatively, the trilateral contract is the single act which can transfer the contractual position.

Even if there is no obligation to transfer the contractual position, the trilateral agreement may transfer the contract to the entering party. It is interesting because, unlike with transfers of claims and transfers of rights, the transfer of a contract could have a different structure than the contract serving as legal title. With regard to the claims and rights, the contract creating the title of the transfer is made by the same parties as the performing contract, i.e. the actual transfer contract. Having the same parties, one could ask, what is the meaning of requiring different contracts? In the event of a transfer of contract, however, it would be plausible to have a contract on creating

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[18] S 6:208 of the Civil Code.

[19] Péter Gárdos (n 16) 22; Ágnes Juhász, 'A szerződéses pozícióban bekövetkező alanyváltozás *(Change of the party in a Contractual Position)*' in Zoltán Csehi, Katalin Raffai (eds), *Állam és magánjog. Törekvések és eredmények az Európai Unió joga, a nemzetközi magánjog, polgári jog és polgári eljárásjog keresztmetszetében (State and Private Law. Ambitions and Results in the Cross-section of the Law of the European Union, the International Private Law, Civil Law and Civil Procedural Law)* (Pázmány Press 2014, Budapest) 143.

[20] Principles of European Contract Law (2002) Art. 12:201: A party to a contract may agree with a third person that that person is to be substituted as the contracting party. In such a case the substitution takes effect only where, as a result of the other party's assent, the first party is discharged.
Draft Common Frame of Reference (2009) Book III. Art. 5:302. A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship.
UNIDROIT Principles of International Commercial Contracts (2010) Art. 9.3.1.: "Assignment of a contract" means the transfer by agreement from one person (the "assignor") to another person ("assignee") of the assignor's rights and obligations arising out of a contract with another person (the "other party").
Art. 9.3.3.: The assignment of a contract requires the consent of the other party.

an obligation to transfer the contractual position; this contract should be concluded by the exiting and the entering party, while the performing contract could be the trilateral contract between all interested parties. However, the legal regulations lack any reference to such a structure for the transfer. Taking into consideration that, for other transfer transactions, the differentiation between the title and the performing transaction was explicit and consequent, we cannot think that different wording is intended to bear the same meaning. Since there is no reference to the title of the transfer as a precondition of the completion of the transfer, we can conclude that such a title is not required. This transaction consequently has no internal structure; there are no separate elements of the transaction that culminate in a transfer.

III Comparison of the Transfer Transactions

Comparing the regulations of different transfer transactions, one can find that, with the exception of the transfer of contracts, all of the transfers are structured uniformly. Putting together the charts showing the structure of the transfers, the same pattern can be seen. The transfer takes place only if at least two elements are present: a title for the transfer and a separate transaction, which is the performance of the obligation originating from the title. The performing action may vary: it can be a transfer of possession or registration in an authentic register or an assignment of a claim or a transfer of right (whatever this term means), but, from a structural point of view, it is quite clear that neither the title nor the performing act is sufficient in itself for completing the transfer.

The uniform regulation is not a simple coincidence. It was an explicit intention of the legislator to regulate the transfer of claims and transfer of rights in the same structure as the transfer of property.[21]

For the transfer of property, the main reason for maintaining the previous structure, i.e. to require transfer of possession of movables as an inherent element of the transfer was that, in a regime where a simple agreement transmits ownership rights (consensual system), the transferor has to keep property it does not own as without any ownership interest until the transfer of possession.[22]

In addition, the transfer of possession provides publicity to the transfer. Since the owner of the property has ownership rights against anybody else, who is the owner should be known to anybody. This end can be served by requiring the transfer of possession, since in the majority of cases the possessor is the owner (or at least the possessor has some connection to the owner; perhaps he has a title from the owner to possess the thing).

Such a solution to the regulations of transfer of property was not inevitable. In foreign models we could also find other options. Consequently, how to design the regulations on

[21] Lajos Vékás (ed), *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez (Expert Proposals for the Draft of the New Civil Code)* (Complex Kiadó 2008, Budapest) 848–849.

[22] Attila Menyhárd in *Kommentár a Polgári Törvénykönyhöz* (n 3) 980.

transfer transactions was a policy question, and it was especially a policy question in connection with claims and rights, where none of the above-mentioned argument prevails. Even if we would accept the consensual regime of transfer of claims or rights, the transition period when the property has already transferred, but the possession is kept by the transferor would not cause problem, because there is no possession of claims or rights. They are not things; they cannot be kept under physical control.

Similarly, with regard to claims and relative rights, there could be no deed for publicity. The interested parties are identified by name, so the information about the transfer can be conveyed by direct ways and not through publicity.

Furthermore, for the transfer of property, the title and the performing transaction are different by nature. Generally, the title is a contract (though it could be another legal fact like tort liability, unjust enrichment, etc.) which is an expression of the parties' will, while the performance is a physical act of transfer of control over the subject of the transfer. Separation of different phenomena has justifiable meaning. However, for transfers of claim and transfers of rights, both the title and the actual transfer have the same character; namely, they are contracts. As a matter of course, it is not impossible to keep contracts having different content separately. However, it could be questionable whether requiring a title for the transfer makes the transaction safer or more efficient or more secure. I am not convinced about that, especially because the defects of the legal title cannot have any consequences in connection with an obligor acting in good faith.

What was the reason, then, for choosing the same structure for the claims and rights as for the transfer of property? There was an argument saying that in all foreign legal systems where the transfer of claims and rights are regulated, the structure of such transactions follows the structure of the transfer of property.[23] Furthermore, the old Hungarian legal scholarship prior to World War II treated assignment as a performing transaction that needed a title for transferring the claim.[24] Under these arguments, the draughters of the Civil Code came to the conclusion that there is no reason for deviating from the structure of the transfer of property with regard to the transfer of claims and rights.[25] It is also argued that the structure including a title and a performing transaction can better serve the requirements of the complex transactions of business life, because there could be a clear dividing line between the title and the performing transaction.[26] Although it is not obvious what the advantage of such a solution is, compared with a transfer by a single act, one practical consequence can be identified. After a long debate, the Civil Code provided that only such claims can be assigned which already exist or at least the legal relationship from which the claims will originate exists when the assignment happens.[27] That means that claims from future legal relationships cannot be transferred.

[23] Péter Gárdos (n 10) 101–113.

[24] Péter Gárdos (n 10) 114–122.

[25] Péter Gárdos (n 10) 122–125; Péter Gárdos in Lajos Vékás, Péter Gárdos (eds), *Kommentár a Polgári Törvénykönyhöz (Commentary to the Civil Code)* (Wolters Kluwer 2014, Budapest) Vol. 2. 1643–1644.

[26] Péter Gárdos in *Kommentár a Polgári Törvénykönyhöz* (n 25).

[27] S 6:194 (1) of the Civil Code.

However, it is not forbidden to contract for transferring a future claim from a future legal relationship. Hence, the contract that serves as a title for the transfer may contain such an obligation, even if the assignment of such a claim is not allowed. However, if this was the only advantage of differentiating the title and the performing transaction then this aim could have been reached in a simpler way, namely by eliminating the restriction on transferable claims.

It is obvious that, even if the structure of the transfer transaction is identical, the performing transaction cannot be the same. Claims and rights cannot be handed over like things. Instead, for claims and rights, the performing transaction is a contract as well as the title in most of the cases. This will result in all probability in a confusion of the title and the performing transaction. I believe that, in practice, assuming the obligation to transfer a claim and the actual transfer by the assignment will take place in a single transaction, which does not exclude the separation of the two elements.

IV Transition of the Contracts for Transfer of Property

The uniform structure of the transfer transactions brought a need for the transformation of the contractual system in order to adapt it to this new regime. Traditionally we had specific contracts, the focus of which was on the transfer of property. The classic types of contracts, such as sale, exchange or donation contracts, are designed to serve as a title for the transfer of property. The main obligation of one party in all these contracts is to transfer the property rights over the subject of the contract. The problem was that property law in Hungary accepted, as a subject of property law relationships, only physical things (with some minor exceptions).[28] Taking this situation, the above-mentioned contracts were not suitable for being a title for the transfer of claims and rights, because their definition limited them to the transfer of property, and the subject of a property law legal relationship could not be anything else but physical things.

There were at least two possible solutions to this contradiction. One was to broaden the subject of property law, and then the sale contracts as a contract for property transfer included claims and rights. However, special considerations of property law regulation did not support such a broadening; therefore, we had to choose the other possible solution, i.e. their regulation in contract law. The core of the regulations was that the specific contracts with a function of transfer of property should be made suitable for the transfer of claims and rights.

This task was fulfilled by the following rules:

'The rules on the sale of goods shall also adequately apply to contracts from which an obligation to transfer rights or claims for a consideration originates.'[29]

'The provisions relating to gifts shall also adequately apply to contracts for commitments for the gratuitous transfer of rights and claims.'[30]

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[28] Changing of this approach and broadening the subject of the property law was a debated topic in course of codification, however, finally the traditional solution prevailed.

[29] S 6:215 (3) of the Civil Code.

[30] S 6:235 (3) of the Civil Code.

For exchange contracts, the same result comes from the general rule according to which the rules of sale contracts shall be applied to it.[31]

The above rules change the character of these contracts. We cannot take them as contracts for the transfer of property, because they are equally suitable for transfer of other subject matters, such as claims and rights. As a matter of course, any rule connected with the physical existence of the subject of the contract cannot be applied with regard to claims and rights.

[31] S 6:234 of the Civil Code.

Bohumil Dvořák*

Assignment of a Contract in the New Czech Civil Code

The paper discusses the regulation of the assignment of contracts under the new Czech Civil Law and explores the subject matter of an assignment, its forms and the consent of an assigned party. First, the author denies that the transfer of contract is a new legal concept in the Czech Law System. He also points out that the provisions of Sec. 1895-1900 NCC were deeply inspired by the Italian Codice Civile (Art. 1406-1410 CC). On the contrary, the regulation of PECL (12:201) does not constitute, from author´s point of view, a sufficient base for the national legislation.

I Substance and Source of Inspiration

It has to be noted first of all that the legal institution of assignment of contract has been expressly laid down in our legal system for the first time in history. The previous national legal regulations were based on the traditional concept of the content of *obligation,* characterised by the terms *claim* and *debt,* which are further associated with the terms *creditor* and *debtor.* The *law of obligation* to date has therefore concentrated on the regulation of *succession* with regard to the individual claims and debts of the indebted person. The regulation of the legal institution of the so called *blanket assignment* is also in line with this tradition (See Sec. 1897 of the Czech law in the Annex). Through the assignment of contracts, however, a *change in the party of obligation* comes into effect, i.e. there is a succession into the *legal position of a party,* not only a change of the subject of the individual rights and *duties.*[1]

The newly introduced *legal institution* represents, from the legislative point of view, a shift in the development in the law of obligation. Whereas the Roman law interpreted the *obligation* as *iuris vinculum,* a legal tie, by which the parties of obligation were bound together, the development of economic relations in the 19th century constituted its relaxation with regard to individual claims

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[1] See J. Busche, U. Noack, V. J. Rieble von Staudingers, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Second Book.* (Recht der Schuldverhältnisse. §§ 397–432., Sellier – de Gruyter 2005, Berlin) 133.

and debts.[2] The legal institution of assignment of contract in a certain sense represents the completion of this development – the legal tie between the parties is fully loosened.

Despite all the above, the legal institution laid down cannot be considered as utterly unknown to our legal system to the present day. The idea of succession into the rights and duties of a party *to an obligation* was implemented e.g. by Sec. 680 paragraph 2 of the Civil Code 1964, according to which, in the case of a change of property, the transferee (purchaser) enters the legal position of a lessor. It is this entry 'into the legal position' of a party to an obligation that is characteristic of the assignment of contract as well.

It follows from the aforesaid that the previous regulations had foreseen the *succession into the legal position of a party.* It may be taken as a proof of fact that the legal institution of assignment of contract is compatible with the system of *civil law;* the explicit legal regulation is thus the reflection of its general *applicability.*[3] It is nevertheless clear that the assignment of contracts was possible also on the basis of the *previous regulations;* the contract of assignment of contract could be concluded as an *innominate contract* (Sec. 51 of the Civil Code 1964) by taking the basic *principle of the private law regulation,* i.e. the *equality of the parties,* into account. For the assignment of contract all three participating parties were thus obliged to deliver an *expression of will.*[4]

In Europe, the explicit regulation of assignment of contract appears only in a later period of time; in the first place, the Italian (Article 1406–1410 Cc), the Portuguese (Article 424–427 Cci) and the Dutch Civil Codes (6th book BW art. 159) should be mentioned.[5] Furthermore, we would like to draw attention to Article 12:201 of Principles of European Contract Law (PECL), which also addresses the regulation of assignment of contract. It is worth mentioning, above all, *paragraph 2,* basing itself on the presumption that if the assignment of contract represents a transfer of rights to performance, the provisions of PECL on assignment of claims apply, and, in the case of transferring debts, the provisions of PECL on debt assumption apply. We believe that the proposed 'European' concept is not right, as it does not fully capture the substance of the assignment of contract: not only the rights and duties from the *synallagmatic contract* are transferred to the third party, but the total legal position of the party of the obligation. The obligation is more than just a complex of claims and debts; it also involves, e.g. the *right to withdraw from the contract,* the *rights from the arbitration clauses* or the *rights from the prorogation agreements,* etc.[6]

The Czech legislator cannot be accused of not adopting the PECL model. However, not even the close attachment to the Italian regulations,[7] which often form an explicit basis for the national institution of assignment of contract, can be considered as utterly free of difficulty (See Sec. 1899 of the Czech law in the Annex).

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[2] See J. Sedláček, *Obligační právo [The Law of Obligation]. Obecné nauky o právních jednáních obligačních a o splnění závazků.* (2nd edn, Spolek Právník 1933, Brno) 140.

[3] K. W. Nörr, R. Scheyhing, W. Pöggeler, *Sukzessionen. Forderungszession, Vertragsübernahme, Schuldübernahme* (2nd edn, Mohr Siebeck 1999, Tübingen) 180.

[4] D. Looschelders, *Schuldrecht. Allgemeiner Teil* (6th edn, Heymanns 2008, Köln et al.) 370.

[5] Ch. von Bar, R. Zimmermann, *Grundregeln des Europäischen Vertragsrechts. Part III.* (Sellier 2005, München) 716.

[6] See K. Larenz, *Schuldrecht. First Volume. Allgemeiner Teil* (14th edn, CH Beck 1987, München) 616–617.

[7] See von Bar, Zimmermann (n 5) 717.

II General Interpretations

The legal regulations state that a contract, by which one of the parties of the *contractual obligation* as an *assignor* transfers their rights and duties of *the contract* or part of it to a third party *(assignee),* is a *bilateral contract.* The *party of the assigned contract ('assigned party')* is not in the position of a contractual party from the view of the assignment contract, and therefore does not intervene in the *legal relationship* between the assignee and the assignor. Their *competence* consists in the prior or subsequent consent to the assignment of contract (Sec. 1897), by which this assignment comes into effect (Sec. 1898).

However, it is not excluded that the *expression of the will* of all three participating parties are laid down *in the same document.* Unless otherwise stipulated in the assignment of contract, the *consent* to the assignment has exclusive effect of fulfilment for the *assignor.* For the party entering the existing contractual relationship in replacement (assignee), the contract is of an *obligation nature.*

With regard to the fact that the contract on the assignment of a contract constitutes a *causal obligation*, its conclusion assumes a certain *cause* (Sec. 1791). This can be the *purchase*, *exchange* or *donation*, and, where appropriate, the entry into a *substitution of another person's obligation* for the purpose of *fulfilment* of one's own debt (Lat. *causa solvendi*). In any case, it is required to draw a distinction between the two kinds of rights and duties among the parties of the assignment of contract: on the one hand, there are the *obligations of an assignment of contract* and on the other hand the *obligations of a legal relationship,* entered into by the assignee instead of the assignor.[8]

The law does not accept the assignment of contract if it is excluded by the *nature of the contract.* The legal ban obviously refers to cases when the assigned contract is of a unilaterally binding *nature (non-synallagmatic).* This *interpretation* seems to be underlined by the Italian regulations, which explicitly govern only the cases of contracts committing to *reciprocation of performance* (Article 1406 Cc). We nevertheless believe that there is no reason whatsoever for any restrictions regarding the assignment of contract in this context. With regard to assignment of contract, the whole legal position of the party is being transferred from one person to another, and not only a certain *assignment of claim* or *assumption of debt.* The legal position of a party also involves some other *rights, competences and duties* which, together with the assignment of claim or assumption of debt, do not necessarily have to be transferred (the right to withdraw from the contract, information duties).[9] It is therefore possible that even *donation* (Sec. 2055), *precarium* (Sec. 2189) or *loan* (Sec. 2193) etc. can turn into the object of assignment.

[8] See Sedláček (n 2) 141.

[9] Armin Ehrenzweig, Adolf Ehrenzweig, H. Mayrhofer, *System des österreichischen allgemeinen Privatrechts. Second Book* (Das Recht der Schuldverhältnisse. First Section. 3th edn, Manz 1986, Wien) 534.

III Subject Matter of an Assignment

The law is not quite clear in its addressing of the assignment of contract. The *direct subject matter of the obligation* arising from the contract on assignment of contract is the assignee's duty to enter the legal position of the original party of the obligation (assignor). This duty is typically fulfilled at the moment of the assigned party agreeing to the assignment.

As an *indirect subject matter of the obligation* arising from the assignment of contract, we consider the complex of rights and duties that originate from the legal position of a contractual party. The assignee is not only assigned with all the rights and duties referring to the *performance,* including all their *accessories* (Sec. 513), but also the complete *ancillary rights* (e.g. accessions of a claim) and *competences* linked to the legal position of the obligation party. For demonstration purposes, some of them are listed by the law *(conventional fine, right to withdraw from the contract, arbitration clause)* (Sec. 1896).

With regard to the fact that the *subject matter of an assignment* is not a contract but the *legal position of the party of obligation*, there is no obstacle for the transfer of rights and duties from those legal relations that are formed differently than by contract (Sec. 1723). If the *assigned party* agrees to this, there is no reason for the transfer not to be accepted. In such cases, the provisions on the assignment of contract will be able to be applied directly and not only adequately (Sec. 10). The *subject matter of an assignment* might not only be the existing obligations, but also future obligations.[10]

IV Forms of Assignment

The law does not lay down a requirement of written form for the contract on assignment of contract. In principle, the assignment of contract comes into effect even in the event of an oral agreement on the assignment by the participating parties;[11] the assignment of contract *by an implied contract* is unlikely to be applied in practice. The *absence of requirements as to form* of the contract on assignment of contract is in line with the regulation of the form of *assignment of claim* (Sec. 1879) and with the form of the *assumption of debt* (Sec. 1888) or of the *accession to the obligation* (Sec. 1892).

[10] See B. Dvořák, in M. Hulmák (ed), *Občanský zákoník V. Závazkové právo. Obecná část. Komentář.* (Commentary on the Czech New Civil Code. Part V., CH Beck 2014, Praha) 796.

[11] See W. Möschel in M. Krüger (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Second Volume.* (Schuldrecht Allgemeiner Teil. §§ 241–432. 5th edn, CH Beck 2007, München) 2565, in contrast to it Busche, Noack, Rieble (n 1) 133.

V Consent of the Assigned Party

The prerequisite for the coming into force of the contract on assignment of contract is the *consent of the assigned party.*[12]

Consent can be granted only by the person who is, in the time of the consent, a party to *the obligation,* from which the rights and duties are transferred to the *assignee.* The law does not stipulate to whom that consent shall be given; by definition it seems to be clear, however, that this must be to at least one of the parties *of assignment contract.* The assignment of contract comes into force at the moment of receiving the assigned party's consent. Should consent to the assignment of contract be given beforehand, the moment of the assignment of contract coming into force is the moment when the assigned party receives the *notification of the assignor* on the assignment or when the *assignee proves the transfer of contract.*

The consent of the assigned party refers only to the *part of assignment* which regulates the *assignment of the legal position of assignor to assignee.* It is not the assigned party's task to comment on the *provisions of assignment referring to its cause,* or even on the *ancillary provisions.*

However, it is exactly in the aforementioned context that the problematic nature of the provisions of Sec. 1899 comes to the surface, which grants the *assigned party* the right to amend their *given consent* at a later date.

VI Conclusions

The regulations concerning the assignment of contract in a certain sense represent the completion of the development of the obligation law from the originally rigid obligation in the sense of *'iuris vinculum'* to the relaxation of the relationship between the obligation parties.

The Czech legislator does not solve the issue of rights and duties of the *parties of assignment* in the event that the *assigned party* does not give their consent to the assignment. We agree with this position, as it always depends on the will of the parties in each individual case.

The *absence of requirements as to the form of assignment* raises the question of which form should be required when the *assigned contract* must be in *written form.*

Rather problematic and complex, in our view, is the right of the assigned party to reject the *release of the assignor from their obligation* (Sec. 1892).

[12] Nörr, Scheyhing, Pöggeler (n 3) 193.

Annex

Sec. 1896 – 1900 of the New Czech Civil Code

Assignment of a contract

Section 1895

(1) Unless excluded by the nature of a contract, either party may, as an assignor, transfer his rights and duties under a contract or part thereof to a third person if the assigned party agrees and if the contract has not yet been fully executed.

(2) Where a continued or periodic performance is envisaged under a contract, the contract may be assigned with effects in respect of the part of the contract which has not yet been executed.

Section 1896

In the case of a partial assignment of a contract or assignment of a contract to several assignees, the rights of the assigned party under ancillary clauses in the contract may not be prejudiced; ancillary clauses include, without limitation, stipulations on condition, advance payment, earnest, contractual penalty, withdrawal from contract and withdrawal fee, and the arbitration clause.

Section 1897

(1) Assignment of a contract becomes effective against the assigned party upon its consent. If such consent was granted in advance, the assignment of the contract against the assigned party becomes effective when the assignment of the contract is notified to that party by the assignor or proved to it by the assignee.

(2) If a contract concluded in writing contains a stipulation that it has been concluded to the order of one of the parties or another stipulation having the same meaning, that party shall assign the contract by endorsing the instrument. The essential elements of an endorsement, as well as the persons entitled thereunder and the manner in which they demonstrate their right, shall be governed by legal regulations on promissory notes. They are also relied on when considering the person who may be required to provide the document to a person who has lost it.

Section 1898

When the assignment of a contract becomes effective against the assigned party, the assignor becomes released from his duties to the extent of the assignment.

Section 1899

(1) The assigned party may prevent the consequences under Section 1898 by declaring, vis-à-vis the assignor, that it refuses such release. In that case, the assigned party may require the assignor to perform in case the assignee fails to perform the duties assumed.

(2) The declaration may be made within fifteen days from the date on which the assigned party became or must have become aware that the assignee failed to perform. Although a declaration made late does not eliminate its effects under Subsection (1), the assigned party shall compensate any damage caused by the default.

Section 1900

The assigned party shall also retain all the contractual defences against the assignee. The assigned party shall retain other defences which it had against the assignor if such retention is reserved in the contract or in the consent to the assignment of the contract.

Petra Joanna Pipková*

Risk of Loss and its Passing to the Buyer under the New Civil Code in Comparison with CISG

I Introduction

My paper deals with an important legal institution of the law of obligations, and especially of sales law – the risk of loss and its passage. When regulating this topic, the new Czech Civil Code, as well as the former Czech Commercial Code, drew inspiration from the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). This is probably a little extraordinary, at least for this region of Europe. This is probably due to the socialist history of Czech Republic and the fact that we had specific provisions regarding international trade (the International Trade Code – inspired by the CISG predecessor) that were a sort of an inspiration for the Commercial Code after the Velvet Revolution. Looking merely at the wording of the Czech Civil Code, we can state that the 'transposition' is not exact and was not always really successful. Therefore, I compare its regulation in CISG and in the Czech Civil Code in my paper in order to determine whether they differ also in practice and if the deviation of the Czech Civil Code from CISG represents a disadvantage for the parties. In order to do that, in my paper, I first try to define the notion of the risk of loss and its consequences in both systems (II), and then I analyse the process of passing risk in different situations (III). Finally, I address the influence of fundamental breach of contract by the seller on the passage of the risk to the buyer.

II Notion of the Risk of Loss

The Czech Civil Code, as well as CISG, does not define the notion of the risk of loss. As such, in both systems, we have to rely on interpretation which is, however, similar throughout many different legal systems.

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1 Components of the Notion

The crucial point of the concept of risk of loss is fortuity, i.e. the question of when the materialisation of the risk is accidental. This is not defined in either of the regulations under review. Fortuity presupposes that the source of loss or damage is imputable neither to the buyer nor to the seller. This can be either actions of a third party or natural phenomena (e.g. storms, earthquakes, droughts), or accidents, wars, revolutions, thefts or acts of vandalism and further some state interventions.

The materialisation of the risk consists, in principle, in actual loss or damage to the purchased item. Loss means physical destruction of the item, either complete or at least to such a degree that it excludes its future usage, while damage means objectively a physical impairment of the item.[1]

While CISG speaks of loss or damage, the Czech Civil Code speaks – traditionally – only of damage (the German BGB speaks of accidental perishing and accidental deterioration). However, it is commonly – around the world – understood that the risk of loss covers not only damage to or loss of the purchased item but also other forms of some kind of diminution of value of the purchased items.[2] This can be, for example, theft, embezzlement, emergency unloading, erroneous actions of the carrier (e.g. delivery to the wrong buyer), reduction of quantity on the way or state interventions such as confiscations or unpredictable export or import bans. Existing import or export bans lie in the sphere of responsibility of each of the parties.[3] The harm caused by market development (e.g. diminution of the market value of the purchased item) or other economic risks are not covered – this lies, in principle, in the sphere of responsibility of each of the parties. There is one significant exception to this principle and that is the case when the transported goods need to be redirected, which may inflict significant extra costs.[4] This has to be borne by the buyer unless the seller is liable for choosing an inappropriate transport route.

Art. 66 CISG is interpreted in such a manner that the risk does not only concern the purchased item but also the documents regarding the goods, i.e. the documents with the function of tradition.[5] Neither the Czech commentary literature nor case law provides any guidance on this as yet. However, in my opinion, the wording of the Czech Civil Code does not oppose this interpretation.

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1 Mankowski in Franco Ferrari, Eva-Maria Kieninger, Peter Mankowski, *Internationales Vertragsrecht* (CH Beck 2012, München) art. 66 CISG, no. 10.

2 Hachem in Peter Schlechtriem, Ingeborg Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, CH Beck 2013, München) art. 66 CISG, no. 5.

3 Hachem (n 2) art. 66 CISG, no. 10.

4 Hachem (n 2) art. 66 CISG, no. 12.

5 Mankowski (n 1) art. 66 CISG, no. 11.

2 Risk to the Price – Risk to the Performance

The risk itself can be subdivided into two categories: risk to the price *(Preisgefahr)* and risk to the performance *(Leistungsgefahr).* Risk to the price determines who will have to bear the financial consequences of the potential materialisation of the risk; while risk to the performance means who ultimately suffers from the loss or damage to the purchased item. While the risk to the price changes in time (as I elaborate below), the risk to the performance in fact ultimately always stays with the buyer, regardless of whether he has to pay the price or not. It is him who will either receive a damaged item or not receive anything. In law, the bearing of risk to the performance decides whether the seller will have to pay damages for not performing or for not duly performing.

There is, of course, a difference between individual things and fungible things. The risk to the performance concerns primarily only individual things and fungible things that were individualised [i.e. clearly identified to the contract – see also below (Chapter III.5.)]. If the individualisation has not yet occurred, the risk to the performance is generally borne by the seller, unless the loss/destruction concerns the whole category of items.

3 Significance of the Passing of the Risk

a) Bearing the consequences of accidental loss or damage

As already stated above, the allocation of risk of loss determines who will have to bear the materialisation of the risk as defined above, i.e. who will suffer the financial consequences of the damage or loss of the purchased item. Both art. 66 CISG and Sec. 2125 (1) of the new Czech Civil Code stipulate, with different words, that if the risk materialised after the passage of the risk to the buyer and the purchased item has perished or was damaged, the buyer is not discharged from his obligation to pay the full price. He is also, though not stated expressly in either of the norms, obliged to take over the purchased item, even if it is damaged.[6]

As already stated above, the obligation to pay the full price persists also when the quantity of the purchased item is reduced after the passing of the risk. The buyer will also be burdened with the fortuitously incurred extraordinary transport costs if they occur after the passage of the risk and if not stipulated otherwise, e.g. through the application of Incoterms.

A difference, at least in wording, concerns the exception to this rule, i.e. situations when this effect of passing of the risk does not apply.

The CISG states that the buyer is discharged of his obligation to pay if the loss or damage is due to an act or omission of the seller, while the Czech Civil Code discharges the buyer if the seller caused the materialisation of the risk through a breach of his obligation. These two different wordings may lead to the conclusion that the exemption under CISG is broader than the

[6] Mankowski (n 1) art. 66 CISG, no. 9.

exemption under the Czech Civil Code. However, if we look at the interpretation of art. 66 CISG and the possible interpretation of Sec. 2125 (1) of the Czech Civil Code (under the influence of the previous regulation in the old Commercial Code), we may conclude that the content of the regulation itself does not differ. After all, art. 66 was the model for the provision in the old Commercial Code,[7] and the provision of Sec. 2125 (1) is a word-for-word copy. However, there is neither case law nor commentary literature that would provide more information on how to interpret the exemption.

The question, thus, is how to interpret 'act or omission' and 'breach of his obligation'. The crux of the matter is whether the behaviour encompasses only violations of the contractual obligations or whether it also encompasses other acts or omissions of the seller. The Czech provision might lead to a restrictive conclusion, reducing the seller's obligations to those stipulated in the contract; however, the term 'obligation' needs to be interpreted broadly, not as only a contractual obligation but as a legal obligation covering, of course, contractual obligations but also other connected obligations.

On the other hand, the notion of 'act or omission' in CISG is interpreted rather restrictively. The older scholars interpreted it very narrowly as meaning only violations of contractual obligations, while modern scholars view it as also covering other modes of behaviour.[8] Nevertheless, this controversy is of low significance. In practice, the vast majority of situations will be violations of contractual obligations.[9] The reason why CISG has a broader wording is the fact that CISG does not cover all of the post-contractual accessory obligations and there was a fear these might be excluded from the rule.[10] In any case, the exemption is narrowed down by further requirements: (i) it is not any causative behaviour by the seller that triggers the exemption; it must be behaviour that is in breach of his obligations [be it a contractual obligation, post-contractual obligation (esp. not to endanger the goal of the contract) or another obligation to exercise due care];[11] and (ii) the conduct of the seller cannot be justified (e.g. the seller commissions an inspection of the already dispatched goods because of a suspicion of damage to the goods and the goods are impaired through the inspection[12]).[13]

Due to the purpose of the norm and the history of its codification, Sec. 2125 (1) of the Czech Civil Code should, in my opinion, be interpreted similarly.

b) Liability for lack of conformity with the contract

Passing of risk, or better said the moment when the risk is passed, has a further function. It determines when the purchased item shall conform to the contract or have other properties it should exhibit. If it does not conform at this particular moment, it triggers the rights of the buyer

[7] Irena Pelikánová, *Komentář k obchodnímu zákoníku* (4th edn, Linde 1997, Praha) sec. 461, 220.
[8] Huber in *Münchener Kommentar zum BGB* (6th edn, CH Beck 2012, München) (MüKo) art. 66 CISG, no. 12.
[9] See, for example, Mankowski (n 1) art. 66 CISG, no. 16; Huber (n 8) art. 66 CISG, no. 12.
[10] Huber (n 8) art. 66, no. 12.
[11] Benicke in *Münchener Kommentar zum HGB* (3rd edn, CH Beck 2013, München) (MüKoHGB) art. 66 CISG, no. 6.
[12] Hachem (n 2) art. 66 CISG, no. 26.
[13] Huber (n 8) art. 66, no. 13.

connected with material and legal defects. If the defect occurs earlier and is rectified by the seller before the risk passes to the buyer, this defect does not trigger any such rights. The same applies to defects that occur after the passage of the risk. However, the difference between the occurrence of a new defect and an already existing defect becoming apparent has to be distinguished. The latter, of course, leads to the right of the buyer to claim his rights from defective performance.

Both Sec. 2100 (1) of the Czech Civil Code and art. 36 (1) CISG regulate this matter in the same manner. The Czech Civil Code only adds another instance of formation of buyer's rights regarding defective products, i.e. when the defect occurs after the passing of the risk but is caused by the seller's breach of his obligation – contractual, post-contractual accessory or statutory obligation.

The special rules on consumer sales contracts in the new Czech Civil Code do not connect the formation of the seller's liability for defects with the passage of the risk, but with the moment when the consumer takes over the purchased item.

III Passage of the Risk of Loss in the New Czech Civil Code and in the CISG

The regulation of the passage of risk in the sales contract under the new Czech Civil Code cannot deny its inspiration from the CISG. However, it follows its own order and suffers, as many parts in the new Czech Civil Code do, from inaccuracies and erroneous formulations taken over from the old regulations.

1 General or Subsidiary Rule

The general rules on the passage of the risk in the Czech sales law differ slightly from the regulations in CISG, as CISG is designed for the sale of goods, i.e. movables among professionals, while the Czech sales law deals with all kinds of sales contracts. It therefore has a general rule in Sec. 2082 (1), under which the risk of loss passes to the buyer with the acquisition of ownership, and a general rule for movable property in Sec. 2121 (1), under which the risk of loss passes with taking over the purchased item by the buyer and which corresponds to the CISG rule in art. 69 (1).

If I am not mistaken in my interpretation of the law, the general rule of Sec. 2082 (1) of the Czech Civil Code applies only with regard to consumer sales contracts. In all other cases, the general rule of Sec. 2121 (1) applies, either because it is part of the provisions concerning movables or by express reference (in cases of immovables) or because of reference by logic (in instances of asset deals). The provisions on consumer sales law pretend to be exhaustive (which is, in my opinion, not the case), but they tend to exclude, at least in part, the application of the provisions regarding the sales of movables. Although the general idea of exclusion of these provisions is, in my opinion, untenable, in this case the application of the general rule of Sec. 2082 (1) is clearly more advantageous for the consumer with regard to the special rules of passing

of the risk that I will deal with below.[14] This is because it applies regardless of how the purchased item is transmitted to the buyer and they do not have to bear the risk before they actually have the purchased item in his remit.

Still, the general rule applicable to the consumer does not say anything on the consequences of the passage of the risk of loss, i.e. on the continuance of the obligation to pay the price. As such, although consumer sales law is a special norm *(lex specialis)* and law on the sales of movables is generally not applicable, here Sec. 2125 has to be applied.

A special rule for immovables in Sec. 2130 of the Czech Civil Code, stating that, if the parties establish a time when the buyer shall take over the immovable thing, the risk of damage passes on the buyer at this time may seem unnecessary. However, the time of acquisition of the ownership right depends not on the parties themselves but on the cadastre, whose registration of the rights to the property is the constitutive act. Thus, the parties will usually arrange a different time for taking over of the property. If they do not arrange such a time, the risk of loss passes in line with the general rule in Sec. 2121 (1), as Sec. 2131 refers to the application of provisions concerning movable property. However, if they arrange a time, the risk of loss passes regardless of whether the buyer took over the immovable or not, or the reason for not taking it over.

Both the Czech regulation as well as CISG put the delay of the buyer in taking over the purchased item on a par with actually taking it over, on condition that the seller placed the item duly at the disposal of the buyer [see art. 69 (1) CISG and Sec. 2121 (2) or Sec. 1976 (if the general rule of Sec. 2082 applies) of the Czech Civil Code].

2 Goods to be Placed at the Buyer's Disposal at a Place other than the Seller's Premises

A further possible situation is that the parties agree that the buyer will take over the purchased item at a place other than the seller's premises. There is a significant difference in formulation between art. 69 (2) CISG and Sec. 2122 of the Czech Civil Code. These provisions are *leges speciales* to the general rule contained in art. 69 (1) CISG and Sec. 2121 of the Czech Civil Code. As the purchased item is transmitted outside of the sphere of the seller, the rule is modified and builds up on specific prerequisites.[15]

CISG states that 'if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that

[14] This provision is of course (as many other provisions on consumers) not entirely in line with the provisions in Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, on consumer rights, which in art. 20 stipulates: '*In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods. However, the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.*' This will of course have to be dealt with, if to the disadvantage of the consumer, with an EU-conform interpretation of the norm.

[15] Mankowski (n 1) art. 69 CISG, no. 18.

the goods are placed at his disposal at that place.' CISG, thus, presupposes that (i) the parties agreed that the buyer will take over the purchased item at a place other than the seller's premises, (ii) the purchased item is placed at his disposal, (iii) the buyer is aware of this fact, and (iv) the performance is due.

On the other hand, the Czech Civil Code states that 'if the buyer shall take over the thing from a third party, the risk of damage passes on him at the moment when he could dispose of the thing, but not earlier than the time of performance.' The prerequisites of the Czech Civil Code are the following: (i) the parties agreed that the buyer shall take over the purchased item from a third party, (ii) the buyer can dispose of the item, and (iii) the performance is due.

The difference in formulation concerns, thus, the location where the buyer shall take over the purchased item and knowledge of the possibility to dispose of it.

If we consider the question of place other than the place of business of the seller (CISG), this will of course be usually the premises of a third party, usually the warehouse keeper (Czech Civil Code). Thus, insofar, the rules accord. However, the CISG rule has in fact a broader application spectrum. It was actually drafted in order to deal especially with cases where the buyer shall take over the purchased item from a third party.[16] Yet, it also covers sales contracts stipulating the seller's obligation to bring the purchased item to the buyer *(Bringschuld)* and distance purchasing *(Fernkauf)*.[17] It definitely excludes any premises of the seller.[18] The *Bringschuld* case under Czech law will, thus, in my opinion not be covered by this special rule but by the general rule of Sec. 2121 (1) (the buyer takes over the purchased item) and (2) (the buyer does not take over the purchased item but it is placed at their disposal), though the second paragraph will have to be further developed by the courts in order to suit the needs.

It may seem that, under this general rule, the prerequisite of the due date is missing. However, the general rules of the law of obligations (Sec. 1910 and 1962) stipulate that the creditor (here the buyer) cannot be forced to accept performance before the due date.

If we consider the question of the possibility of the buyer to dispose of the item (Czech Civil Code), this of course presupposes placing it at their disposal and their knowledge of it (CISG). It is not enough that the buyer had a possibility of knowing, i.e. negligence is not enough. The buyer has to know positively.[19] Positive knowledge does not necessarily mean that the seller has an obligation to inform the buyer. The buyer can obtain such information from another source, e.g. from the warehouse keeper or carrier.[20] However, in case of doubt, it will be for the seller to prove that the buyer had such knowledge.[21] The buyer should, however, not have the possibility to abuse this rule and delay the passage of the risk of loss unduly. As such, it is enough

[16] Benicke (n 11) art. 69, no. 5.
[17] Hachem (n 2) art. 69 CISG, no. 13.
[18] Huber (n 8) art. 69, no. 8.
[19] Hachem (n 2) art. 69 CISG, no. 21.
[20] Huber (n 8) art. 69, no. 13.
[21] Luboš Tichý, Petra Joanna Pipková, Jan Balarin, *Kupní smlouva v novém občanském zákoníku. Komentář* (CH Beck 2014, Praha) Sec. 2122, 240, no. 9.

if the notice has reached the sphere of the buyer, so that they could under normal circumstances become aware of the fact and, thus, the seller could have a legitimate expectation.[22]

The legal consequence of all this is that the risk of loss passes to the buyer if all these prerequisites are fulfilled, regardless of whether the buyer actually took over the purchased item or not.

3 Goods to be Handed over to a Carrier

If the parties arrange that the purchased item shall be transported to the buyer by an independent carrier, the risk of loss passes to the buyer before he actually takes over the purchased item. The regulations, both in the Czech Civil Code [Sec. 2123 (1)] and in CISG [art. 67 (1)], mean the same although the formulations differ. This is because the Czech provision follows the previous regulation in the old Commercial Code which was already inspired by CISG. The only thing that differs from the previous Czech regulations and from CISG is the omission of the provision that the fact that the seller retains (Czech Commercial Code) or is authorised to retain (CISG) documents controlling the disposition of the goods (e.g. a bill of lading) does not affect the passage of the risk. The seller may retain these documents for different reasons, e.g. because he wants to dispose of the item until the buyer pays the price.[23] However, this shall not have an influence on the passage of the risk. This is the consequence of the fact that the CISG does not connect the passage of the risk to the acquisition of ownership but to the actual physical authority over the purchased item.[24] As Sec. 2121 ff. follows the same principle, it is only logical to interpret Sec. 2123 (1) too as meaning that retaining the aforementioned documents by the buyer does not have an effect on the passage of the risk either.

The rule on goods to be handed over to a carrier knows two different situations. Either the parties do not agree on a place where the purchased item should be handed over to a carrier and then the risk of loss passes to the buyer upon handing it over to the first carrier or the parties arrange that the purchased item shall be handed over to the carrier at a certain place and then the risk of loss passes over to the buyer when it is handed over to the carrier at this certain place, even if he is not the first carrier. This rule applies both under the Czech Civil Code and under CISG.

4 Goods in Transit

The purchased item may already be transported when the sales contract is concluded. In these cases, the Czech Civil Code [Sec. 2123 (2)] and CISG (art. 68) chose different solutions. The Czech Civil Code follows a solution that the Czech law has known since the International Trade Code of 1963. If the sales contract concerns goods in transit then the risk of loss passes

[22] Hachem (n 2) art. 69 CISG, no. 22.
[23] Benicke (n 11) art. 67, no. 14.
[24] Hachem (n 2) art. 67 CISG, no. 27.

retroactively to the moment when they were handed over to the first carrier. The Czech legislator chose this solution because the moment of handing over to the first carrier is the last moment when it was possible for the parties (especially for the seller) to ascertain the state of the goods.[25] This, certainly, seems to be unfair towards the buyer; therefore, the Czech legislator provides for a safeguard: the seller bears the risk of loss or damage that occurred before the conclusion of the contract and of which the seller knew or, with respect to the circumstances, ought to have known. The formulation 'ought to have known' is interpreted in such a manner that not knowing is caused by the seller's negligence.[26] In other words, if the seller had applied the average standard of care he would have known. For the possibility of knowing, it is enough that the information was available from the media.[27]

By contrast, CISG fixes, in principle, the conclusion of the contract as the decisive moment. Art. 68 also provides for a similar solution as in the Czech Civil Code, i.e. that the risk of loss passes retroactively with the handover to the carrier. However, this applies only 'if the circumstances so indicate', i.e. not only in cases where the parties agree upon such a solution but also in other specific situations. There are not many leads on how to interpret these 'circumstances'. There is one situation which is undisputed, i.e. in cases where transport insurance for the time from handing over to the carrier exists, and which can be invoked by the buyer.[28] The decisive circumstances are, generally speaking, determined by the significance of the cash flow risk to the buyer.[29] If the cash flow risk is insured or otherwise covered then the passage of the risk is retroactive. However, in case of doubt, the first rule, i.e. passage of the risk upon the conclusion of the contract, applies. Art. 68 CISG knows the same safeguards relating to the knowledge of the seller as the Czech Civil Code.

Although it seems a more unfair solution for the buyer, the Czech solution in Sec. 2123 (2) circumvents the difficulties of determining whether the loss or damage occurred before or after the conclusion of the sales contract. As such, it seems to me to be a more efficient solution. The buyer knows the risks and concludes the contract while knowing the risks. The buyers in these circumstances will usually be businessmen or similar entities and, hence, we can expect from them a certain responsibility for their actions. If the buyer wishes to protect himself he can insist on buying only goods covered by transport insurance.

5 Specific Provisions Concerning Fungible Things

The specific provisions on fungible things concern cases where the risk of loss passes to the buyer without them actually taking over the purchased item. This can happen in several cases: the goods are to be transported by a carrier in bulk; the goods are in transit in bulk, or the goods are to be placed at the disposal of the buyer, either by the seller himself or by a third party. If, in

[25] Ludvík Kopáč, *Komentář k zákoníku mezinárodního obchodu* (Panorama 1984, Praha) sec. 382, 215.
[26] Ludvík Kopáč, *Obchodní kontrakty: obecná úprava obchodních smluv*, II. díl. (Prospektrum 1993, Praha) 441.
[27] Kopáč (n 26) 441.
[28] See, for example, Huber (n 8) art. 68, no. 8; Mankowski (n 1) art. 68 CISG, no. 14; Hachem (n 2) art. 68 CISG, no. 9.
[29] Benicke (n 11) art. 68, no. 5.

these cases, only a part of the stock or bulk would perish or be damaged and the seller could arbitrarily decide that exactly this part belonged to the buyer then it would be unfair to let the buyer bear the consequences. Therefore, both CISG and the Czech Civil Code provide for a rule to deal with this problem. If the risk of loss shall pass to a buyer who did not take over the purchased item that is a fungible thing, it passes only if the purchased item was individualised.

The norms under scrutiny use different terms [sufficiently separated and distinguished from other things (Sec. 2124 of the Czech Civil Code), clearly identified to the contract (arts. 67 (2) and 69 (3) CISG)] but in both cases it amounts to individualisation. The individualisation can be performed in different manners: e.g. by markings on the goods, by shipping documents, by notice given to the buyer [art. 67 (2) CISG].

IV Fundamental Breach of Contract

There is a special regulation for cases where the seller has committed a fundamental breach of the sales contract. In such an event, the passage of the risk of loss de facto does not occur.

The Czech Civil Code states this rule in a very enigmatic fashion, which can only be understood if we look at its history, especially at Sec. 461 of the old Commercial Code, after which it is modelled, and Sec. 380 (2) of the International Trade Code, which was its predecessor and was a lot clearer. Sec. 2125 (2) of the Czech Civil Code states that 'paragraph 1 is not applied if the buyer asserts his right to a delivery of a spare thing, or if he withdrew from the contract.' Paragraph 1 of the same provision states that a loss that occurred after the passage of the risk has no bearing on the buyer's obligation to pay the price. Translated into simple language, this provision means that if there is a defect attached to the purchased item for which the seller is liable (according to sales law) and the defect (or other violation of the sales contract) is of such an intensity that the buyer has a right to revoke the contract or claim a substitute and they do so then the risk of loss did not pass to the buyer.

The corresponding rule in CISG, art. 70, differs. It states that 'if the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.' This provision has two functions: (i) the buyer does not lose his claims relating to the fundamental breach of contract if the risk materialises (as he cannot lose rights they acquired before the loss or damage occurred),[30] and (ii) if the buyer uses these claims then, in certain cases, the risk passes back to the seller.[31] The fundamental breach of contract is understood to be a breach that causes the right of the buyer to ask for a delivery of a substitute according to art. 46 (2) or to declare the contract avoided according to art. 49 (1) lit. *b)* (non-delivery) or (2) (qualified late delivery).[32]

[30] Hachem (n 2) art. 70 CISG, no. 5.
[31] Huber (n 8) art. 70 CISG, no. 3.
[32] Hachem (n 2) art. 70 CISG, no. 6.

As such, the two provisions say the same, albeit with different words, though CISG is much more comprehensible.

V Conclusions

In my opinion, my analysis shows that though the regulations under scrutiny (excluding the specific rules governing consumer sales contracts) differ in wording (mostly to the disadvantage of the Czech Civil Code), they contain similar rules with similar results in practice, though sometimes these are reached through different ways, sometimes more complicated ones in the Czech Civil Code. There are, thus, only few deviations, predominantly concerning the type of purchased items they concern or the person of the buyer. Where it differs in the same situation (goods in transit), the Czech solution, in my opinion, seems to be better practicable.

Miloš Kocí*

Hungarian Fiduciary Asset Management Contracts in the Context of Czech Law

I Introductory Remarks

The new Hungarian and Czech Civil Codes[1] have both recently adopted the legal institution of trust in some form. The concept is known in the Czech Republic as a 'trust fund' and in Hungary as a 'fiduciary asset management contract'.

The Czech legislator has surprisingly taken inspiration from beyond Europe in the Civil Code of Quebec. The Hungarian regulation follows the continental legal tradition represented by the laws of Liechtenstein and Luxembourg. The result is that the approach to trusts varies in each country: the Czech trust fund is conceived as part of property law and the Hungarian trustee asset management as part of contract law.

This paper highlights the pivotal, fundamental and far-reaching topics that most determine the functionality of trusts in both countries. As such, only the following issues are covered: creation of trust, notion of ownership, protection of creditors, duties of the trustee, and asset-tracing vehicles and termination of trust.

II Creation of Trust

Generally, a trust is a relationship where property is held by one party for the benefit of another. A trust is created by a settlor who transfers some or all of his property to a trustee, who then holds that property for the trust's beneficiaries.[2]

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1 Hereinafter the 'HCC' and the 'CCC'.

2 See David Hayton, Paul Matthews, Charles Mitchell, *Underhill & Hayton's Law Relating to Trusts and Trustees* (18th edn, Butterworths Law 2010, London) 2.

1 Formal Requirements

Under Czech law, a trust may be established only by contract or will,[3] free or in return for payment.[4] The contract may be bilateral or multilateral and may be oral or written; even the will need not be in writing.[5] A trustee need not be a party to the contract, so the trust is established once a trustee starts to manage the entrusted assets,[6] as it is not desirable to set up a trust where nobody takes care of the property. A trust is not subject to any registration.

Also in Quebec the contract may be executed orally, for example by phone, without being subject to registration.[7] The same applies, for example, in England,[8] Japan, South Korea and Taiwan.[9]

However, under Hungarian law, the contract must be in writing,[10] like in Liechtenstein and Luxembourg.[11] The trustee must always be a party to the contract.[12] Like in the Czech Republic, the contract is not subject to any registration. In this regard, the HCC significantly deviates from the Liechtenstein model of a trustee contract.[13]

2 Privileged Will

As shown, if the Czech trust is established by will, it is created upon the settlor's death. If the appointed trustee does not accept the management of assets, another one is appointed by the court.

The Hungarian legislator has adopted a different approach as the provisions of a will take effect only upon the trustee's acceptance of the appointment under the conditions set out therein, and the courts may not intervene.[14] A will is not privileged in any way, which means that the intention of the settlor to set up a trust does not enjoy any special protection.

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[3] Section 1448 para 1 CCC. Trust may be also created by law, see Explanatory report to the CCC, p. 353.

[4] See Explanatory report to the CCC, p. 353.

[5] Section 1532 CCC.

[6] Section 1451 CCC. This does not apply in case of will, where trust automatically arises ater dech of the settlor.

[7] Rainer Becker, *Die fiducie von Quebec und der trust: ein Vergleich mit verschiedenen Modellen fiduziarischer Rechtsfiguren im civil law* (Mohr Siebeck 2007, Tübingen) 290 and 296.

[8] See Maurizio Lupoi, *Trusts: a comparative study* (Cambridge University Press 2000, Cambridge) 97 or Hayton, Matthews, Mitchell (n 2) 206.

[9] Makoto Arai, 'Trust law in Japan: inspiring changes in Asia, 1922 and 2006' in Lusina Ho, Rebecca Lee (eds), *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis* (Cambridge University Press 2013, Cambridge) 28. Wu Ying-Chieh, 'Trust law in South Korea: developments and challenges' ibid, 49 and Wang Wen-Yeu, Wang Chih-Cheng, Shieh Jer-Shenq, 'Trust law in Taiwan: history, current features and future prospects' ibid, 71.

[10] Section 6:310 para 2 HCC.

[11] See also Miloš Kocí, Luboš Tichý, 'Trust – Srovnávací studie' in Luboš Tichý, Kateřina Ronovská, Miloš Kocí (eds), *Trust a srovnatelné instituty v Evropě* (Centre for Comparative Law of the Faculty of Law of the Charles University in Prague 2014, Prague) 226.

[12] Section 6:310 para 1 HCC.

[13] Kocí, Tichý (n 11) 226–227.

[14] Section 6:329 para 2 HCC.

3 Irrevocable Unilateral Act

Like in Liechtenstein,[15] Hungarian trusts may also be established by means of a unilateral statement, which is not possible under Czech law. This requires the fulfilment of two conditions: (i) the settlor and the beneficiary are the same person and (ii) the statement is executed in an authenticated instrument.[16] It is inconsistent that the Hungarian legislator does not require a subsequent written consent in this case if it is required when the trust is established by will, though it is commonly accepted that a will is a unilateral act sui generis.

Furthermore, the first condition of an irrevocable unilateral act is problematic. It would be more appropriate if the identity of the settlor and trustee were required instead of the current solution. In this constellation, entering into a contract is not possible; however, the legislator should still find a way to enable the establishment of a trust for the benefit of third parties. This solution is used, for example, in Japan and South Korea.[17]

4 Conclusions

– With regard to the creation of trusts, the HCC is more formalistic than the CCC.
– Hungarian courts should be allowed to intervene to protect the intention of the settlor if the appointed trustee does not accept the conditions set out in the will.
– If, under Hungarian law, the consent of the trustee is required in the case of a will, it should also be required in the case of an irrevocable unilateral act.
– Both the Hungarian and Czech legislators should enable the establishment of a trust by an irrevocable unilateral act also where the settlor and the trustee are the same person, since the settlor should be allowed to manage the assets for the benefit of third parties.

III Notion of Ownership

1 Different Approaches to Ownership

The CCC has taken over a unique concept of ownership from the Canadian province of Quebec. This concept has brought a revolutionary element into fiduciary relationships: when a trust is created, a separate and independent set of assets arises, not owned by anybody, including the trustee, settlor or beneficiary.[18] This concept of autonomous ownership has only one analogy in Czech legal history, the so-called *hereditas iacens,*[19] and is in sharp contrast with

[15] Section 899 para 2 of the Personen- und Gesellschaftsrecht, Law of 20 January 1926, LGBl No. 4 of 19 February 1926 (the 'PGR').
[16] Section 6:329 para 1 HCC.
[17] See Arai (n 9) 28–29 and Ying-Chieh (n 9) 49.
[18] Section 1448 para 3 CCC.
[19] Section 545 ABGB.

the tradition of Civil Law.[20] The trustee is only nominally registered as owner of the trust property where necessary, but always with the appendix 'trustee'.[21]

What are the reasons for this concept of ownership? There are no jurisdictions beyond Quebec and the Czech Republic where it would be applied, so we must immerse ourselves in Quebec's legal history to understand it.

In the past it was disputed in Quebec who actually is to be regarded as the owner of the trust assets. The owner could be the settlor, based on the resolutive condition, the beneficiary, based on the theory of suspended ownership, or the trustee, because he manages the assets. The problem is that none has full and unlimited ownership; not even the trustee has all proprietary rights as he lacks *usus, fructus* and *abusus*. Moreover, the Civil Law jurisdictions do not know the concept of dual ownership as it must be fully attributed to only one entity.[22]

Hence, both Quebec and Czech legislators endorse the concept of autonomous, separate and independent ownership because it circumvents these theoretical problems. The result is, inter alia, that personal debtors of the settlor, trustee and beneficiary may not claim the assets of the trust because it is not owned by any of them. This concept may be understood as a modality of ownership or an interlude in ownership, but clearly "ownership will revive in full force when a *fiducie* comes to an end."[23]

The HCC does not solve this issue explicitly. It does not even state that the ownership must be transferred from the settlor to the trustee. The applicable provisions only provide that '[u]nder a trustee asset management contract the trustee undertakes to manage the assets in his own name and on the beneficiary's behalf'[24] and that 'the trustee shall have the right of disposition over the managed assets according to the conditions and within the limits set out in the contract.'[25]

However indispensable the transfer of ownership may seem, another provision only says, '[m]anagement of the assets shall cover the exercise of entitlements stemming from the ownership […] and the performance of obligations arising therefrom.'[26] Moreover, no HCC provision states that the trustee is to be entered into public registers as owner of the property.

Inevitably, the following questions must be asked: Must ownership really be transferred under the HCC? If yes, in what quality? Is it exclusive or dual ownership?

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[20] John B. Claxton, *Studies on the Quebec Law of Trust* (Thomson Carswell 2005, Toronto) 27–28.

[21] Section 1456 CCC.

[22] For further details see Yves Caron, 'The Trust in Quebec' (1980) McGill Law Journal 25 (4) 421–444.

[23] Yaëll Emerich, 'The civil law trust: a modality of ownership or an interlude in ownership' in Lionel Smith (ed), *The Worlds of the Trust* (Cambridge University Press 2013, New York) 40.

[24] Section 6:310 para 1 HCC.

[25] Section 6:318 para 2 HCC.

[26] Section 6:318 para 1 HCC.

2 Protective Trusts under the HCC

The possible answers have major significance for protecting assets against creditors. Should the trustee or beneficiary be regarded as owner of the property, then the property is sufficiently protected against their personal creditors by special provisions of the HCC.

However, if the settlor remained owner of the assets, the trust under the HCC would provide no protection against the settlor's personal creditors. This would mean that the Hungarian trust could not – contrary to the regulations in Quebec and the Czech Republic – be used as a 'protective trust', which under certain circumstances allows the settlor to protect part of his property against future debtors.[27]

3 Security Trusts under the HCC

A further restriction imposed on Hungarian trusts is the impossibility to establish them for security purposes, which does not follow only from unclear provisions governing the transfer of assets. This option is explicitly excluded by the legislator, who considers a trustee collateral arrangement null when it provides, '[a]ny clause on the transfer of ownership, other right or claim for the purpose of security of a pecuniary claim, or on the right to purchase, with the exception of the collateral arrangements provided for in the directive on financial collateral arrangements, shall be null and void.'[28]

This is in contrast with prevailing practice not only in Europe. Securitisation by means of trusts or trust-like legal institutions is possible under French[29] and Quebec[30] law as *fiducie-sûreté,* and in England as security trusts.[31] Also one of two basic kinds of German *Treuhand* serves this purpose, the so-called *Sicherungstreuhand.*[32] Security trusts play a relevant, and sometimes even irreplaceable, role in the provision of funds to companies in financial distress and could be definitely beneficial to businesses also in Hungary.

4 Conclusions

– The Hungarian legislator should clarify if a transfer of assets is required for a trust to be created.
– The Hungarian legislator should clarify whether protective trusts are permitted.

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[27] Becker (n 7) 273.
[28] Section 6:99 HCC.
[29] It may be even used for the purposes of restructuring a company, see Fabrice Anselmi, 'La fiducie-sûreté pourrait faciliter les restructurations d'entreprises', an article from 29 October 2009 for L'AGEFI Hebdo. Downloadable at http://www.agefi.fr/articles/la-fiducie-surete-pourrait-faciliter-les-restructurations-d-entreprises-1112554.html.
[30] Becker (n 7) 265.
[31] Hayton, Matthews, Mitchell (n 2) 60-66.
[32] Rainer Kulms, 'Německo mezi trustem a Treuhandem' in Luboš Tichý, Kateřina Ronovská, Miloš Kocí (eds), *Trust a srovnatelné instituty v Evropě* (Centre for Comparative Law of the Faculty of Law of the Charles University in Prague 2014, Prague) 20.

– The Hungarian legislator should enable the creation of a security trust by introducing a special provision amending the current trust legislation.

IV Protection of Creditors

1 Voidability of Legal Acts

The specific of Trust Law is that the debtor, if he settles a trust, may use the trust property as the beneficiary and behave as the owner. The objection that a trust is just another kind of contract is not convincing because, if the debtor decided to circumvent the law by using some more traditional type of contract (such as a donation or sale contract), the risks are intimidating. Once the property is transferred (even if just formally) to another person, the original owner loses control over the assets and has no rights attributed to the settlor or beneficiary under trust law (e.g., to appoint a new beneficiary or trustee). This makes a trust a more comfortable vehicle for fraudulent purposes compared to other legal institutions.

Under Czech law, any legal act may be invoked ineffective only within objective periods amounting to (i) five years if the debtor deliberately acts to impair satisfaction of the creditor and the acquiring party has knowledge of such an intention and (ii) two years if the intention of the debtor must have been known to the other party or the legal act was gratuitous.[33]

The right to claim damages is subject to the general subjective limitation period of three years[34] commencing when the impaired party gets knowledge about the damage and the wrongdoer.[35] The same rule applies to unjustified enrichment. This means that, under Czech law, once the ownership is transferred to the trustee and five years elapse, the transfer of ownership is irreversible, even in cases of fraud. Of course, the damaged party may start criminal proceedings or claim damages, but it will not be possible to reinstate the assets.

However, in Quebec a one-year subjective period is applicable to voidability of legal deeds and commences from the day on which the damaged party gets knowledge of the impairing act.[36] In the Czech Republic, like in Quebec, trusts are not subject to any registration, and therefore this protection of the damaged party should be introduced also into Czech law.

In Hungary the situation is quite different, since '[a] contract by which the basis for satisfying a third person's claim has been deprived entirely or in part shall have no legal force in respect of such third person if the acquiring party acted in bad faith or had a gratuitous advantage originating from the contract'[37] and 'at the third party's request, the acquiring party is obliged to tolerate satisfaction from the acquired property and enforcement against such property.'[38]

[33] See Sections 589 et seq. CCC.
[34] Section 629 para 1 CCC.
[35] Section 620 para 1 CCC.
[36] Section 1635 of the Civil Code of Quebec.
[37] Section 6:120 para 1 HCC.
[38] Section 6:120 para 3HCC.

The HCC does not provide for any period for voidability, therefore ineffectiveness of legal acts may be invoked during the whole general limitation period of five years.[39]

2 Conclusions

– With respect to the specifics of Trust Law, the provisions on voidability of legal acts should be amended in the Czech Republic.
– The HCC provides for a sufficient protection of creditors with regard to the Trust Law.

V Duties of the Trustee

Both the HCC and the CCC comprise a relatively detailed – and potentially mutually inspiring – regulation of the trustee's duties, which reflects the fact that the trustee is a key figure in any fiduciary arrangement, including trusts.

1 Inspiration for the CCC

The HCC stipulates a special provision on the independence of the trustee, according to which, '[t]he settlor and the beneficiary may not give instructions to the trustee and any clause to the contrary shall be null and void.'[40] Enhancing independence of the trustee is necessary because he may also be personally liable for his acts (e.g., for breaching his powers).[41]

The HCC further imposes on the trustee special confidentiality requirements: '[t]he trustee shall keep confidential all facts, data and information about which he gained knowledge in the course of or in connection with carrying out his trustee responsibilities.'[42] Surprisingly, there is no such provision under Czech law. The CCC only stipulates that the trustee may not use any information acquired during management of the property for his own benefit, unless he has the consent of the beneficiary.[43]

The HCC also pays special attention to the protection of third parties: '[t]he trustee shall bear unlimited liability with his personal assets for claims arising from obligations undertaken to the burden of the managed assets, if such claims cannot be satisfied from the managed assets, and the other party did not know or should not have known that the commitment by the trustee reached beyond the limits of the managed assets.'[44] Under Czech law, the trustee is personally liable only if he trespasses his competences, but he does not need to inform a third party that

[39] Section 6:22 HCC.
[40] Section 6:316 HCC.
[41] Section 1420 CCC.
[42] Section 6:319 para 1 HCC.
[43] Section 1415 para 2 CCC.
[44] Section 6:323 para 2 HCC.

his commitment reaches beyond the limits of the managed assets. In this case, therefore, the third party's good faith is not protected under Czech law.

Finally, the CCC is missing any settlement obligation of the trustee, unlike the HCC: '[i]f the termination of trustee asset management puts the managed assets at risk, the trustee shall take measures as necessary according to the contents of trustee asset management until the time of settlement.'[45] Currently, such an obligation can be only deduced on the basis of legal fiction under the CCC.

2 Inspiration for the HCC

The HCC provides, '[u]nder the principle of reasonable commercial practices, the trustee shall have the obligation to protect the managed assets from foreseeable risks.'[46] But how will this objective be achieved? The Czech legislator gives some clues:

– the trustee must consider the return on and expected profit of the investments and, if possible, spread investment risk to achieve a ratio between fixed income and variable revenues that reasonably corresponds to economic conditions;[47]

– the trustee may not acquire more than 5% of stocks of the same issuer for the beneficiary;[48] and

– the trustee may not acquire for the beneficiary a share, bond or other debt securities of a person who breached the duty to pay revenue from the securities; the trustee also may not provide a loan to such a person.[49]

The HCC is missing any provision on insurance of the managed assets. Under the CCC, '[t]he trustee is authorised to insure the administered property against usual risks at the expense of the beneficiary'[50] and '[…] has the right to get property liability insurance under the administration at the expense of the beneficiary if he exercises the administration gratuitously."[51] The right of the trustee to have, under some conditions, the managed property insured at the expense of the beneficiary should be positively anchored also in the HCC.

3 Conclusions

– De lege ferenda the Czech legislator should get inspiration from the HCC's provisions governing independence and confidentiality of the trustee, protection of third parties and the settlement obligation of the trustee.

[45] Section 6:327 para 2 HCC.
[46] Section 6:317 HCC.
[47] Section 1432 CCC.
[48] Section 1433 CCC.
[49] Ibid.
[50] Section 1427 para 1 CCC.
[51] Section 1427 para 2 CCC.

– De lege ferenda the Hungarian legislator should get inspiration from the CCC's provisions governing cautious investments of the trustee and his right to have the managed assets insured at the expense of the beneficiary.

VI Asset Tracing

1 Hungarian *Spurfolgerecht*

In England[52] and Liechtenstein, we know of asset tracing vehicles that serve to protect the trust property. Especially the *Spurfolgerecht* under Liechtenstein law is very interesting:

> [i]f third party acquires a thing or a right and is aware that it belongs to the trust and the trustee is not entitled to dispose thereof, certain persons (settlor, other trustee, beneficiary or trustee appointed by the court) may claim that these assets be reinstated by such a third party or they can file an action for recovery of unjustified enrichment.[53]

The HCC seems to have been influenced by this provision because it follows its logic, stating, '[i]f the trustee […] unlawfully transfers any part of the assets he manages to a third party, the settlor and the beneficiary shall have the right to recover such assets and to have it reinstated among the managed assets, if the third party did not act in good faith or there was no pecuniary interest.'[54]

Hungarian regulation of asset tracing is even stricter than the *Spurfolgerecht,* because it covers not only bad faith of the third party but also all gratuitous transfers, and potentially even infringes upon the good faith of third parties.

It is a mistake that the CCC has no comparable legal regulation, making it more complicated for the settlor and beneficiary to protect the trust assets against unlawful dispositions of the trustee. The general provisions of the CCC on acquisition of the right of ownership from a non-entitled person, which assume the good faith of the acquirer,[55] apply, but gratuitous transfers are not covered by the CCC.

2 Conclusions

– The HCC has adopted a modern and effective asset tracing vehicle.
– The CCC has adopted no asset tracing vehicle and compared to the HCC makes trust assets more vulnerable to unlawful dispositions of the trustee.

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[52] Hayton, Matthews, Mitchell (n 2) 1286.
[53] Section 912 PGR.
[54] Section 6:318 para 3 of the HCC.
[55] Section 1109 CCC.

VII Termination of Trust

1 Rule against Perpetuity

The CCC and HCC have fundamentally different approaches to the rule against perpetuity. Under Czech law, the duration of trusts created for charitable purposes is not limited, whereas the existence of trusts created for private purposes is limited to approximately three human lives.[56] Contrary to this, under the HCC, '[i]f the trustee asset management contract is signed for an indefinite duration, or for a period of more than fifty years, it shall terminate after fifty years. Any clause to the contrary shall be null and void.'[57]

This rule against perpetuity is strict and does not differentiate between trusts created for private and charitable purposes, although foundations are not time-limited by the HCC, either. There is no functional need to limit the existence of trusts to 50 years, the less in the case of charitable trusts. The HCC should be revised and significantly amended in this regard.

2 Absence of the Trustee

Under the HCC, '[t]rustee asset management shall terminate if there is no trustee managing the assets for a period of over three months, at the time of termination of the trustee mandate.'[58] The Czech legislator has adopted a more sensitive approach than the harsh consequence of termination and states that the '[s]ettlor, beneficiary or other person with legal interest may suggest to the court that […] a trustee be recalled or new trustee be appointed.'[59]

Contrarily, an intervention of the Hungarian courts is allowed only under the assumption that the trustee has seriously breached the contract and no settlor exists: '[i]n the event of the settlor's death or dissolution without succession, if there is no other settlor for the managed assets, the court shall have powers to recall the trustee at the beneficiary's request, and shall appoint a replacement trustee at the same time, if the trustee has seriously breached the contract.'[60]

However undesirable it is for a trust to exist without a trustee, its automatic termination whenever the trustee is absent may harm not only the trust assets but also the best interests of the beneficiary. Therefore, the HCC should be amended to allow appointment of the trustee by the court to avoid automatic termination of the trust when the trustee is not given.

[56] Section 1460 CCC.
[57] Section 6:326 para 3 HCC.
[58] Section 6:326 para 1 item *c)* HCC.
[59] Section 1466 para 1 CCC.
[60] Section 6:325 para 2 HCC.

3 Conclusions

– The HCC's strict rule against perpetuity should be moderated to reflect the difference between trusts created for charitable and private purposes.
– Absence of the trustee should not automatically result in termination of trust, and the HCC should be amended accordingly.

VIII Final conclusions

The Hungarian legislator should clarify the process of creation of trust and the related concept of ownership. The HCC should clearly allow security trusts, and the HCC's rules governing the duration of a trust and reasons for its termination should be revised.

The Czech legislator should adapt the regulation of voidability of legal acts and introduce some asset tracing vehicle after models applied in Hungary or Liechtenstein.

Both the Hungarian and Czech legislators should enable the establishment of a trust by an irrevocable unilateral act, where the settlor and the trustee are the same person.

Finally, the CCC and the HCC can inspire each other when it comes to the trustee's duties.

Zoltán Csehi*

Rules on Partnership in the New Hungarian Civil Code of 2013

I Regulatory History

The institution of partnerships was already regulated by the former Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC), but it was also known in earlier Hungarian private law. During the Socialist era it fulfilled numerous functions and was used to regulate various matters, ranging from the legal form of small undertakings to the regulation of the financial relationship between life-partners. Since the 1970s, it has become possible to make a limited private business in the legal form of partnership. Even earlier, the relation between unmarried partners who lived together in a common household for a longer period was decided according to the rules of partnership.[1] Partnership itself is even older and has its roots in the Roman law institution of a *societas.* The rules of the FHCC were established by the adoption of Act IV of 1988. This Act on business companies – which granted only limited scope of action for partnerships – was changed only by the adoption of the new Hungarian Civil Code (Act V of 2003 on the Civil Code, hereinafter referred to as NHCC). The rules of the FHCC allowed the establishment of a partnership only for activities and purposes that require the partners to cooperate 'to achieve their common purposes involving economic activities'. A partnership may not pursue any business-like economic activity; the act of pursuing any such activity excluded the possibility to apply the rules pertaining to partnerships (see EBH 2011. 2323.).[2]

This limitation has been eliminated by the new regulations, and, technically, a partnership may be established for any lawful purpose. Other limitations of the former regulations were also deleted, which is to be discussed later.

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[1] Csehi Zoltán, 'Das Recht der Eheschließung und Scheidung und parallel Fragestellungen bei nicht-ehelichen Partnerschaften aus ungarischer Sicht' in Ch. Baldus, P-Ch. Müller-Graff (eds), *Europäisches Privatrecht in Vielfalt geeint / Droit privé européen: l'unité dans la diversité* (Sellier 2011, München) 111–137.

[2] Sárközy Tamás, 'A társaság [Partnership]' in Gellért György (ed), *A Polgári Törvénykönyv magyarázata. [Commentary to the Civil code]* (2nd book, Complex 2007, Budapest) 2030–2032.; Nochta Tibor, 'Társaság [Partnership]' in Nochta Tibor, Kovács Bálint, Nemessányi Zoltán (eds), *Magyar Polgári jog. Kötelmi jog. Különös része. [Hungarian Private Law. The Law of Obligations. Special part.]* (Dialóg Campus 2008, Budapest–Pécs) 220–225.

II Partnership and Companies

According to the Companies Act of 1988, business companies may be established for 'business-like economic purposes', while a partnership cannot be established for such purposes. Another significant difference is that business companies are independent legal entities with legal capacity, while partnerships were – and have been ever since – considered merely as a set of contractual undertakings between the partners. Under the old and the new regulations, business companies are established upon written articles of association (s 3:5), while no written form has been, or is under the new regulations, required for the establishment of a partnership. The involvement of an attorney-at-law or a notary public during the establishment of a business company is a statutory requirement [s 3:95 (2)], while no lawyer is required for the establishment of a partnership. While having an independent organisational structure is an important feature of business companies – even unlimited and limited partnerships have an organisational structure –, it is not a feature partnerships have.

Even Title XXIV of Book 6 of the NHCC is different from the title of the chapter of the FHCC on the same subject, 'The civil law partnership agreement', while the FHCC used the title 'The partnership'.

The regulations remained within the law of contract and the law of obligation and did not move toward the law of persons – as with their development in Germany. At first sight, it is pure contract law: a special contract, nothing else.[3] As a result of the history of partnership over the last 60 years, and the peculiarities of the case law, the new regulations made it more flexible and fit for all kinds of contractual cooperations, whether business, non-profit or any other. The main principle is that the rules on partnership are default rules and there are only a few mandatory provisions. A partnership is the origin of the situation where rights or receivables have several beneficiaries, or an obligation has several obligors, so the general rules of these kinds of obligations also apply (see Chapter VI and VII of Book 6, S 6:28–6:33) and the rules on partnership add these general rules.

[3] Csehi Zoltán, 'A polgári jogi társasági szerződés [The partnership agreement]' in Osztovits András (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja. III.* (Opten 2014, Budapest) 1287–1309.; Kisfaludi András, 'A polgári jogi társasági szerződés [The partnership agreement]' in Vékás Lajos (ed), *A Polgári Törvénykönyv magyarázatokkal.* (Complex 2013, Budapest) 927–936.; Petrik Ferenc, 'XXIV. Cím A polgári jogi társasági szerződés [The partnership agreement]' in Wellmann György (ed), *Az új Ptk. magyarázata. VI/VI.* (HVG-ORAC 2013, Budapest) 498–512.; Fézer Tamás, 'XXIV. Cím A polgári jogi társasági szerződés [The partnership agreement]' in Csehi Zoltán (ed), *Az új Polgári Törvénykönyv kommentárja.* (HVG-ORAC 2014, Budapest) 316–329.; Kisfaludi András, 'A polgári jogi társasági szerződés [The partnership agreement]' in Vékás Lajos, Gárdos Péter (eds), *Kommentár a Polgári Törvénykönyvhöz* (Complex 2014, Budapest) 1195–2214.

III Special Partnerships

The FHCC also regulated certain special kinds of partnerships, such as construction partnerships (s 578/B to 578/F) and the financial relations of persons (partners) living in the same household (s 578/G); Chapter XLVI of the FHCC even included the statutory definition of unlimited and limited partnerships (s 578/H) and also included a contractual provision regarding condominiums (s 578/I). In 2011, the rules pertaining to civil societies – a new phenomenon in non-profit law – were also inserted (s 578/I). This rather diverse regulation, a product of ad hoc legal development, was simplified by the provisions of the NHCC.

Regarding the special forms of partnerships, the regulation of the financial relationships between civil partners is of particular importance and will be covered with the relevant provisions of the Civil Code. Tibor Nochta noted the close relationship with syndicate agreements, which are in fact partnerships with the purpose of controlling and managing business companies and laying down the additional obligations of the partners.[4] A partnership may also be established by partners of a terminated business company by contracting (see BH 1990. 482.).[5]

1 Partnership of Attorneys

A partnership of attorneys established under Regulation No. 2/2006. (III. 20.) of the Hungarian Bar Association is an example of a special partnership. Such partnerships may be established by an attorney or law firm with other attorneys or law firms by virtue of a written contract with a view to entering into permanent cooperation in the performance of mandates [section 23 (5) of the Act on Lawyers].[6] While the partnership is not a separate legal entity but a mere contractual relationship, this quality must be indicated in the name of the partnership, and the partnership must be registered with the chamber of attorneys. The particulars of the partnership are also entered into the register of the chamber.

2 Civil Society

The institution of civil societies was established by Act CLXXV of 2011 on the freedom of association, on the charity status, and the operation and support of civil organisations. Civil societies are not independent legal entities but serve specific purposes, so the rules will remain relevant in the future only in the context of the charity law. The possibility of setting up a consortium to participate in public procurement procedures has been recognised in practice for a long time. A consortium is, in fact, a partnership (see EBH 2011. 2373.; BDT 2011. 2608; BH 2004. 474).

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[4] Nochta (n 2) 224.

[5] BH – Decision of the Supreme Court of Hungary published in official letter, no. 482 from 1990.

[6] *1998. évi XI. törvény az ügyvédekről* (Act XI of 1998 on attorneys).

IV Partnership or Partnership Agreement

S 6:498 of the NHCC describes a partnership agreement rather than the partnership itself. The partnership is created by and throughout the partnership agreement. The rule states three main obligations of the parties of the partnership agreement: (i) cooperation (ii) capital contribution; and (iii) allocation and bearing the risk of the common activities. This is a civil law agreement between the parties to achieve the common goals of the partners. The purpose of the agreement is not the exchange of goods or to provide a service by one party to another, but rather to ensure continuous cooperation between the parties. Cooperation shall mean that the partner shall do something or act for or support the common goal of their agreement. Usually the partners provide capital – assets or money – for this activity, not to each other; the capital is needed for the activity to achieve the common goals. The details of this definition in the Civil Code will be examined in the following point.

V Partners

The Code does not specify any statutory restriction regarding the partners, meaning that any human being or legal entity – i.e. natural persons, business enterprises – may be a partner in a partnership. However, public sector entities are subject to special rules. In other respects, the rules of legal capacity and disposal rights are applicable (e.g. a person with limited disposal rights may also be a partner in a partnership). Theoretically, a person may be a partner in any number of partnerships.

VI Contents of the Partnership Agreement

A partnership is established through a contract – i.e. in the articles of association – and constitutes a contractual relationship between the partners. The contract is a consensual agreement, meaning that it is concluded through the mutual intention of the parties and no written form is required by law. The contract may be also concluded by the occurrence of certain circumstances, even if the parties do not even know that their cooperation does, in fact, constitute a partnership. The general rules on the formation of contract of the Code shall apply to partnerships as well.[7]

This is because a contract may be concluded implicitly, and also because the cooperation and agreement by and between the parties meets the applicable statutory requirements. For this reason, attorneys tend to borrow and include in cooperation and similar agreements a common law clause, whereby the parties to the given agreement represent that their cooperation – e.g. joint tendering or participating in an investment together – may not establish a partnership

[7] Especially S 6:4 (3) with s 6:63.

between them. The subject of such contracts is the cooperation between the parties and the achievement of a common purpose of the parties through their cooperation, so that the necessary assets can be provided and the risk, as well as the potential success and potential financial failure or the failure of the activity, is shared by all the parties. Such contracts do not serve the dynamics of the financial relations or secure the material obligations by and between the parties, but seek to regulate their cooperation in achieving their common objective.

The partner does not provide or do anything in order to receive a consideration from their partner – the essence is the pooling of the partners' resources; their money, property, labour force or a combination of them.

The partners in a partnership are not persons with rights and obligations regarding certain payments and services to be provided to each other, but they are partners subject to an obligation to cooperate in order to achieve their common purpose. A partnership is not a new kind of legal entity. It may or may not be a company. It is a contractual relationship between the partners, meaning that there must be at least two partners capable of establishing and managing the partnership. However, legal evolution may set partnerships off on a road leading toward becoming separate legal entities, as happened in other jurisdictions (see the regulation of partnerships in France or Germany).

VII Purpose of a Partnership

As for the purpose of the cooperation, the new regulations lifted the restriction of the FHCC, and now the partners are allowed to establish a partnership for any lawful – i.e. not prohibited by law – purpose, including the purpose of pursuing economic, business activities, even in a business-like manner. While the courts used to find it null and void, it has now been clarified by the new rules that a partnership agreement may also be used for the implementation of the function of silent partners (BH 1999. 16.).

A partnership may also be used as an association of persons if the partners do not wish to establish an actual association – i.e. a separate legal entity – to pursue their common purpose.

It is a feature of partnership agreements that the partners provide the service jointly with a view to achieving their common purpose, and that the obligations of the partners are stipulated in the agreement (in addition to those stipulated by law). If a partner fails to provide the service as agreed, the other partners may take action against the partner at fault as described below.

VIII Supplementary Rules

The provisions of the NHCC are supplemented by the general rules applicable to obligations (sections 6:1 to 6:57) and to contracts (sections 6:58 to 6:214). These rules are not covered here in detail but, in the context of contractual obligations, they are applicable as reasonable to any and all matters not regulated under Chapter XXIV, for example in the event of breach of contract.

IX Application of Existing Case-law

The findings of old case-law to the FHCC regarding the distinction between contractual relations and partnerships remain applicable. Consignment contracts and loan agreements do not necessarily create partnerships (BH 1995. 217.); joint construction activities carried out by relatives may establish a partnership (BH. 1978. 118.); an agreement similar to a silent partnership – one partner provides the machinery and the profits of the activities carried out by the other partner, with the machinery shared – constitutes a partnership (BH 1977. 327.). The situation is more complicated regarding relationships of a predominantly personal nature, such as regarding settling the accounts after the termination of a relationship between spouses – due to the annulment of the marriage – which also included certain joint economic activities (see BH 1977. 23.). The old cases may be taken into account for legal development purposes with due regard to the new rules.

X Establishment and Capital Contribution

A partnership can be created as an agreement by the partners. Registration or any other act is not required; the partnership agreement shall be made under the general rules of contract law. It is common understanding that capital, a minimum asset, is needed for a successful partnership; however, the Civil Code does not require any minimum value of asset to establish a partnership.

1 Capital Contribution

Section 6:499 of the Civil Code states that each partner in the partnership shall provide capital contribution in equal proportions. The substance of 'capital' is described in subsection 2; the contribution can be money, transferable assets or intangible property and services provided by the partner. All these kinds of contribution will be the common property of the partners, because the partnership is not an independent entity, and not even an independent legal unit.

The statutory rules regarding the obligation of the partners to provide capital contribution and the equality of such capital contribution are permissive. When should the contribution be made? Is it a one-time or a permanent obligation? All those are subject to the agreement of the partners. The capital contribution requirement is not necessary for all kinds of partnerships, being subject to the agreement of the partners. So, a partnership can be established without providing capital contribution. 'Capital contribution' may include the operating costs of the partnership, if they are borne by the partners. Such situations are examples of a continuing obligation to provide capital contribution. The beneficiary of the capital contribution – i.e. the person to whom the capital contribution must be provided by the partner – is not specified by the Code. The beneficiary of the contributions is the collective of the partners. The assets contributed by the partners belong to the collective of the partners. In comparison to the rules applicable to legal entities, the notion of capital contribution regarding a partnership is defined in a much broader sense: while a difference is made only between money and non-monetary

capital contribution for legal entities, and non-monetary contribution may be provided by transferring property or transferable rights of monetary value, the capital contribution for a partnership may include any other kind of service.

2 Valuation of the Contribution

Capital contribution may even be provided as personal work, i.e. work personally performed by a partner for achieving the purpose of the partnership. The value of the non-monetary contribution is fixed by the partners themselves, and the share represented by each contribution to the whole is established by the partners accordingly. The Code does not provide guidance regarding the calculation of the present value of future services, so it can be established freely by the partners. Also, the partnership contract may be amended subsequently if any significant change occurs to the agreed and actually performed services.

3 Beneficiary of the Contribution

The beneficiary of the capital contributions may be the community of the partners and of the beneficiaries of expenditures made to pursue the activities of the partnership, since – as noted above – a partnership is not a separate legal entity, and the services provided to the partnership may be performed to cover the costs and expenditures arising in the course of pursuing the common purpose (i.e. to third parties), but they also need to be taken into account for the purpose of the internal relationships between the partners.

4 Reimbursement

If the capital contributions provided to the partnership deviate from the ratio stipulated in the partnership agreement, the affected partner may seek reimbursement of the difference from the other partners. When using third party materials for construction works, reimbursement may be claimed from the owner of the land (BH 1988. 84.).

5 Means of Contribution

With regard to the obligation of the partners to provide capital contribution, the means and provision of the capital contribution need to be regulated by the partners in the partnership agreement. Since the Code states default rules, the agreement of the partners prevails over the rules. For the capital contribution to be transferred from the private ownership of a partner to the joint ownership of the partners, the partners must reach an agreement to this effect and the intent to transfer property must be specified. The contributed asset becomes the joint property of the partners upon performance by the obligor. As for exactly when and by what kind of legal act the joint property is created, we are of the opinion – in the absence of any other statutory provisions – that joint property is established by and at the time of making the item available for the collective. This means that, in with regard to chattels, the partner needs to hand over the

items to the partners in the partnership (or their proxies) according to the partnership agreement, and the joint ownership is established by and at the time of handing over (and taking over on behalf of the partners) the chattel. The process is more complicated regarding real property, as the registration of ownership is a statutory requirement [see S 5:38 (2)]. As for rights, handing over not being possible, a transfer transaction must be completed, meaning that a specific agreement is required for the provision of the capital contribution as stipulated in the articles of association. As the completion of this transaction implies the acquisition of property and rights by the other partners, the statutory provisions regarding duties and other fiscal powers of the state (e.g. taxation) may also apply.

6 Consideration for Contribution

The Code does not include any provision regarding the consideration payable during asset transfers (usage fee, interest, other payment obligation), not even the relevant rules that formed part of the previous regulations [S 569 (2) of the FHCC]. Thus, we believe it is possible to provide the contribution for a consideration, or the consideration may otherwise appear during the settlement of accounts between the partners. If the agreement of the partners does not include the intent to transfer ownership rights, the assets provided may be used for common purposes. Such use may be allowed to the other partners for free or against consideration, subject to the agreement of the partners. If the capital contribution is provided as money, the rules pertaining to financial obligations are to be applied (unless agreed by the partners otherwise), including the rules pertaining to the ownership of money and securities (s 5:40 – the transferee of money or security becomes the owner) and the consideration for using money (see s 6:383 or 6:388 – accommodation loan).

7 Consumables

Section 6:500 (1) of the Civil Code sets forth a special rule regarding the partnership's consumables: joint use – i.e. joint consumption for the purposes of the partnership – is specifically required regarding goods that are capable of being destroyed through use. On the other hand, all items transferred to joint property are to be used jointly according to the prevailing *in rem* rules (see Sections 5:74 et seq.). While the general rules guarantee their use for the individual benefits of the individual partners, the contractual behaviour, in the case of a partnership, is joint use for the achievement of the common purpose of the given partnership.

8 Limitation of the Right of Disposal

The ownership ratio held by a partner in an item transferred to the joint property of the partners is designated for being used for the purposes of the partnership; the provisions of the Code indicate this fact by depriving the partner of the right to dispose of his or her ownership ratio for the reason that the assets forming joint property may be used only for the purposes of the partnership. The asset of the partner is legally binding for the common goal and not transferable.

9 Claim against Partner of the Partnership for the Contribution

The provision of the capital contribution undertaken by a partner in the articles of association of the partnership may be claimed by any and all other partners [S 6:501 (1) 1st sentence]. Since no separate legal entity is created under the articles of association, the obligee of this claim in such cases is always the community of partners, the interests of which may be enforced by any of the partners. This rule is a mandatory provision of the Code, meaning that a partner may not be deprived of their right to demand performance of the obligation to provide the capital contribution undertaken by any other partner in the articles of association. [S 6:501 (1) 2nd sentence]. The essence of this rule is that the possibility of a partner to take action to enforce the provision of the capital contributions is not limited to their own share, but – without any further authorisation or power of attorney – may also be to protect the interests of the other partners.

XI Protection of the Contractual Purpose

With regard to the obligations of the partners of the partnership, the Code prohibits the partners from taking any action that may jeopardise the success of the common activities or the achievement of the common contractual purpose of the partnership. The partners agree with each other in a contract to pursue the common activity. This contractual undertaking implies a duty of cooperation and a duty of actual performance, as well as a duty to refrain from any and all activities that may jeopardise the common activities or the achievement of the common purpose. If a partner breaches those rules – rooted in loyalty, based on fair cooperation and set forth in the articles of association of the partnership – they may be called up to perform such obligations by any of the partners. The general rules of the breach of the contract are applicable for partnerships as well. Those rules are also redrafted in the new Code.

XII Share of Profits and Losses

1 The Rules on Share of Profit and Loss and the Rule of Societas Leonina

According to the default rules of the Code, the profit and loss generated by the common activities of the partners are to be borne by the partners in proportion to their capital contributions [S 6:502 (1)]. The meaning of this provision is twofold: it applies to the increase and reduction of the joint assets, as well as to the changes to the assets of the partners. A partnership has, or may have, initial assets provided by the partners; the losses can be construed as the reduction of those initial assets, and the partners may also incur additional debts. As such, the reduction of assets affects the joint assets as well as the private assets of the partners in the proportion specified in the articles of association. However, a capital increase means only the increase of the jointly held assets of the partners, and it is to be divided in proportion to the capital

contributions. The ratio of the capital contribution of the partners can be agreed freely by the partners; the distribution of the asset also can be agreed freely, so deviations from this rule are possible, provided that the agreement of the partners is consistent with the *societas leonina* rule. The rule of *societas leonina* states that a partner may not be excluded from sharing any and all losses or profits, but the partners are free to agree on the ratio of such sharing [S 6:502 (2)].

2 Settlement of Accounts

It is possible that a partner in the partnership is required to perform a payment obligation arising from a contract concluded with a third party in relation to the operations of the partnership if this contract was concluded in relation to the operations of the partnership, as the partnership itself is not a legal entity and, as such, cannot be a contracting party. If the payment of the partner exceeds their undertaking stipulated in the partnership agreement, the partner may request the other partners to reimburse the excess. In such cases, the partners in the partnership need to settle their accounts with regard to the performance of the given transaction. It is important to note that the third party contract must be related to the achievement of the common purposes set forth in the partnership agreement [s 6:502 (3)].

XIII Management of the Partnership

According to the Civil Code, the partners are entitled to manage their cooperation and implement their common purpose and activities jointly. While the Civil Code lays down the rules of taking such actions jointly by the partners (s 6:32), the invoked rule of the Civil Code is neither useful nor practical enough in this context – this is probably because the rule specified in Paragraph (3) was adopted. The unity of obligees means that a concordant statement is required from all partners for making a given decision or statement. This would make management efforts significantly harder, if there are several (or even just two) partners. The regulations allow the partners to authorise one or more partners to manage the affairs of the partnership. In addition to the practical considerations, this option is also supported by the necessity of timely, uniform, and transparent management. The Code confirms that, if the partners make such a decision, it also implies that only the designated partner will be able to manage the affairs of the partnership, whereas the other partners will not. Only a partner can be elected to be the manager of the partnership.

1 Personal Management

Only a partner may be the manager of a partnership and the manager's power is also terminated if the partnership in the partnership is terminated or ceases for any reason. Management is a personal obligation; the transfer of management powers is prohibited by a mandatory provision of the Code and the partners cannot agree otherwise in a contract or with another decision. If the managing partner is not a private individual but a legal entity, the management obligation is

performed and the management right is exercised through an appointed natural person as reasonable.

The right to represent the partnership is regulated separately – i.e. from the matter of management – by the new regulations, as all representation-related matters are regulated separately by the Civil Code.

2 Opposition to Management Decisions

Partners who are not authorised to act regarding the affairs of the partnership are entitled to have access to information on the activity of the partnership and to supervise and object to the actions taken by a managing partner. The right to information is regulated in S 6:507. The non-managing partner's right to object means that a partner is entitled to object to any measure taken by management, and, as a consequence, making the respective decision will be delegated to the competence of the level of all partners (s 6:504). The decision by the management objected to by any non-manager partner may not be implemented and the right to object may not be excluded.

3 Objection

The act does not set forth any limitation period with regard to the right to object. Already implemented decisions of the management may be reviewed retrospectively; in other respects, the right to object may be exercised within a reasonable period, i.e. within a period that allows the partners sufficient time for a reasonable review of the decision and the legal consequences thereof.

4 Revocation of Management Powers

If the partners are dissatisfied with the managing partner's conduct, the other partners may revoke the management power from the managing partner by unanimous decision, without having to meet any further statutory requirement [S 6:505 (1)]. It is unclear why unanimity is required by the Code, as a simple majority would seem to suffice. In our understanding, the provision that this right may not be excluded or restricted applies to the revocation of management powers. In our view, the articles of association may require a mere majority decision, as doing so would not violate the rights of any partner. The related managing partner has no right to vote. The Code states that the managing partner has a right to step down, the only hindrance to this being that they cannot frustrate the partnership with their resignation [S 6:505 (2)]. The Code requires that the resignation may not be made at an unsuitable time, i.e. during a period when the partners are unable to appoint another manager or when pressing matters cannot be handed over to anyone else. To whom the resignation is to be addressed is a practical issue. While the addressee of such a resignation is not identified by the Code, the resignation is to be made toward the other partners – i.e. in the form of an addressed statement – since the manager was elected by the other partners (s 6:505).

5 Right to Information

The Code grants a right to information about the deals and activities of the partnership – i.e. the right to learn about the state of affairs of the partnership – to all partners. The partners may exercise this right primarily against the managing partner. The right of the partners extends to having access to the documents and books relating to the operations of the partnership; this right may also be exercised against any partner in possession of such documents. The partners may exercise this right without any justification or explanation; the Code grants these information rights to the partners as subjective rights. The information right of a partner may not be excluded or limited (6:507).

XIV Representation of the Partnership Toward third Parties

As a contractual form of cooperation between the partners for the achievement of a common purpose, the partnership may also be enabled to act as a community toward third parties. In the case of a partnership, only a partner may provide proxy for another partner in connection with the common goals; the partnership itself cannot be appointed as a representative because it is not an independent legal person (s 6:506). Undertakings cooperating in a consortium frequently authorise one of the partners to represent the consortium and to make statements on its behalf during the tender procedure (see BH 2004. 474).

The authorisation may be granted in the articles of association or in a separate document. In the context of mandates, representation powers may also be granted by law (see S 6:274).

The detailed rules of representation are laid down in the third book of the Civil Code (s 3:29 to 3:31) for legal entities, while the general rules of representation are laid down in the sixth book (s 6:11 to 6:20) of the Civil Code.

XV Creditor of the Partner

When the partnership is established, the assets contributed by the partners become the joint property of all the partners of the partnership and these assets are designated for the common goals of the partners and protected by the law. The partner's right of disposal is not given over to those assets through their share of the joint property (s 6:500). While a creditor's interest and creditor's right cannot be excluded from this asset or from this share of the common property, the Code provides a special legal way of how the creditor can enforce it. The creditor of the partner may seek satisfaction from the ownership share of the partner, but they may not have direct access to the asset in this way.

The creditor of the partner is however entitled to terminate the partnership. The rules for this process are similar to those applicable to general partnerships; this is a legal person among

companies, regulated in the 3rd book of the Civil Code,[8] i.e. the creditor of a partner may terminate the partner's partnership and thereby, with the termination of the partnership, the remaining partners shall settle the relationship between the partner and the partnership. If the balance of the settlement is positive for the partner, the creditor will be entitled to this receivable. The creditor may not demand that the share due to the partner from the joint property be released in kind. If the partnership agreement was concluded for a specific term, the partner's creditor may terminate the agreement by giving three months' notice, provided that more than one year is left from the fixed term. If the remaining period is shorter, the creditor becomes entitled to enforce the partner's claim upon the termination of the partnership (in the course of the settlement with all partners). Until that time, the creditor may secure its obligation according to the Judicial Enforcement Act.

XVI Termination of the Partnership

The partnership agreement may be terminated by any of the partners with three months' notice; this terminates the partnership agreement [S 6:509 (1)]. The addressee of the notice is the managing partner of the partnership; if there is more than one managing partner it is sufficient to send the notice to one of them. If there is no managing partner, the notice must be sent to all partners. The termination ceases all legal relationships and the relationship between the terminating partner and other partners, as well as the legal relationships between all other partners, and the partnership will no longer exist between the non-terminating partners. On the basis of the freedom of contract, the partners may agree that the partner wishing to leave the partnership does not terminate the partnership agreement; the only thing he can do is to leave the partnership but the partnership remains among the remaining partners. This solution, exercising the right or option to 'quit' the partnership (or a similar option), which terminates the partnership of the leaving partner only without having any affect to existence of the partnership itself, does not infringe the subjective right of the partners to terminate their own partnership in the partnership, while it saves the partnership from being terminated by the departure of a single partner – which is in line with the intent of the remaining partners.

1 Limitations on Exercising the Right to Terminate

The Code states that the right to terminate cannot be excluded by the partners, but the partners may agree a shorter or even longer notice period. The three-month notice period provides the partners with a reasonable option to terminate their cooperation and settle their accounts. The other factor with a real impact on the exercise of the right to terminate includes all other circumstances that may affect the outcome, success, or important interim stage of the cooperation, or would generate any financial gain or similar event. Such circumstances may limit the exercise of the

[8] S 3:140.

right to terminate, provided that the terminating partner was informed accordingly – either before or after termination – and the exercise of the right to terminate would be detrimental and damaging to the cooperation of the partnership. Primarily material damages may be claimed as damages according to Sections 6:142 and 6:143 of the Civil Code.

2 Termination without Notice

'Termination without notice', a form of termination regulated by the Civil Code, is not available for partnership unless justified for 'substantial reasons' [S 6:510 (1)]. Termination without notice means that the partner does not need to wait three months for the termination to take legal effect – i.e. for the partnership to be terminated – but it becomes effective, and the partnership is terminated, at the time of receiving the notice of termination. The notice is to be sent to the managing partner of the partnership or, if there is no managing partner, to all partners. The 'substantial reasons' may be facts, acts of breach of contract or other actions defined as such by the partners in the partnership agreement, which prevent the partners from cooperating with each other. In this context, the breach of contract by the other partner must be a fundamental or substantial breach that affects a 'material obligation' of the partner. The breach of contract must affect an obligation that has a material and detrimental impact on the cooperation between the partners. Termination without notice is groundless, unlawful, and inconsistent with the partnership agreement if its basis is missing or it is based on false facts. In such cases, termination without notice does not have any legal effect and the partnership is not terminated.

3 Termination of the Partnership

As already explained in the context of representation, partnership constitutes a personal contractual relationship, where the person of the partners is of paramount importance and the rights and obligations of the partners are to be exercised and performed personally. The question of between whom the partnership is established is of fundamental importance, as it identifies the partners trying and wishing to cooperate in order to achieve a common purpose. This feature of partnerships is further strengthened by the rule according to which the partnership terminates upon the death or termination of a partner without a legal successor If a partner with legal personality is terminated and no longer exists, the underlying partnership is terminated without any further action and without taking any other fact into account as of the occurrence of the respective event. For natural person partners, the death of a partner has the same legal effect. For legal entities, the termination of – the respective legal entity without a successor – e.g. deregistration of the legal entity under Section 3:48 of the Civil Code – is the event that triggers the termination of the partnership simultaneously.

4 Keeping a Partnership in Effect

Upon the termination of a partnership, the Code allows the remaining partners to establish a new partnership or even to keep the partnership agreement in effect between the remaining partners, despite the death or termination of a partner. The phrase 'keep in effect' indicates that the remaining partners shall confirm the continued existence and renovation of the partnership between themselves for legal purposes; this means that the partnership is maintained by and between the remaining partners without the deceased (terminated) partner. As the number of partners in the partnership is reduced by one and because the accounts are to be settled with the deceased (terminated) partner, the partnership agreement is to be amended due to the death of a partner and the resulting material implications. The act uses the phrase 'keep in effect' because the partnership continued by the remaining partners and with reduced assets – if the balance of assets is positive – is not in fact the same as, or even identical to, the original partnership. Hence, the death of a partner can cause the partnership to be amended, but the agreement of all remaining partners is required for such an amendment. Naturally, if certain partners do not wish to continue the partnership, the partnership agreement may be concluded by and between the remaining and willing partners.

XVII Exclusion of a Partner

The new provision of the Civil Code implements the institution of excluding partners as previously regulated by the provisions of company law.[9] In the event of termination, the partner decides and acts to leave the partnership. In the case of exclusion, the other partners decide and act that the targeted partner shall leave the partnership [S 6:512 (1)]. A partner may be excluded in those cases specified by the partnership agreement. However, a written agreement is required for such exclusion, though it should be noted that a partnership can be established without a written agreement as well. The unlikely scenario of invoking the provisions of a verbal agreement is also lawful and such important matters should be regulated in writing. Exclusion of a partner may be based on the act or actions of a partner that give rise to the right of the other partners to terminate without notice. As seen in the context of Section 6:510 (2), an accountable breach of contract by a partner affecting a material obligation gives rise to the right of the other partners to terminate without notice, meaning that such breaches may also serve as grounds for exclusion. The partners concerned must decide whether to exclude the partner, if they are at fault or to terminate the agreement, since the two options are mutually exclusive. The decision shall be passed by the unanimous votes all partners, excluding the affected partner.

[9] Act V of 2006, or in the NHCC s 3:107–3:108.

1 Effects of Exclusion

While termination ceases the partnership itself, the legal effect of exclusion is different, as it only terminates the partnership of the partner in breach of a material obligation, while the partnership of, and the contractual relationship between, the other partners remains unchanged. The law requires the unanimous decision of all other partners for the exclusion of a partner. The articles of association may deviate from this provision, but the decision must be made by majority at least.

2 Duty to Settle the Accounts with an Excluded Partner

The partnership of an excluded partner is terminated by virtue of exclusion, so the assets due to the excluded partner in relation to their participation in the partnership must be released and the financial claims relating to their partnership must be settled – this is the meaning of the statutory phrase of settling the accounts [s 6:512 (3)]. The Code does not set a statutory deadline for releasing such assets, so the similar rules set forth in Book 3 may be invoked by analogy (see S 3:150 of the Civil Code). In the course of the settlement, the excluded partner may not demand the release of the assets in kind; such assets may not be released in kind to the excluded partner unless the remaining partners decide otherwise [s 6:512 (3)].

XVIII Settlement

Partnerships provide a legal framework for the partners to cooperate with an intention to achieve a common purpose, and the termination of the cooperation accordingly has an impact on the assets of the partners. A successful partnership may realise extra profits that would increase the assets of the partners but the operations of a partnership may also result in various obligations on the side of the partners. For this reason, the managing partner – upon the termination of the partnership – must make the necessary arrangements for settling the accounts and dividing the common property, with due regard to the provisions stipulated in the partnership agreement. On the basis of the prepared documents, the partners make decisions concerning the means and method of settling the accounts and dividing the common property. According to a default rule of the Code, the property must be divided in proportion to the capital contributions of the partners, but the partners may agree otherwise in the articles of association at the time of contracting [s 6:513 (2)].

The assets handed over for joint use are to be returned to its owner [s 6:513 (3)] and the amortisation and wear and tear of such items are to be taken into account during the settlement by the partners according to the relevant provisions of their agreement. The work and activities performed by a partner is to be valued according to the partnership agreement, and the value is to be taken into consideration during the settlement with due regard to the activities and purpose of the given partnership. As such, the consideration for personally performed works must be taken into account where the cooperation served business purposes, provided economic benefits, and increased the assets of the partners, but personal contributions and works by

partners are not justified in a partnership serving public purposes useful for the society, the prosperity of a community, or cultural purposes. However, the agreement by and between the partners remains the primary regulatory instrument, even in such cases.

XIX Conclusion – Partnership at the Crossroads

The new regulation of partnerships in the Hungarian Civil Code was cleaned of the unnecessary restrictions of the earlier Code Civil of 1959 and so it could play a more important role on the field of freedom of contracts. The new regulations, with default rules, bridge the gap between company law and the law of contract. Under the new regulation of partnerships, they are eligible for such a business agreement earlier; it is only possible before the establishment of a new company. As such, the new regulation of the partnership provides the parties with more freedom in the field of business agreements and cooperation in a contractual way without creating a new legal entity. Despite the special character of partnerships, the community of the partners, like a 'quasi entity', can be a legal subject, which is subject to the interpretation of the rules in the future of the case law. The new regulation of partnerships enriches the regulation of law of property; it creates a special common property of the partners, which is the legal basis of common property linked to a common goal of the partners, and serves the economic and legal protection of the common goal of the partners. This regulation of partnerships creates a transition between contract law, property law, the law of individuals, including company law, and enriches the possibilities of Hungarian private law.

Rita Sik-Simon*

New Regulated Credit and Loan Agreements in the New Czech and Hungarian Civil Codes

I Introduction

Credit and loan agreements are types of contracts commonly used by industry. Because of the financial consequences and often long-term binding character, the contract is of great importance for the borrower. Loan agreements existed already in Roman law, and it was a contract with demanding requirements[1] as to its form to allow for the eventually necessary personal enforcement against a defaulting debtor. The recodification of the Hungarian and the Czech Civil Codes has not left their credit and loan laws untouched, even though today we can rather talk of a pre-formulated business. In my paper, I will look into the new codification of credit and loan agreements in Hungary and in the Czech Republic with special reference to the definition and the termination of such agreements.

II Recodification

1 Recodification of Credit and Loan Contracts without Implementation of the European Consumer Credit Law

Both the Czech and the Hungarian legislator intended to include the widest possible field of civil law in the Civil Code; for example, family law is part of both codices. However, with respect to the European Directives, the legislators did not aim for their perfect implementation in the Civil Code. As regards the implementation of the directives, the Czech legislator chose a rather obscure mixed approach - in certain areas such as distance and off-premises selling, he placed almost all European standards into the Civil Code; but they left the law of consumer credit

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[1] At that time for eventually necessary personal enforcement against a defaulting debtor – in addition to the parties – five witnesses and a balance holder were necessary for an effective contract: see Franz Schnauder, 'The credit agreement through the ages *(Der Kreditvertrag im Wandel der Zeit)'* (2014) 17 WM book 783–791, 784.

completely outside the Code.[2] The concept of the Hungarian codification chooses a different path. Whereas recurring definitions, rules on contractual clauses of standard terms and conditions and some special rules for consumer contracts were organically integrated,[3] lengthy provisions of the Directive remained outside the Code. Implementing the Directives in the CC would have exposed the legislator to the risk of a permanent duty of implementation,[4] and placing the European consumer law in the CC could imperil basic principles of private law. Regarding the implementation of the Consumer Credit Directive, separate acts were enacted in these two countries – as in the majority of Member States; this is different in Germany[5] and the Netherlands,[6] where the directive has found a place in the Civil Code in the context of modernising the law of obligations.[7]

2 New Standards for Credit and Loan Agreements

Concerning credit and loan agreements, both legislators wanted to remove from the existing provisions the last traces of their socialist legacies; some types of contracts, such as bank credit, therefore, disappeared from the codes. The number of provisions regulating the law of credit grew in both Civil Codes; however, the increase in the Czech Civil Code was caused by the legislature transferring the old norms of the Commercial Code into the new Civil Code. With the recodification, the Czech legislator ended, with effect of 1st January 2014, the dualism in Czech civil law and made the Civil Code[8] the main Code also for commercial contracts.

As for the rules of crediting, both Civil Codes studied include separate definitions and rules for credit and loan contracts. They are hence structurally similar to the Austrian Civil Code, because many of the newer CC codifications – such as the German, Dutch CC[9] or the Civil Code

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[2] Similarly concerned the majority of the Member States including France, England, Austria, Romania, Malta, Latvia, etc: see http://eur-lex.europa.eu/search.html?instInvStatus=ALL&or0=DN%3D72008L0048*,DN-old%3D72008L0048*&qid=1410295078729&DTS_DOM=NATIONAL_LAW&type=advanced&lang=de&SUBDOM_INIT=MNE&DTS_SUBDOM=MNE&page=2.

[3] Lajos Vékás, 'Proposal for the modernizing of a general rules of contract law' *(Javaslat a szerződések általános szabályainak korszerűsítésére)* (2001) 3 PJK 3–14. <http://ptk2013.hu/polgari-jogi-kodifikacio/vekas-lajos-javaslat-a-szerzodesek-altalanos-szabalyainak-korszerusitesere-pjk-2013-3-14-o/865>.

[4] Because of the ever-changing EU consumer law, the legislator would make the CC to a permanent building lot. See Barbara Dauner-Lieb, Thomas Heidel, Gerhard Ring (eds), *Obligations in Civil Code trends and problem areas two years after the obligation law reform, (BGB Schuldrecht aktuell, Entwicklungstendenzen und Problemschwerpunkte zwei Jahre nach der Schuldrechtsreform)* (German lawyer Verlag 2003, Bonn) 5. See also: Peter Bülow, 'Consumer credit law in the CC *(Verbraucherkreditrecht im BGB)'* [2002] NJW 1145.

[5] The German legislator implemented the Consumer Credit Directive in 2002 at the obligation law reform under § 491 et seq. CC. See also Peter Bülow (n 4) 1145.

[6] The Dutch legislator has implemented the EU Consumer Credit Directive 2008/48/EU as a new chapter 7.2A DCC 'credit contracts for consumers' into the NL-CC in May 2011.

[7] The German legislator chose the so-called 'big solution' of integrating many smaller acts, such as the General Terms and Conditions Act, the Off-premises Selling Act, the Distance Selling Act and the Consumer Credit Act in the Civil Code. See Dauner-Lieb, Heidel, Ring (n 4) 5.

[8] Zákon č. 89/2012 Sb. občanský zákoník od 3.2.2012.

[9] It must be added that the Dutch legislator has introduced in May 2011 the implementation of the Consumer Credit Directive as a new chapter in the Code 7.2A. 'credit contracts for consumers.'

of Quebec – lack the definition of a credit agreement. The structural relationship of these contracts is visible in the Hungarian Civil Code.[10] Credit agreements serve as a precontract for further crediting contracts such as loan contracts. Such clarification is missing in the Czech Civil Code, and, surprisingly, the Austrian General Civil Code structurally reversed the relationship between credit and loan agreements. According to § 988 AU-Civil Code (Au-CC), loan contracts about money are called credit agreements. We immediately notice that the demarcation between loan and credit contracts is fraught with difficulties. Some bank lawyers even claim that the distinction between these types of contracts is artificial and alien to the system,[11] because the loan agreement is hardly regarded as a 'real contract' in practice.

III Definition and Termination of Credit and Loan Agreements

1 Credit Agreement

a) Secondary law definition of a credit agreement

The definition of a credit agreement can be found in secondary law. According to Art. 3 II. c. of the Consumer Credit Directive[12] 'credit agreement' means an agreement whereby a creditor grants or promises to grant to consumer credit in the form of a deferred payment, loan or other similar financial accommodation. Excluded are 'agreements for the provision on a continuing basis of services or for the supply of goods of the same kind; here the consumer pays for such services or goods for the duration of their provision by means of instalments'. This definition of the Directive does not necessarily constitute a particular type of contract of the law of obligations, but rather serves – in a more pragmatic way - as a specific expression of a contract, the purpose of which it is to give the consumer some form of financial aid or to promise this. According to Art. 2, para. 2 lit *f)* of the Directive, the provisions of the Directive (shall) apply only to credit agreements provided for a consideration. This may result from a deferral, but certain agency agreements or possibly certain leasing contracts[13] could also be regarded as credit agreements if the other conditions of the directive are fulfilled. From the European perspective, credit agreement is therefore a generic term, the sub-terms of which are loan, deferral payment or other financial aid.

The Dutch Civil Code in Article 7:57 c. adopts the definition of the directive without amendments. The German solution in § 491 para. 1 De-CC dispenses with the concept of a credit

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[10] *2013 évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013, Hungarian Civil Code) 2013. Február 26.

[11] Petr Liska – Štefan Elek, 'Banking contracts in the New Civil Code of the Czech Republic *(Banki szerződések Cseh Köztársaság a új Polgári Törvénykönyvében)*' (2014) 5 Jogtudományi Közlöny, manuscript 12.

[12] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive OJ 87/102/EEC, [2008] OJ L133/66–92.

[13] Norbert Reich in Norbert Reich, Hans-Wolfgang Micklitz, *European Consumer Law (Europäisches Verbraucherrecht)* (4th edn, Nomos 2003, Baden-Baden) 739.

agreement, and instead uses the word loan in a broad sense, otherwise its scope would be too narrow.[14]

b) Credit agreements as a narrow sub-concept in the Czech Civil Code

Regarding the definition of a credit agreement, the Czech law text almost verbatim reminds us of § 407 on Bank Credit of the Commercial Code of 1991.[15] According to § 2395 CZ-CC the creditor agrees, by the loan agreement, to provide the debtor at their request and for their benefit with financial resources up to a certain limit, and the debtor agrees to repay the financial resources and to pay interest. The scope of the term is relatively limited, according to the Czech Civil Code: fungible goods cannot be the object of a credit agreement.

Why? This can be explained by the history of the old rule. In the period of socialism before 1989, only banks could offer credit to socialist organisations; individuals could only conclude loan agreements.[16] Credit agreements were therefore regulated by the Commercial Code and loan contracts by the Civil Code. When the Czech Civil Code was recodified, the Commercial Code was repealed, and many rules, such as the rules on credit agreements, were relocated in the new Code. With respect to credit agreements, the rules have been doubled, but their terms have not improved.

Due to the uncritical adoption of the former Commercial Code provisions[17] the new rules avoid extending the credit definition. They do not provide for a gratuitous contract. They are silent about the extraordinary termination rights of the creditor, and do not deal with the problems of loss in value of the security provided. Only the general causes on termination (§ 1998 et seq. Cz-CC) and on withdrawal (§ 2001 et seq. Cz-CC) might help, but these require that the parties have agreed upon rights of withdrawal and termination in the contract. Only for loans with a specified purpose does the old-new rule from the former Commercial Code[18] provide for extraordinary termination. If the credit is used for a different purpose than the one specified, the code guarantees an immediate right of withdrawal for the creditor (§ 2400 Cz-CC). The explanatory memorandum devotes little attention to this type of agreement. The legislator deals with the explanation of the rules in less than four phrases.[19]

c) Credit Agreement as a generic term in the new Hungarian Civil Code

The new Hungarian Civil Code (Hu-CC) regulates the credit agreement in more detail, because the old Civil Code of 1959 contained only a single paragraph on the bank credit agreement. Similar to the old Czech settlement, before the reforms only a financial institution could provide credit. The old contract type already structurally fulfilled the function of the Directive's

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[14] This would led to lack of implementation BT-Dr 14/6040, S 252, see also Peter Bülow (n 4) 1146.

[15] Zákon č. 513/1991 Sb., Obchodní zákoník od 5.11.1991 *(Commercial Code).*

[16] Liska–Elek (n 11) 12.

[17] Liska–Elek (n 11) 12.

[18] See. § 501 para. 2 CZ-Commercial Code

[19] K § 2395–2400, Petr Nečas, Jiri Pospisil, *Důvodová zpráva k NOZ v Praze dne 02.03.2012 516.* Available: http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze. pdf.

concept of credit. The new codification only extended the contractual constructions to be granted and the circle of potential creditors. The creditor need no longer be a bank or a financial institution. The new definition in Section 6:382 Hu-CC: Credit agreements reads as follows: (1) Under a credit agreement the creditor undertakes to ensure the availability of a specific credit limit, and to conclude a loan agreement, contract of suretyship, guarantee contract or conduct another loan operations up to the said credit limit, and the debtor undertakes to pay the fee agreed upon.

The new regulation emphasises that the credit agreement is a separate type of contract, which has certain similarities with the precontract,[20] for example, the obligation to conclude a contract, upon fulfilment of certain conditions. Other than the precontract, the credit agreement has specific legal effects: the creditor must maintain the credit limit for which the debtor pays fees. Unlike the old rules, the new norms do not dictate a mandatory written form.[21] In addition, the new rules regulate in more detail the rights of the debtor to terminate the contract.[22] Generally speaking, the creditor must call on the debtor to provide adequate guarantees in the first place; without this he may terminate the contract only exceptionally in accordance with Section 6:382, para. Section 5 Hu-CC which provides: '[t]he creditor shall be entitled to terminate the credit agreement without requesting the debtor to provide adequate guarantees, if it is evident that the debtor is unable to provide adequate guarantees'. With this two-step termination mechanism and with extraordinary termination for the obviously non-performing credits, the Code provides for an appropriate balance of interests between the parties.

2 Loan Agreement

a) International examples

Loan agreements are not defined in secondary law. The 'DCFR' (Draft Common Frame of Reference),[23] which was prepared by the Study Group on a European Civil Code, attempted to define the loan agreement, in Book IV, part F, as a specific contract, but the scope of application of this contract is very limited. Neither consumer loans nor mortgage-secured real estate contracts are included in that definition of the loan contract.

Loan contracts IV.F. -1: 101: Scope reads:

(2) A loan contract is a contract by which one party, the lender, is obliged to provide the other party, the borrower, with credit of any amount for a definite or indefinite period (the loan period), in the form of a monetary loan or of an overdraft facility and by which the borrower is obliged

[20] XIII. Chapter § 6:37 Hu-CC.

[21] See § 522 para. 2 old Hu-CC from 1959.

[22] Preamble LII. Chapter Credit contract, § 6:382 Hu-CC.

[23] Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds), prepared by the Study Group on European Civil Code and the Research group on EC Europe Private Law (Acquis Group), *Principles, Definitions and Model rules of European Private Law Draft Common Frame of reference (DCFR)* (outline edition, Sellier 2009, Munich).

to repay the money obtained under the credit, whether or not the borrower is obliged to pay interest or any other kind of remuneration the parties have agreed upon.

Concerning other recent international codifications of civil law, it should be noted that they nearly always distinguish a loan for use and a simple loan or loan for consumption[24] as in the Dutch Civil Code. German law distinguishes a loan of money and loan of objects.[25] Whereas a loan for use and also a simple loan or loan for consumption – unless otherwise agreed – are gratuitous, the CC of Quebec presumes them to be non-gratuitous.[26] In German law, both types of loan are usually non-gratuitous. According to the Dutch Civil Code, loan for interest contracts must be in writing, but the sum of interest is not a compulsory part of the contract.

b) Loan agreements in the Hungarian and Czech Civil Code

The rules on the loan agreement in the Hungarian and the Czech Civil Code show many differences. Even the placement of the rules shows a structural difference. While the Hungarian legislator regulated the loan requirements after the provisions on credit contracts, the Czech legislator - similar to the Austrian – has done that the other way round. The typical case of loan contracts, according to the Czech Civil Code, concerns fungibles and is gratuitous,[27] whereas the Hungarian rules provide for a non-gratuitous loan of a sum of money.[28] The gratuitous loan of money and a loan contract on fungible goods are regulated only as special types. In both countries the rules are applicable both to loans on securities and to loans of goods, which are traded on the stock exchange to apply (§ 6:389 para 1 Hu-CC, and § 2390 Cz-CC). The Hungarian rules make it clear (§ 6:389 para 2 Hu-CC) that they also apply to credit on goods, hire instalment purchasing and to all those non-gratuitous contracts which stipulate the advance performance of a service by one party.

The rules of these two countries differ furthermore in that the Hungarian borrower is not required to actually borrow the loans provided (praestare services) and that the options of the lender to terminate the contract have been specified in more detail in Hungary. The Hungarian Civil Code even allows for the refusal of the disbursement of the promised loan amount under the conditions of § 6:384 Hu-CC.

In addition to a limited right to extraordinarily terminate defaulting loans according to § 6:387 para 2 Hu-CC, the Hungarian legislature has provided for an ordinary right of the lender to terminate the contract. In addition to the termination rights of a creditor, the lender can terminate the contract according to § 6:387 para. 1 Hu-CC also in the event of delayed repayment, if the borrower does not provide additional security to compensate for a loss in value of the original security, if the borrower interferes with the examination measures of the lender, practically as a punitive measure, for example, when testing the solvency or concerning loans with a specified purpose. Here we notice a difference to the Czech law: while the Czech Civil Code punishes the

[24] See 7A: 14 at Book 7A Particular Contract NL CC.
[25] See §§ 488 and §§ 607 De-CC.
[26] See 2314 – (88) Quebec CC.
[27] See § 2390 Cz-CC.
[28] See § 6. 383 Hu-CC.

misappropriated use of credit only for credit agreements, but with a right of extraordinary termination, Hungarian law allows for this in the context of a loan agreement, but only in the form of ordinary termination.

Although both codifications deserve praise for adjusting the rules and making them more detailed and especially the Hungarian legislator for differentiating the termination rights of the lender, they deserve criticism for their silence on the right of the borrower to terminate the contract. It is a little surprising that they did not even attempt to solve in detail the problem of the continuing obligations – at least in the general provisions of the law of contract. Even though the parties might agree on a right of the borrower to terminate the contract, and the early repayment of a loan was already made possible by the old Consumer Credit Directive of 1987[29] – but only for non-mortgage secured loan agreements – we should look at this problem.

c) Termination of a loan agreement by the borrower

When reforming the German law of obligations in 2002, the legislator codified the case law developed since 1997,[30] which gave the borrower an extraordinary right to terminate the contract if he had a legitimate interest in doing so. Hence, for instance in the event of a divorce, relocation or a so-called scrap property, the borrower has the right to terminate a mortgage-secured fixed-rate loan,[31] but he must pay a so-called early repayment penalty *(Vorfälligkeitsentschädigung).* The early repayment penalty is a compensation for damages, and a complicated clearing method[32] between the parties. With this norm, the German legislator intended to strengthen the internal justice of the contract, with the liberalization of pacta sunt servanda, the principle under fairness considerations to restore the equality between the parties. The Austrian Civil Code also recognises the extraordinary right of both parties to terminate the loan agreement, if its perpetuation is unreasonable for important reasons (§ 987 Au-CC).

The German legislator armed the borrower with other ordinary rights of termination, depending on whether the contract provides for a fixed or a variable interest rate (according to § 489 De-CC). With these rules, the German legislator intended to counteract the General Conditions of the banks which provided for the affiliation of interest. Further clues for the solution of conflicts of interest in the context of the performance of continuing obligations are provided by the general law of obligations (§§ 312-313 De-CC) if the circumstances of the original basis of the contract for the performance of continuing obligations have severely altered and the perpetuation of the contract is unreasonable (§ 490 para. 3 in conjunction with § 313 and 314 De-CC).

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[29] Art. 8 of the Council of 22 December 1986 on the approximation of laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ Directive 87/102/EEC, [1987] L042/0048-0053, in the new Consumer Credit Directive 2008/48/EC of the provision is in Article 10, paragraph 2 *r)* agreements.

[30] BGHZ 136, 161, 164 et seq.

[31] Klaus Peter Berger in Franz Jürgen Säcker, Roland Rixecker, *Münchener Kommentar* (5th edn, CH Beck 2010, München) Obligation law, special part to § 490 para. 2 et seq. p 827; see also Stephan Grundmann, 'Loan and credit law after the reform of the obligation law *(Darlehens- und Kreditrecht nach dem Schuldrechtsmodernisierungsgesetz)'* [2001] BKR 66–72, 70.

[32] The legislator willfully adhered to any method of settlement. In practice there are several methods to be avoided. See K. P. Berger (n 31) 838.

Neither the Hungarian nor the Czech credit law was inspired by these credit management prescriptions. The general rules of the law of obligations allow for a change in the contract at any time; however, considering the bargaining power of the parties, that will often be unrealistic. In instances of a grossly disproportionate agreement, the parties have right to renegotiate the contract (deviation from clausula rebus sic standibus) and if these negotiations fail, the court can help.

The right to compensation of the lender remains. As defined in § 2399 para. 2 Cz-CC, the borrower has to pay interest only until repayment of the principal, but which other claims the lender may make for early repayment of the loan remains unclear. The Hungarian legislator recognises at least the problem and explains in the explanatory memorandum on the early settlement of monetary debts that the claims of creditors must be recognised.[33] However, the rules in § 6:36 Hu-CC only states that the debtor bears the additional fees caused by the early redemption without further clarifying what this includes and up to which amount. The definition of the additional costs remains the task of jurisdiction or further legislation. With regard to consumer contracts, the legislature limits the amount of additional fees to be paid according to § 6:131 Hu-CC, to the costs *directly* caused by early redemption.

It is too early to see whether such detailed rules solve the problem in practice. However, if it is recognised that in 2002 the German banks adopted the termination rights immediately in the so-called General terms and conditions of the banking industry,[34] one might wonder whether a clear provision in the Hungarian and Czech Civil Codes might not also contribute to legal certainty or to a better balance of interests.

IV Summary

Concerning the credit and loan agreements, both legislators wanted to remove from the existing provisions the last traces of their socialist legacies. Both Civil Codes include separate definitions and rules for credit and loan contracts. Regarding the Czech rules on credit agreements, the legislator adopted – uncritically – the former Commercial Code provisions and the new rules avoid extend the definition of credit, are silent about the extraordinary termination rights of the creditor, and do not deal with the problems of loss in value of the security provided. The new Hungarian regulation emphasises that a credit agreement is a separate type of contract, which has certain similarities with a precontract. The new rules regulate in more detail the rights of the debtor to terminate the contract; the rules provide for an appropriate balance of interests between the parties.

[33] T/7971 sz. *Törvényjavaslat a Polgári törvénykönyvről,* 555 et seq.

[34] Arne Wittig, 'Critical and non-performing loan management – changes due to the obligation law reform *(Kritische und notleidende Kreditmanagements – Änderungen auf Grund der Schuldrechtsreform)'* [2002] NZI 635 et seq.

The norms on the loan agreement in the Hungarian and the Czech CC show many differences. Even the placement of the rules shows a structural difference, but in both, rules are applicable to loans on securities and to loans of goods which are traded on the stock exchange Regarding termination, we notice also differences: while the Czech Civil Code punishes the misappropriated use of credit only for credit agreements but with a right of extraordinary termination, the Hungarian law allows for this in the context of a loan agreement, but only in the form of ordinary termination. Although both codifications deserve praise for adjusting the rules and making them more detailed and especially the Hungarian legislator for differentiating the termination rights of the lender, they deserve criticism for their silence on the right of the borrower to terminate the contract.

Balázs Tőkey*

Insurance Contracts in the New Hungarian Civil Code

I Introduction

We would like to give a short overview of the regulation of insurance contracts in the new Hungarian Civil Code (Act V of 2013 on the Civil Code, hereinafter referred to as NHCC)[1] in this paper. Of course, we cannot interpret this topic in detail in a short paper and so we will just focus on the following fundamental questions:

– What are the characteristics of insurance contracts according to the NHCC? Which typical questions about the characteristics of insurance contracts can be answered with the help of the norms of the NHCC?

– How does the structure of regulation of insurance contracts look like in the NHCC? What are the advantages and disadvantages of the classification chosen by the NHCC?

– What is technical form of regulation of insurance contracts in the NHCC? What are the mandatory and the default rules?

II The Definition and Characteristics of Insurance Contract in the NHCC

It is not easy to answer the question of what insurance is. Moreover, insurance has at least two legal aspects. On the one hand, we can speak about the insurance business, which is regulated by public law, and on the other hand we can speak about insurance contracts, which are regulated by private law.

We have to admit that these categories are not really separated in common law; as we can read in one English insurance law textbook,

> 'the courts have not fully defined the common law meaning of "insurance" and "insurance business", since they have, on the whole, confined their decisions to the facts before them. They have, however, given useful guidance in the form of descriptions of contracts of insurance. The best established of

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[1] The NHCC entered into force on 15th March, 2014.

these descriptions appears in the case of *Prudential v Commissioners of Inland Revenue* [1904] 2 KB 658. This case, read with a number of later cases, treats as insurance any enforceable contract under which a "provider" undertakes:

(1) in consideration of one or more payments

(2) to pay money or provide a corresponding benefit (including in some cases services to be paid for by the insurer) to a recipient

(3) in response to a defined event

(4) the occurrence of which is uncertain (either as to when it will occur or as to whether it will occur at all); and

(5) adverse to the interests of the recipient.'[2]

However, the legal science has tried several times to find a definition of an insurance contract. One of the best-known descriptions comes from the American Professor William R. Vance. 'Under his definition, an insurance contract was between the insurer and the insured and required five elements:

(1) The insured must possess an interest, the insurable interest, in the thing being insured and the value of that interest must be able to be assessed;

(2) The insured must be subject to a risk of loss if the insured interest is destroyed or damaged by the happening of certain specified fortuitous events;

(3) The insurer assumes the risk of loss (also known as risk transference);

(4) The insurer assumes this risk of loss as part of a general plan to distribute actual losses amongst a large group bearing similar risks; and

(5) The insured pays a fee to the insurer, which goes into a general insurance fund, as consideration for the insurer's promise to assume the risk of loss.'[3]

Moreover, we can find a definition of insurance contract in the statutory state law of the U.S., based on the practice of courts and the tests made by the legal science. For example, according to New York Insurance Law § 1101 (1) 'Insurance contract' means any agreement or other transaction whereby one party, the 'insurer', is obligated to confer benefit of pecuniary value upon another party, the 'insured' or 'beneficiary', dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event.[4]

In the civil law systems, the jurisprudence tries to separate the categories of insurance business and insurance contract. For example, in Germany, insurance is the subject of an insurance contract.[5] Insurance is not defined by the legislator but, regarding the practice of the Federal Administrative Court of Germany *(Bundesverwaltungsgericht),* we can find the definition

[2] John P. Lowry, Philip Rawlings, *Cases and Materials in Insurance Law* (Hart 2004, Oxford) 26.

[3] See Elizabeth F. Brown, 'Will the Federal Insurance Office Improve Insurance Regulation?' [2012] Winter University of Cincinnati Law Review 569.

[4] Ibid.

[5] See Egon Lorenz, 'Einführung' in Roland Michael Beckmann, Annemarie Matusche-Beckmann (eds), *Versicherungsrecht – Handbuch* (CH Beck 2009, München) Rn. 111.

of insurance, which is the following: insurance is provided if a provider undertakes, in consideration of payment, to provide certain services in response to the occurrence of an uncertain event if the transferred risk is distributed to numerous people threatened by the same danger and risk taking is based on calculations using the law of large numbers and if risk taking is an independent subject of the contract and not just an ancillary obligation.[6] However, 'insurance contract' is defined by the German legislator in Section 1 of the Insurance Contract Act (*Versicherungsvertragsgesetz,* hereinafter referred to as VVG): 'By concluding an insurance contract, the provider undertakes to cover a certain risk of the policyholder or a third party by providing certain services in response to the occurrence of the defined insured event. The policyholder shall perform the agreed payment (insurance premium) to the provider.'[7]

In Hungary, the legislation also separates the terms insurance business and insurance contract. Section 4 of Act LX of 2003 on Insurance Institutions and the Insurance Business defines insurance business in the following way: it is a commitment that is based on an insurance contract, legal regulation, or membership relation, whereby the insurer undertakes to designate a group of persons deemed to be exposed to the same risk or similar perils (risk group) in order to assess the risks that can be measured by mathematical and statistical means, establish a consideration (premium) for the commitment, create specific reserves, assume the risks stipulated and provide services as contracted.[8] And Section 6:439 (1) of the NHCC contains the definition of 'insurance contract'. It prescribes that, under an insurance contract, the insurer undertakes to provide coverage for the risk specified in the contract, and to provide settlement or benefits for loss arising upon the occurrence of a specific event after the starting date of risk coverage, and the insured person undertakes to pay an insurance premium as agreed upon.

As we said in the introduction, our first aim is to examine what the characteristics of an insurance contract are according to the NHCC and which typical questions about the characteristics of insurance contracts can be answered with the help of the norms of the NHCC. To answer

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[6] The original German text is the following: 'Eine Versicherung ist gegeben, wenn sich ein Unternehmen gegen Entgelt rechtlich verpflichtet, für den Fall des Eintritts eines ungewissen Ereignisses bestimmte Leistungen zu erbringen, wenn das übernommene Risiko auf eine Vielzahl durch die gleiche Gefahr bedrohter Personen verteilt wird und der Risikoübernahme eine auf dem Gesetz der großen Zahl beruhende Kalkulation zu Grunde liegt und wenn die Risikoübernahme selbstständiger Gegenstand des Vertrags und nicht nur Gegenstand einer Nebenverpflichtung ist.' See Egon Lorenz, 'Einführung' in Roland Michael Beckmann, Annemarie Matusche-Beckmann (eds), *Versicherungsrecht – Handbuch* (CH Beck 2009, München) Rn. 119.

[7] The original German text is the following: 'Der Versicherer verpflichtet sich mit dem Versicherungsvertrag, ein bestimmtes Risiko des Versicherungsnehmers oder eines Dritten durch eine Leistung abzusichern, die er bei Eintritt des vereinbarten Versicherungsfalles zu erbringen hat. Der Versicherungsnehmer ist verpflichtet, an den Versicherer die vereinbarte Zahlung (Prämie) zu leisten.' This definition corresponds to the general definition technique: it prescribes the typical contractual obligations of the parties. As such, it is not a clearly defined term of insurance contract, but it is a description of the insurance contract as a particular agreement. See Dirk Looschelders, '§ 1 Vertragstypische Leistungen' in Theo Langheid, Manfred Wandt (eds), *Münchener Kommentar zum Versicherungsvertragsgesetz* (CH Beck 2010, München) Rn. 1.

[8] Our translations of Hungarian legal texts are based on the translations of Complex DVD JogtárPlusz.

these questions, first we have to summarize the characteristics of an insurance contract. Regarding the common law and German jurisprudence[9] we can find the following elements:
– uncertainty
– premium
– insurance benefits
– insurable interest
– risk calculation based on actuarial methods.

After that, we should see what significance these expressions have and which common problems or questions are connected to these elements.

1 Uncertainty

It is quite clear that insurance shall cover an uncertain risk. We can classify the risks according to the level of their uncertainty. We can speak about absolute risks if the event will surely occur but its date is uncertain (e.g. death) or relative risks if it is also uncertain whether the event will occur (e.g. a theft). If the occurrence itself and its date is certain and known as well, we cannot speak about uncertainty; these events cannot be an insured event.

However, regarding uncertainty, it can be questioned whether an insured event can be one that occurred before the conclusion of the contract. If the insurance covers risks which occurred before the conclusion of the contract this is retroactive insurance. How can these events be uncertain? The answer is quite simple: these risks are still uncertain if the parties do not know, at the time of the conclusion, whether the insured event has occurred or not. If one of the parties knows that the event has occurred or has not occurred, that risk is not uncertain and therefore is not insurable. Although the retroactive coverage of an insurance policy is not common, the PEICL contains special provisions about it to avoid the coverage of those events of which the occurrence or non-occurrence is known by one of the parties.[10] However, the PEICL does not solve the problem, if the policyholder aims to cover those risks when the insured event occurs after the submission of the offer and before the conclusion (which is called unreal or false

[9] The definition of the Principles of European Insurance Contract Law (PEICL) does not contain any other relevant element. According to Article 1:201 (1) 'Insurance contract' means a contract under which one party, the insurer, promises another party, the policyholder, cover against a specified risk in exchange for a premium. The text of PEICL is available on this homepage: <http://www.uibk.ac.at/zivilrecht/restatement/draft>.

[10] See Article 2:401 of the PEICL:
Retroactive Cover
(1) If, in the case of cover granted for a period before the contract was concluded (retroactive cover), the insurer knows at the time of the conclusion of the contract that no insured risk has occurred, the policyholder shall owe premiums only for the period after the time of conclusion.
(2) If, in the case of retroactive cover, the policyholder knows at the time of the conclusion of the contract that the insured event has occurred, the insurer shall, subject to Article 2:104, provide cover only for the period after the time of the conclusion of the contract.

retroactive insurance).[11] These risks will not be covered by the insurance according to the PEICL because, at the time of conclusion of the contract, the policyholder knows that the insured event has occurred.[12]

The NHCC answers this question quite clearly. According to the definition of an insurance contract [Section 6:439 (1)], the insured event does not need to be a future event; it must simply be a specific event, which occurs after the starting date of risk coverage. Section 6:445 (1) prescribes that the coverage of risk by the insurance company shall commence at the time fixed by the parties in the contract or, failing this, at the time the contract is concluded. It means that the parties can choose a starting date for the risk coverage other than the time of conclusion of the contract and this date can be earlier or later. This is an important modification to Hungarian insurance law by the NHCC because the former Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC) prescribed in Section 536 (1) that the insured event shall be a future event. As such, the earliest starting date for the risk coverage could be the time of conclusion of the contract according to the FHCC.

The problem of unreal or false retroactive insurance is also solved – more or less – by the NHCC. Section 6:444 (3) prescribes that if an insured event occurs during the risk assessment period, the insurance company shall be entitled to refuse the offer only if the offer sheet contains an express warning to that effect, and it is instantly clear from the nature of the insurance cover requested or from other circumstances of risk coverage that an individual risk assessment is necessary for accepting the offer. However, it is questionable whether this norm will just be applied to consumer insurance or for all types of insurance, because the title of the Section refers to consumer insurance but the text of the norm does not. In our opinion, this norm shall also apply to non-consumer insurance if the offer – which is normally prepared by the insurer – states that the starting date of risk coverage is the submission of the offer. In this case the insurer is not free to refuse the offer; it must follow the rules of Section 6:444 (3), because, if the insurer could freely refuse the offer, its obligation to cover the risks which occur after the submission of the offer as well would have no meaning.

The other question about uncertainty is whether the insured event can depend on the conduct of the policyholder or the insured person. It is quite obvious that the insured event shall have an independent nature. For example, § 1101 (2) of the New York Insurance Law prescribes that a 'fortuitous event' is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party, while section 536 (2) of the FHCC contained an illustrative list of events which could be insured events,[13] and all these events were ones that are beyond the control of either party.

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[11] See Jens Muschner, '§ 2 Rückwärtsversicherung' in Theo Langheid, Manfred Wandt (eds), *Münchener Kommentar zum Versicherungsvertragsgesetz* (CH Beck 2010, München) Rn. 5.

[12] See Christian Armbrüster, 'PEICL - The Project of a European Insurance Contract Law' (2013) Fall Connecticut Insurance Law Journal 133. We have to mention that Section 2 of VVG has very similar rules about retroactive insurance as the PEICL. However, according to the VVG, the knowledge of the parties about the occurrence of the insured event shall be examined at the submission of the contractual acceptance which can be a different date for the parties.

[13] Section 536 (2) prescribes that insured event means, among others:
a) an event of loss specified in the contract;

However, it is quite clear in insurance practice that there are cases when the occurrence of the insured event is not totally independent of the policyholder or the insured person. For example, marriage assurance is a legally accepted form of insurance:[14] it is obvious that the marriage of the insured person is not an event independent of the insured person. However, it does not only depend on the insured person: marriage is a decision by two people.

The NHCC demonstrates more clearly that the insured event does not need to be totally independent of the conduct of the policyholder or the insured person. On one hand, it does not contain the illustrative list of possible insured events; on the other hand Section 6:440 on insurable interest mentions birth and marriage insurance as accepted forms of insurance.

According to some Hungarian insurance policies, the insured event can be one where its occurrence mainly depends on the insured person, e.g. in the case of health insurance, where the insured event can be a medical check-up for the early diagnosis of diseases that is paid by the insurer. The rules of the NHCC do not answer clearly this question but in our opinion these events could not be regarded as insured events because the independent nature is totally missing.

2 Premium

Regarding insurance premium as a characteristic of insurance contracts, the most relevant question is whether insurance contracts can have a gratuitous form or not. The NHCC answers it unambiguously: the definition of an insurance contract [Section 6:439 (1)] prescribes that the policyholder shall pay insurance premiums. The NHCC contains special norms on the gratuitous contract form of several other types of contract (e.g. service provision agreement, lease agreement etc.). However, the NHCC does not regulate the gratuitous form of insurance contract. It means that, according to the NHCC we cannot speak about an insurance contract without premium because the definition of insurance contract prescribes the obligation of paying a premium, which is a mandatory rule as with all definitions in the NHCC and there is not any exception which could overwrite this mandatory rule.

Of course, it is possible to provide risk coverage in a gratuitous form in Hungary: an insurance company has offered free health insurance with very limited services for one year as a promotion. According to the NHCC it is a valid contract, but the rules of insurance contract cannot be applied to this contract because of the lack of premium.

b) death or attainment of a certain age;

c) an accident causing injury, disability, health impairment, or death.

[14] The European Parliament and Council Directive 2002/83/EC concerning life assurance [2002] OJ L345/1. (Life Assurance Directive) also mentions the marriage assurance.

3 Insurance Benefit

There are two interesting questions about insurance benefits. The first one is whether the insurer's service needs to be a payment or if it can be something else. The other is whether the insurer can choose another form of risk coverage than paying some level of reimbursement if the insured event occurs, i.e. if the insurer can offer services which are independent of the occurrence of an insured event.

It is not a question in insurance practice that the insured person can receive the insurer's service not just as a payment but in other forms, too. For instance, Article 1 of Council Directive 84/641/EEC of 10 December 1984 amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1984] OJ L339/21. prescribes the assistance insurance that the aid (the insurer's service) may consist of in the provision of benefits in cash or in kind. However, it is still not clear that, if the insured person receives an in kind service, it shall also be seen as an in kind service performed by the insurer (first standpoint) or it shall be seen as an in kind service performed by a third party which is paid by the insurer (second standpoint). It is not just a theoretical question because it can have important practical consequences, e.g. in the case of health insurance belonging to the in kind model,[15] the insurer is liable for any medical malpractice if we agree on the first standpoint, but it is not liable if we agree on the second. There is a debate in Spain, where insurers typically offer benefits in kind, on this question. According to the practice of the Spanish Supreme Court, the insurer is also liable for medical malpractice if the health care provider is not owned by the insurer but was chosen by the insured person from a list of health care providers made by the insurer. This practice is widely criticized by Spanish jurists because they think that an insurer cannot offer medical services: it can just bear the costs of medical services.[16] We agree with the first standpoint: of course an insurer cannot directly perform a medical service. However, if the insurer offers direct access to health services its service is more than paying the medical costs, in the context of another contract concluded with the health care provider. The insurer frequently chooses or helps to choose the health care provider and organizes the procession of health services and so its service is more than an indirect payment. In our opinion, the NHCC is closer to this standpoint: Section 6:439 (2) prescribes that the insurer's service covers the payment for the insured person's loss in the amount and in the manner defined in the contract and other policy benefits with regard to indemnity insurance. It clearly means that those services which are not directly performed by the insurer shall also be seen as the services of the insurer and it shall be liable for their failures.

We think that the second question is answered by the NHCC, too. Its Section 6:439 (1) prescribes that, under an insurance contract, the insurer undertakes to provide coverage for the

[15] The in kind model means that the insurer does not offer the reimbursement of health costs but it offers direct access to health services.

[16] Fernando Carbajo Cascón, *La Responsabilidad civil del asegurador de asistencia sanitaria* (Fundación Mapfre 2012, Madrid) 162.

risk specified in the contract, and to provide settlement or benefits for loss arising upon the occurrence of a specific event after the starting date of risk coverage. According to the text, there are two form of the insurer's service: the first one is providing coverage for a risk and the second one is providing benefits in case of the occurrence of the insured event. It is clear that there is a conjunctive connection between the two forms of service because the NHCC uses the word 'and'. It means there is no insurance without services connected with the occurrence of the insured event. However, the insurer can offer other services within the framework of an insurance contract if these services also provide coverage for the insured risk. We can give some examples for these services, such as consultancy about prevention or medical check-ups for the early diagnosis of diseases.

It is an important legislative change because the FHCC prescribed that the service of insurer should be the payment of a certain amount of money or performance of another service upon the occurrence of the insured event. According to this amendment by the NHCC it is now clear that these services, which are independent of the occurrence of the insured event, can also be offered by the insurer in the framework of a 'pure' insurance contract and we shall not see these agreements as unclassified contracts.[17]

4 Insurable Interest

The FHCC regulated the insurable interest among the rules of property insurance. Its Section 548 prescribed that only persons who were interested in protecting a property or those who concluded contracts on behalf of an interested person should be entitled to conclude property insurance contracts. However, Section 545 – which was among the common provisions and so it had to be applied to personal risk insurance as well – prescribed that the insurance contract should terminate in the event of termination of the insurable interest. It means that, according to the FHCC, the insurable interest also was one of the characteristics of all insurance but the FHCC defined insurable interest only as it related to property insurance.

The NHCC terminates this contradiction. Section 6:440 – among the general provisions, just after the definition of an insurance contract – defines insurable interest. It prescribes that an insurance contract may be concluded by any person who has a vested interest in avoiding the occurrence of an insured event under some form of property or personal relationship, or who has a vested interest in the occurrence of an insured event in respect of life insurance policies, which comprises assurance on survival to a stipulated age only, birth assurance or marriage assurance, or those who conclude the contract on behalf of an interested person. Any indemnity insurance and group fixed-sum policy concluded in contradiction to this provision shall be null and void.

[17] This amendment has another consequence: it makes clear that the insurer also fulfils its obligations if no insured event occurs before the termination of the insurance contract. See Zavodnyik József, 'A biztosítási szerződések' in Osztovits András (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja III. kötet* (Opten 2014, Budapest) 1112.

The NHCC – as well the FHCC – distinguishes two types of insurable interest. On the one hand, it is generally those persons who have a vested interest in avoiding the realisation of a risk who will conclude an insurance contract. We can call this type direct insurable interest. On the other hand, there are those persons who conclude the contract on behalf of an interested person. We can call this type indirect insurable interest. The NHCC does not say anything about the relationship between the policyholder and the insured person with regard to indirect insurable interest. However, in our opinion, the practice of the FHCC should be followed in this question. It means that a special relationship between the policyholder and the insured person shall justify the insurable interest of the policyholder as well, e.g. that the policyholder shall be the employer or a relative of the insured person.

According to the NHCC there are exceptional cases when the insurable interest may be a positive one: the insured person may be interested in the occurrence of an insured event. This positive event may be the attainment of a certain age, birth or marriage according to Section 6:440. However, it does not mean that it is not possible to conclude an insurance contract which contains another positive event as insured event. The definition of life insurance (Section 6:477) prescribes that the insured event of a life insurance policy may be the insured natural person's death or attainment of a certain age, or at another predetermined time or occurrence of a specific event. It means that the insured event may also be, for example, the graduation of the insured person or other positive events as well.

It is a bit strange how the NHCC handles the lack of insurable interest because only indemnity insurance and group fixed-sum insurance are null and void but individual fixed-sum insurance is not if the insurable interest is missing. The reason for this distinction should be that in the case of individual fixed-sum insurance it is more difficult to examine the insurable interest. Section 6:475 of the NHCC therefore prescribes that, in connection with fixed-sum policies, the written consent of the insured person shall be required for concluding or amending the contract if they do not personally conclude it. It means that the insured person may decide on the existence of insurable interest; their written consent substitutes for the examination of insurable interest.[18]

5 Risk Calculation Based on Actuarial Methods

It is quite clear that risk calculation based on actuarial methods is an important characteristic of insurance business or activity. However, it is still questionable whether it also is one of the characteristics of an insurance contract. The definition in NHCC of an insurance contract (Section 6:439) only prescribes that the insurer shall provide coverage for the risk specified in the contract, but does not say anything about the calculation of this risk. Only the definition of insurance business or activity (Section 4 of Act LX of 2003 on Insurance Institutions and the Insurance Business) prescribes that the insurer shall apply risk calculations based on actuarial

[18] Takáts Péter, 'A biztosítási szerződések' in Wellmann György (ed), *Az új Ptk. magyarázata V/VI.* (HVG-ORAC 2013, Budapest) 338.

methods and insurance business or activity may be performed only when in possession of the authorization of the supervisory authority.[19]

In our opinion regarding these two definitions, this fifth element is not a mandatory element of an insurance contract according to the Hungarian law. If a bicycle shop offers a service that it repairs all defects to the client's bicycle in a determined period of time for a specific sum of money fixed in the agreement, this contract shall be considered as an insurance contract, despite the lack of risk calculation based on actuarial methods. Of course this activity by the bicycle shop shall not be considered as an insurance business because of the lack of risk calculation based on actuarial methods. It means that this very simple insurance service can be offered in the framework of an insurance contract but the service provider does not need the authorization of the supervisory authority.

III The Structure of Regulation of Insurance Contracts in the NHCC

The FHCC divided the insurance into three groups: property insurance, life insurance and accident insurance. The NHCC does not follow the FHCC, but Section 6:439 (2) distinguishes between indemnity insurance[20] and insurance of fixed sums.[21] This classification is based on PEICL. According to this, the regulation of insurance contracts in the NHCC is structured as follows:

- General Provisions on Insurance Contracts
- Indemnity Insurance Contracts
  - *a)* General Provisions on Indemnity Insurance Contracts
  - *b)* Liability Insurance Policies
- Fixed-sum Policies
  - *a)* General Provisions on Fixed-sum Policies
  - *b)* Life Assurance Policies
  - *c)* Accident Insurance Policies
- Health Insurance Contracts

This structure is not typical of insurance codes. The most common one is a first part covering general provisions; the second part is on indemnity insurance and the third one on human risk insurance.[22] However, the NHCC is not the only code which applies the category of fixed-sum insurances, e.g. the Chapter on Insurance in the Dutch Civil Code contains the following sections: General Provisions, Indemnity Insurance and Sums Insurance or Non-

[19] The supervisory authority is the Hungarian National Bank.

[20] 'Indemnity insurance' means insurance under which the insurer is obliged to indemnify against loss suffered on the occurrence of an insured event.

[21] 'Insurance of fixed sums' means insurance under which the insurer is bound to pay a fixed sum of money on the occurrence of an insured event.

[22] See e.g. the *Code des assurance* (the French Insurance Code), the *Ley de Contrato de Seguro* (the Spanish Act on Insurance Contracts) or the *Versicherungsvertragsgesetz* (the Austrian Act on Insurance Contract Law).

indemnity Insurance. However, the Dutch Civil Code does not contain special provisions on accident insurance and health insurance because the Section on Sums Insurance is separated into subsections, General Provisions of Sums Insurance and Life Insurance.

In our opinion it is not a good solution which was chosen for the NHCC applying side by side the category of fixed-sum insurance and the classical categories of human risk insurance (life, accident and health insurance). Our first problem is that the NHCC does not have an organic structure. Health insurance cannot be classified in the distinction between indemnity insurance and fixed-sum insurance because it can be both. As such, health insurance is placed in a separate chapter after indemnity insurance and fixed-sum insurance as an outsider, which is not an elegant solution. Our second problem is that the separation between indemnity insurance and fixed-sum insurance is not sharp enough in the NHCC. As well as the fact that health insurance cannot be classified, Section 6:486 (3) prescribes that the provisions on indemnity insurance shall apply to accident insurance with some exceptions. It means that the NHCC regulates only one fixed-sum type of insurance (life insurance). This is not simply a theoretical problem, because the provisions of the NHCC do not prescribe clearly which rules of indemnity insurance shall apply to accident insurance, to those types of health insurance which are indemnity insurance and to health insurances that is fixed-sum insurance.

IV The Technical Form of Regulation of Insurance Contracts in the NHCC

The majority of insurance codes normally apply more mandatory rules than for the regulation of other particular contracts, in order to protect the interests of the policyholders, the insured persons and the beneficiaries, who are typically consumers. It is a quite common solution that an insurance code prescribes that the contract between the parties shall not deviate from the provisions of the code to the disadvantage of the policyholder, the insured person or the beneficiary unless expressly permitted by the code. The Ley de Contrato de Seguro (the Spanish Act on Insurance Contracts) and the FHCC contain a similar prescription. The other typical method is that the code expressly enumerates those sections which are mandatory rules. This solution is chosen e.g. by the German and Austrian Versicherungsvertragsgesetz (the German and the Austrian Act on Insurance Contract Law).

The legislator of the NHCC chose another way. The mandatory rules (e.g. the waiting period shall not be longer than 6 months) are exceptional among insurance rules. However, it does not mean that the other sections regulating the insurance contract would be clearly default rules. Section 6:455 prescribes the following: if the policyholder is a consumer, the contract shall be allowed to derogate from the provisions of the insurance contract only to the benefit of the policyholder, the insured person and the beneficiary, where that provision pertains:

a) to the insurance company's implicit conduct in a consumer contract;
b) to any considerable increase in insurance risk;
c) to the consequences of non-payment of premiums;
d) to maintaining the amount of insurance cover;

e) to the obligation to prevent and mitigate damages;

f) to the obligation of disclosure and notification of changes and the obligation of reporting the occurrence of an insured event;

g) to any composition between the insured person and the injured party;

h) to premium payment obligations when the contract is terminated;

i) to the insurance company's exemption from settlement obligations;

j) to claims for compensation.

Furthermore, Section 6:456 prescribes that if the policyholder is a consumer, the contract shall be allowed to derogate from the exclusion of derogation only to the benefit of the policyholder, the insured person and the beneficiary with respect to fixed-sum and health insurance policies.

The key point of these regulations is the fact of whether the policyholder is a consumer or not. If the policyholder is not a consumer then most insurance norms of the NHCC are default rules. If the policyholder is a consumer, those norms are mandatory rules which are listed in Section 6:455 and Section 6:456. Those norms which are not listed in these Sections are mostly also default rules in those contracts which are concluded by a consumer as policyholder. According to Section 8:1 (1) point 3, 'consumer' shall mean any natural person acting for purposes which are outside his trade, business or profession. It has no significance whether the insured person or the beneficiary is a consumer or not.

The NHCC thus uses quite a rare regulatory method. However, other codes also apply this approach, e.g. the Dutch Civil Code contains several levels of mandatory rules. There are some articles from which the parties may not derogate. In other cases, the Dutch Civil Code prescribes that it is not possible to derogate from the specified articles to the disadvantage of the policyholder, beneficiary or other persons (e.g. insured person, injured person, pledgee or other third party). Finally there are such articles where it is not possible to derogate from the named articles to the disadvantage of the policyholder or beneficiary when the policyholder is a natural person who, when they entered into the insurance agreement, was not acting in the course of his professional practice or business.[23]

As we mentioned before, the FHCC did not allow derogation to the disadvantage of the policyholder, the insured person or the beneficiary from all articles regulating insurance contracts. The NHCC thus offers insurers a new opportunity to deviate from the provisions of the insurance contract in the cases mentioned above. However, the insurers will face at least two problems because of the regulations in the NHCC. First, they have to find the correct way of applying contract terms which derogate from the insurance contract rules of the NHCC to the disadvantage of the policyholder, the insured person or the beneficiary. It is well known that normally the entire content of insurance contracts shall be considered as general contract terms and conditions. According to Section 6:78, those general contract terms and conditions that differ substantially from the relevant legislation shall form part of the contract only if the other party has expressly accepted them after being explicitly informed about them. It means that the insurers (if they intend to derogate from any insurance contract rule in the NHCC) must

[23] See the Article 7:943, 7:963, 7:974 and 7:986 of the Dutch Civil Code.

find out which differences are substantial and which not and, in the case of substantial differences, how the policyholder must be informed and how the policyholder shall conclude the contract in order to fulfil the criterion of being explicitly informed about the differences, which must also be expressly accepted by the policyholder. These are very important questions because, if the insurer does not fulfil these criteria by the conclusion of the insurance contract, those terms differing from the rules of the NHCC will not form part of the contract and the rules of the NHCC shall be applied instead of them. As such, we can give the following advice to insurers: they should prepare a separate document which lists all the parts of the terms that differ from the rules of the NHCC and the policyholder shall also sign this document to declare that he expressly accepts those terms after being explicitly informed about them. In our opinion, this is the best way of concluding the contract that guarantees that all the differing terms will form part of the signed contract.

The second problem which insurers may face is the consequences of such a contract being entered by a consumer as an insured person, but which was originally concluded by a person who cannot be considered as a consumer. In this case the policyholder becomes a consumer after the insured person has entered the contract. It is unclear what happens to those contract terms which derogate from the rules of the NHCC to the disadvantage of the policyholder, the insured person or the beneficiary but these derogations are prohibited by Section 6:455 or Section 6:456 if the policyholder is a consumer. In our opinion, these terms must be amended automatically by the rules of the NHCC because Section 6:455 and Section 6:456 do not contain such restrictions that they shall be applied just in those cases where the policyholder is a consumer at the time of conclusion of the contract. It means that these provisions shall also be applied if the policyholder later becomes a consumer (i.e. if the insured person who is a consumer enters the contract concluded by a policyholder who is not a consumer).

Non-contractual Obligations

Ádám Fuglinszky*

Risks and Side Effects: Five Questions on the 'New' Hungarian Tort Law

The rules of extra-contractual liability did not remain unaffected by the overwhelming reform of the Hungarian private law, which resulted in the codification of the New Civil Code in 2013. According to the Statement of Reasons provided by the legislator, the amendments and changes in this field set the following three objectives. The first was to incorporate those liability rules which were already part of the legal system but had been accommodated by other acts so far (for example, the rules on product liability or environmental damage). The second goal was to include the sound solutions developed in the 'judge-made law', i.e. by the case law of the court practice. Finally, the legislator's ambitions also covered the introduction of new rules and solutions (partly transplanted from other legal systems) in order to give satisfactory answers to problems of liability law which before could be provided neither by the legislator nor by the case law (for example the foreseeability doctrine, alternative liability and Non Cumul, i.e. the exclusion and prohibition of parallel damage claims on the basis of extra-contractual liability between contracting parties).

Paradigmatic changes can hardly be envisaged; however, some amendments are significant enough to raise questions on the justification, efficacy and usefulness of the new rules and tools.

After a short introduction giving an overview on the structure and basics of extra-contractual liability (I) as regulated by the new Hungarian Civil Code (Act V of 2003 on the Civil Code, hereinafter referred to as NHCC), we analyse the amendments of the rules on extra-contractual liability by posing five questions, provocative to some extent (II): 1 Did we really codify the case law? 2 Do we really know what the 'new' tools are for? 3 Are the 'new tools' really necessary? 4 Did we tie up all of the loose ends? 5 Did we consider all the risks and side-effects? This critical 'questionnaire' is followed by a short summary on our conclusions (III).

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I The Landscape: an Overview on the Structure and Basics of Extra-contractual Liability in the Hungarian Civil Code

The Hungarian extra-contractual liability regime follows the French model in many aspects. The general rule on delictual (extra-contractual) liability is a *'big general clause',* which neither restricts liability for particular losses caused by specific wrongful conducts (as is the case in the tort law of the common law jurisdictions), nor limits the duty to pay damages for the infringements of particular assets, goods and values specified by the law (enumeration of protected goods, *System der geschützten Rechtsgüter*), as is stipulated in s 823 para 1 of the German BGB. According to s 6:519 NHCC, 'any person who causes damage to another person wrongfully shall be liable for such damage. The tortfeasor shall be relieved of liability if able to prove that they were not at fault.' As such, this is a fault-based liability rule with presumed fault. The doctrine of 'adequate cause' plays a very important role in keeping the floodgates closed, i.e. in rejecting absurd and exaggerated damage claims.

There is also another general clause, which establishes a *general strict liability* for damages caused by *highly dangerous* or *extra hazardous activities.* As is stated in s 6:535 para 1 NHCC, the operator is relieved of this liability only if they are able to prove that the damage occurred due to an unavoidable event that falls beyond the realm (or scope) of their highly dangerous activities.

The above specified basic liability rules are supplemented by a couple of other *special* (still *fault-based*) *liability structures,* including liability for employees,[1] agents,[2] obligors of other contracts,[3] shareholders[4] and executive officers[5] of legal persons; liability for the actions of public authorities (public officials, judges, public prosecutors, bailiffs and public notaries);[6] liability for the acts of non-culpable persons[7] and, last but not least, liability for damages caused by animals.[8] The NHCC contains detailed provisions on product liability in accordance with Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.[9] There is also a 'quasi delictual' rule on damages caused by parts of the building that have fallen off or by any other deficiency in the building (building damages). The owner is liable for such damage, unless they are able to prove that the regulations pertaining to construction and maintenance

[1] S 6:540 paras 1 and 3.
[2] S 6:542.
[3] S 6:543.
[4] S 6:540 paras 2 and 3.
[5] S 6:541.
[6] S 6:548–6:549.
[7] S 6:544 para 1.
[8] S 6:562 para 1, however a strict liability applies to damages caused by 'dangerous animals' (cf. s 6:562 para 2) and by so-called huntable animals (S 6:563).
[9] S 6:550–6:559.

have not been violated and that they have not acted wrongfully (and they were not at fault either) in the course of construction and maintenance.[10]

As far as the damages to pay are concerned, *'lump sum compensation in cash'* is the rule; however, the court can award *periodic payment* for recurrent future loss, namely for 'loss of income' and 'loss of maintenance' (the latter if the primary victim dies). If the extent of damage cannot be precisely calculated, the court can award general damages (based on appraisal) that would be sufficient to compensate the aggrieved party. There is no longer a rule on 'non-pecuniary damages' in the new code. This legal phenomenon was very much stressed by inherent contradictions, and so the legislator decided to replace it by the so-called *'sérelemdíj',* i.e. *pain and suffering (Schmerzensgeld, solatium doloris).* According to s 2:52 para 2 NHCC, the rules on liability and damages apply to the prerequisites of this 'pain and suffering' – as to the (liable) person obliged to pay for the pain and suffering and to the exculpation in particular – but also that no proof of any (non-pecuniary or immaterial) disadvantage or loss has to be provided beyond the infringement of a personality right. (The evidence on some kind of immaterial disadvantage was required in the practice of the former Civil Code.) Section 2:52 para 3 NHCC contains the factors the judge will consider while deciding on the amount of pain and suffering, generally at their free discretion. These are as follows: the circumstances of the case, in particular the severity of the infringement; the repetition of the infringement; the degree of fault; and the impacts of the infringement on the victim and on their environment.

II Five Provocative Questions

1 Did We Really Codify the Case Law?

As one of the legislator's goals was to incorporate the sound solutions developed by the courts, it might be useful to check whether this goal has been achieved and how these achievements can influence everyday court practice again. The examples elaborated below show that there are some contexts wherein the real and true judge made solutions have not been included into the code but rather some mutations of them.

a) New rules, which truly represent former judicial solutions

First, minors and those who do not have *capacity of discernment* due to mental illness or similar are not responsible for the damage caused by them. It is their custodian with whom liability lies. The notion of 'lack of capacity of discernment' or *'non-culpability'* had not been defined by

[10] Cf. s 6:560, which is followed by another rule (s 6:561) on the liability for damages caused by fallen, thrown or dumped objects. The liability lies with the tenant or other user of the dwelling or premises. If the tenant or user identifies the person who caused the damage, they shall bear liability as a surety. The tenant or user shall be relieved of liability if they prove that the person who caused the damage was on the premises unlawfully (i.e. they were a trespasser).

statutory law before. Now s 6:544 para 1 contains a statutory definition as follows: 'Any person whose discretionary ability is limited to an extent whereby that person is unable to comprehend the consequences of their actions leading to the damage shall not be held liable for the damage they caused.' This statutory definition reflects the concept, developed by the courts, that culpability must be checked in every case in such a way that it can be assumed or rejected for the 'wrongful' conduct in question, because the 'tortfeasor' might be able to comprehend the consequences of some of their actions while they cannot foresee those of their other acts and omissions.[11] Minors aged 12 and above are generally able to predict the consequences of their conduct; however, this general statement is not without exceptions. Additional important achievements of the case law have been fixed in the NHCC in this regard. S 6:537 para 2 (related to the liability for damages caused by dangerous activities) states that contributory negligence cannot be applicable if a non-culpable person (victim) has contributed to the occurrence of the damage. The operator who is fully liable for the damages suffered by the aggrieved party in this case shall be entitled to lodge a claim for compensation against the guardian (custodian) of a victim lacking discernment.

Second, the principle of *'compensatio lucri cum damno'* (i.e. that the amount of damages to be paid shall be reduced by any financial advantage of the aggrieved party resulting from the wrongful conduct), has already been applied in the case law, too. Now this doctrine has become a part of the statutory law on extra-contractual liability. The principle as the rule is however supplemented by an exception, whereby the court can abstain from its application if this were deemed redundant, having regard to the circumstances of the case. For example, if the aggrieved party is supported by family members, charitable organisations or similar, it can be presumed that the supporters do not intend to provide financial aid to the tortfeasor but to the victim. Their donations have a sharply defined purpose, a kind of contractual *'donatio inter vivos'* that is definitely not aimed at the enrichment of the tortfeasor. The deduction of this kind of donation is not justified and so the exemption applies.

Third, in the former Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC) the rule and the exception regarding the modes of 'compensation' had been turned upside down, because the statutory rule of 'restitutio in integrum' was awarded much less frequently than the statutory exception, of *compensation in terms of money*. The legislator now adjusted the rule to the reality and compensation in terms of money became the rule de jure as well.[12]

[11] Havasi Péter, in Wellmann György (ed), *Az új Ptk. magyarázata VI/VI., Kötelmi jog, Harmadik, Negyedik, Ötödik és Hatodik Rész* (HVG-ORAC 2013, Budapest) 478.

[12] Cf. S 6:527 para 1: 'The tortfeasor shall provide compensation in cash, unless compensation in kind is justified by the circumstances.'

b) New rules which are thought to be incorporations of the case law, but in reality are not

As referred to above, there is a general strict liability regime for damages caused by *extra-hazardous (or dangerous) activities.* The liable person is not necessarily the one who actually carried out the respective activity that caused the damage, but the so-called *'operator.'* The former Civil Code did not contain any statutory definition of the notion of the 'operator', therefore flexible criteria came into being in the court practice; this agglomeration of aspects and decisive factors was applied but always adjusted to the particular case in question. Sometimes one aspect was accented and the next time another, as the case at hand required. The components of the notion of 'operator' included the following: who was the owner of the equipment being used to carry out the activity; in whose interest the activity was carried out and who profited from that (profit and responsibility shall go hand in hand); who was able to control, coordinate, regulate and influence the activity; and who was entitled to make the fundamental decisions on how, where and when the dangerous activity was carried out.[13]

The legislator seems to have picked out one component of the above listed diverse criteria and to have highlighted this aspect as the sole decisive factor on the core question of who is to be considered as the operator. According to s 6:536 para 1 'The person *in whose interest* the hazardous activity is carried out shall be recognised as the operator.'

Despite the statements made in the commentaries of the NHCC (according to which the legislator did not want to change the notion of 'operator' as it emerged in court practice and so the earlier case law can be referred to accordingly[14]; moreover, the legislator also refers to the previous court practice in the Statement of Reasons, making an impression indirectly that they are convinced of having maintained this flexible court practice), it is our understanding that highlighting one criterion can overwhelmingly change the interpretation and application of the rule. Let's tackle this by a few examples.

If a rental car caused an accident, the car rental company was considered as the operator and no court came to the idea to qualify the renter (leaser) as the operator. However if the only question asked is in whose interest the dangerous activity (operating, driving a car) had been, it would be difficult to deny that it happened also – at least partly – in the interest of the renter (leaser). Is it sound and just to consider the renter (leaser) to be the operator?

The solution chosen by the lawmaker might be evaluated as even more unjust in the following imagined situations. Let's suppose that two friendly couples visit a concert together. They live quite far from another; nevertheless, the couple who arrived by car offers the other couple a lift, i.e. to bring them home by car. On the way they run over a pedestrian. There would have been no doubt according to the former court practice that the owner, the driver of the car, had been the

[13] Lábady Tamás, in Vékás Lajos, Gárdos Péter (eds), *Kommentár a Polgári Törvénykönyvhöz* (Wolters Kluwer 2014, Budapest) 2274.

[14] Lábady Tamás, in Vékás Lajos (ed), *A Polgári Törvénykönyv magyarázatokkal* (Complex 2013, Budapest) 949; Havasi (n 11) 468.

operator. However, if one takes the statutory definition seriously and poses only that particular question, of in whose interest the car was driven, then the answer may be that it was in the sole interest of the couple who had been given a lift, otherwise the couple having the car would not have gone in that particular direction at all. The detour had been only made in the interest of the couple without a car. Another imagined example results in an even less justified solution. Let's suppose a female neighbour is in the very late stages of pregnancy, but her husband is abroad on a business trip. In the middle of the night the childbirth begins and the lady asks her neighbour to bring her to the nearest hospital. The car runs a pedestrian over on the way. The question reads again as follows: in whose interest was the car operating? Was it in the driver's (neighbour's) interest? Hardly; their interest would have been to sleep in their bed. It was rather the lady's interest to get into the hospital as fast as possible. Is she deemed to be the operator? That remains to be seen.

Moreover, the commentaries confirm that response No 40 of the Civil Law Department of the Supreme Court seems to be overruled by the new statutory definition. This response referred to cars in joint conjugal property. The essence of the response was that not necessarily both spouses were to qualify as the operator, but only that spouse who regularly drove the car. Yet, in reality, the family car is used in the interest of both spouses, of the whole family, hence all family members can qualify as operators.[15]

Further difficulties can arise from the difference of the operator's notion as it is regulated in the NHCC on the one hand and in s 3 No 35 of Act LXII of 2009 on Liability Insurance in Respect of the Use of Motor Vehicles on the other hand. According to the latter statutory notion, 'operator shall mean the person shown in the document issued by the competent authority of the country where the motor vehicle is based as having custody of the vehicle (authorised operator, holder of authorisation), or, failing this, the owner of the vehicle.'

2 Do We Really Know What the 'New' Tools Are For?

There is a new rule on the *liability* (of the legal person) *for the tortious conducts* of *executive officers,* and on the *officers' personal liability* towards third parties. As it is regulated in s 6:541: 'If an executive officer of a legal person causes damage to a third party in connection with their office, liability in relation to the injured person lies with the executive officer and the legal person, jointly and severally.'

There was no such a rule in the former Civil Code; however, another liability rule for the wrongful acts of the agent covered also the tortious conducts of the executive officers, provided they were acting within the frame of a 'mandate', i.e. a civil law contract and not as the employees of the legal person. If they were employees of the company, the aggrieved party could sue the legal person only, but not the employee directly. In the new code, there is a direct liability of the executive officer, jointly and severally with the legal person, irrespective of the legal relationship between the legal person and the officer, in other words, it does not matter whether

[15] Lábady (n 14) 949.

they are an employee or a mandatee. Another relevant provision must be quoted in this respect. S 30 para 1 of the former Act IV of 2006 on Companies stated that (only) the company was responsible for the damage caused by the executive officer to a third party when acting in their capacity as executive officer. This provision has been overruled by the above cited s 6:541 NHCC. There is no particular explanation for this change. There is no other section in the NHCC which could have spread so much panic and fear in business circles as did the new s 6:541 NHCC. At least three different interpretations came up regarding this rule.

According to the broadest interpretation, the new rule has an undesirable side-effect: the legislator may have created a legal basis for the direct and personal liability of executive officers for the companies' debts. This could be seen as piercing the corporate veil, whereby the stab hits the executive officers. Such personal and direct liability would be a sword of Damocles over the executive officers' heads.[16] (The panic resulted in the slight increase of taking out Directors and Officers (D & O) liability insurance in Hungary.) Those authors who opted for this interpretation made critical remarks about the new rule being at the same time too harsh towards executive officers and superseding the special liability rules concerning the activity of executive officers in the NHCC and in other Acts, for example Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings. S 3:118 NHCC provides for the liability of executive officers in respect of third parties as follows. 'In the event of a business association's dissolution without succession, creditors may bring action for damages up to their claims outstanding against the company's executive officers on the grounds of non-contractual liability, should the executive officer affected fail to take the creditors' interests into account in the event of an imminent threat to the business association's solvency.' According to this special provision (and to the collateral rules in the Insolvency Act), the creditors have to file a declaratory action beforehand, then they have to wait until the end of the liquidation procedure, and only after the closure of this procedure can they file the damage claim against the executive officers of the company. Why would the creditors submit themselves to this complicated multi-stage procedure if they can claim damages on the basis of s 6:541 immediately?

The narrow interpretation of s 6:541 NHCC is represented first and foremost by the members of the Codification Committee. They emphasise that it is not the executive officer who is personally and directly liable for the company's debts but the other way round: it is the company that is responsible (jointly and severally with the executive officer) for the wrongful conduct performed personally by the officer. The justification of the company's liability is that it was the officer's capacity and their status of acting on behalf of the company that enabled them to perform the wrongful conduct.[17] Moreover, it is stressed that the rule covers delictual liability only, i.e. all damage claims which can be traced back to the company's breach of contract are excluded

[16] Sárközy Tamás, 'Az új Ptk. jogi személy könyvének néhány problémája' (2013) 5 Ügyvédek Lapja, 2–7, 4–5. Kemenes István, 'A vezető tisztségviselő deliktuális kártérítési felelősségéről II. (Kételyek a Ptk. 6:541. §-ával kapcsolatban)' (2014) 12 Céghírnök, 3–5, 5.

[17] Lábady (n 13) 2286–2287; Kisfaludi András, 'A jogi személy vezető tisztségviselőinek felelőssége az új Polgári Törvénykönyvben' in Csehi Zoltán, Koltay András, Landi Balázs, Pogácsás Anett (eds), *(L)ex Cathedra et Praxis, Ünnepi Kötet Lábady Tamás 70. születésnapja alkalmából* (Pázmány Press 2014, Budapest 307–338) 335, 337.

from the scope of s 6:541. Therefore, the contractual creditors of the company can sue the officers directly only under s 3:118 NHCC (and according to the collateral rules in the Insolvency Act) if all the preconditions therein are met. The exponents of this theory give some banal examples, that s 6:541 applies if the officer, while taking part in a business meeting, steals the notebook of a third party or if the executive officer gets involved in a punch-up at the Directors Ball and hurts someone seriously. In these imaginary cases, it was their capacity as an executive officer that enabled him to carry out the wrongful conduct and the aggrieved third parties were not in a contractual relationship with either the company or the executive officer.

There is a kind of middle course between the two different interpretations as specified above. The question is whether s 6:541 applies if, for example, hazardous waste (produced by the company as by-products) is stored wrongfully on the adjacent land instead of being transported as prescribed to a hazardous waste deposit; or software is being downloaded illegally by the employees of the company; or the company joins a cartel and thereby causes losses to third parties. If one of these wrongful conducts was ordered by the executive officer himself, or by someone else but the officer knew or should have known all about it, it can be hardly disputed that the damage was caused by the personal conduct of the executive officer to third parties who are definitely not the creditors of the company. Even if the broad interpretation that the executive officers are directly and personally liable for the company's debts can indeed be rejected, it would be rather difficult to deny their liability, as per this last interpretation, for such extra-contractual wrongful acts as in these imaginary cases (hazardous waste, illegal software download, cartel).

3 Are the 'New Tools' Really Necessary?

a) Some tools which are definitely useful

First, in the FHCC there was no explicit regulation of how is *liability to be divided* or, to be more precise, how the damages should be portioned out or prorated in the following three situations. The first case is the victim's contributory negligence.[18] The second one is the internal relationship between joint tortfeasors after they, or one of them, paid the damages awarded by the court to the aggrieved party within the frame of their joint and several liability.[19] The third situation is when the court exceptionally does not establish joint and several liability, although the loss had been caused by joint tortfeasors. The court is entitled to do so if the aggrieved person has themself contributed to the occurrence of the loss or if establishing joint and several liability appears unjustified in exceptional circumstances.[20] The NHCC provides for a uniform three-stage regime for all the above-specified three situations. The liability shall be borne in proportion to the degree of the fault. If the degree and thereby the proportion of the fault cannot be assessed,

[18] S 6:525 NHCC.
[19] S 6:524 para 3 NHCC.
[20] S 6:524 para 2 NHCC.

the liability shall be prorated in proportion to the respective contributions (involvements) to the event(s) which resulted in the injuries and losses (i.e. to the causal chain). If the proportion of their contribution cannot be determined either, the liability and the duty to pay or bear the damages shall be divided into equal shares. In our opinion, this codified solution can bring the uncertainty in this field to an end, even though an additional question arises, namely whether the 'proportion of the contribution' (to the causal chain) is a question of fact only (i.e. subject to the factual causation, 'but-for-test' only) or a question of law as well at the discretion of the judge (i.e. subject to legal causation theories such as adequacy, proximate cause, etc.)

Second, in s 6:524 para 4, the joint and several liability is extended beyond the joint tortfeasors to the so-called *cumulative* and *alternative causation* (or liability) as well. The rule itself provides as follows: 'The provision applicable to joint tortfeasors shall apply mutatis mutandis also if any one of the activities carried out at the same time would in itself be sufficient to cause the damage, or if the particular activity that in fact caused the damage cannot be identified.' The rule covers two different situations. The cumulative causation is if any one of the activities carried out concurrently (at the same time) would in itself be sufficient to cause the damage. As if two hunters hit a third one and each shot in itself would have caused the fatal result; or two plants let polluting chemicals flow into the river and each pollution in itself would have been sufficient to cause the mass death of fish.[21] The policy reason behind the rule is quite obvious: none of the hunters, polluters, i.e. tortfeasors can be relieved of liability with reference to the action of the other(s), which would have been sufficient in itself to cause the damage, too. The alternative causation as referred to in the second half of the above cited rule reads as follows: joint and several liability applies also if there were several tortfeasors involved carrying out an activity and the particular activity that in fact caused the damage cannot be identified. In these cases, lack of evidence would strip the victim of being awarded damages. There are sound policy reasons whereby the justification of this new rule can be explained. All tortfeasors involved committed an act which should arouse the disapproval of society. It was surely one of them who really caused the injury. It would be a windfall to the tortfeasor being relieved of liability just because there was someone else who also carried out a wrongful act. Moreover, all of them endangered the victim and the respective danger led to the injury. Joint and several liability also serves prevention, which is one of the main goals of liability law.[22] Joint and several liability had been already applied under the FHCC by analogy, in cases now to be subsumed under the new rule. (Schoolkids threw wooden screws and one of them hit the victim's eye, but nobody knew who threw that particular wooden screw.[23] Friends threw fireworks simultaneously and one exploded

[21] Nochta Tibor, in Csehi Zoltán (ed), *Az új Polgári Törvénykönyv magyarázata, Kommentár a 2013. évi V. törvényhez* (Menedzserpraxis 2014, Budapest) book 6, 505.

[22] Boronkay Miklós, 'Felelősség potenciális károkozásért: gondolatok az alternatív okozatosságról' in Csehi Zoltán, Koltay András, Landi Balázs, Pogácsás Anett (eds), *(L)ex Cathedra et Praxis, Ünnepi Kötet Lábady Tamás 70. születésnapja alkalmából* (Pázmány Press 2014, Budapest, 41–60) 42–44. Art. 3:103 (Alternative Causes) para 1 of Principles of European Tort Law also covers this situation; however, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage; i.e. a kind of proportional liability applies instead of joint and several liability.

[23] BH 1995. 214.

near to the arm of one of them, causing serious injuries. Who threw that particular firework never emerged.)[24] In our opinion, this is a sound solution one can agree with. Some details will undergo judicial interpretation and evaluation, for example what does it mean that the respective activities must be carried out the same time, or whether the activities being carried out must be the same (homogenous cumulative or alternative causation) or also different activities being carried out the same time suffice to apply joint and several liability (heterogeneous cumulative or alternative causation).

Third, according to s 6:532, compensation shall be due immediately upon the occurrence of the damage. It means that the tortfeasor has to pay default interest from the point in time when the damage occurred. S 6:534 allows the judge to award damages based on the value conditions prevailing *at the time of the verdict* if the value conditions between the time when the tort was committed and the time when the court verdict was passed underwent substantial changes due to the passage of time or other circumstances. This is nothing else but the inclusion of sound court practice into the Civil Code.[25]

b) Foreseeability doctrine: where there is doubt

The new Civil Code introduced the so-called foreseeability clause or doctrine both into contractual and the extra-contractual liability.[26] In the field of extra-contractual liability, foreseeability is not an autonomous rule but it is built in into the notion of proximate cause. According to s 6:521, 'no causal relationship shall be deemed to exist in respect of any damage that the tortfeasor could not and should not have foreseen.' The new rule raises several questions.

The first structural issue is whether foreseeability is a *question of fact* or a *question of law.* If it is a question of fact, an additional problem arises, with whom the burden of proof lies. The victim has to prove that the loss was foreseeable to the tortfeasor or, to the contrary, the tortfeasor must provide evidence that the losses were not foreseeable to them. The wording of the rule seems to include both factual ('could not') and normative foreseeability ('should not have'). With reference to the latter, the losses are foreseeable even if the particular tortfeasor did not foresee them in the respective case, but a reasonable man in their shoes should have foreseen them; this is undoubtedly a question of law and interpretation at the discretion of the judge. As far as the question of fact is concerned, the wording is rather ambiguous on the burden of proof. What does 'no causal relationship shall be deemed to exist' mean? This is surely not an instruction towards the courts to investigate the factual foreseeability ex officio, because this would contradict the general principle of civil procedural law, whereby the court is bound to the request of evidence filed by the parties and so the court cannot initiate taking evidence ex officio. An answer can be drawn from the systematic interpretation of the rule. Foreseeability is considered

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[24] BDT 2010. 2221.

[25] Csöndes Mónika, in Osztovits András (ed), *A Polgári Törvénykönyvről szóló 1959. évi IV. tv. magyarázata* (Opten 2011, Budapest) 1453.

[26] The foreseeability clause of contractual liability is dealt with in another paper. Cf. Ádám Fuglinszky, 'The Reform of Contractual Liability in the New Hungarian Civil Code: Strict Liability and Foreseeability Clause as Legal Transplants' (2015) 79 (1) The Rabel Journal of Comparative and International Private Law, 72–116.

and regulated as part of the causal connection, i.e. proximate cause. The proximate cause between the tortious conduct and the damage in general must be proven by the plaintiff, i.e. by the aggrieved party. Consequently, the foreseeability (to be more precise, the factual side and/or factual bases of foreseeability) of the losses as part of the causation must be proven by the aggrieved party.

There was no explicit foreseeability clause applied in the Hungarian liability law so far, but there was a need – as in every legal system – to find reasonable, fair and sound methods to limit the principle of full or total compensation. However, within the frame of the so-called theory of *adequate cause* applied frequently in the court practice, foreseeability was (and is) an implied factor; according to this view the law shall hold somebody as liable only for those consequences they could foresee while performing the wrongful conduct, otherwise prevention – one of the main goals of the law on damages – cannot prevail. In some judgments, foreseeability is even addressed by name.[27] We forecast that the achievements of the judicial practice on causation will not disappear and be replaced by foreseeability; on the contrary: they will be used simultaneously. It will therefore not be easy to find and declare the differences between them and to identify the particular role allocated to them in limiting liability. According to our understanding, the outreach of foreseeable damages must be narrower than that of direct consequences, thus foreseeability shall not be treated as only the express derivative of what has so far been practiced under the guise of proximate cause. We assume proximate cause and foreseeability as a model with two concentric circles: the outward defensive wall (against completely unfounded damage claims) is the criterion of proximate cause, and foreseeability serves as a kind of inward defensive line, thus: all losses that are foreseeable are necessarily causal but. at the same time, not all causal consequences are foreseeable to the tortfeasor or to the reasonable man in their shoes.

As elaborated on elsewhere, through transplanting the foreseeability doctrine, the immanent difficulties of its application are imported as well.[28] Without addressing all the details here, the most important issues are touched upon as follows. It is obvious that if the particular loss, in precise terms and its exact value (i.e. the exact amount of damages) must have been foreseeable, nothing will be ever foreseeable, since nobody is an oracle capable of predicting the future. If only the foreseeability of some kind of damages of some value is required, all consequences can be deemed to be foreseeable. 'In some sense everything is foreseeable, in another sense nothing.'[29] The scope and range of the foreseeable depends on the 'focal length' of the judicial practice's lens.

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[27] The Győr Regional Court of Appeal decided recently on a misfeasance in public office case, wherein the plaintiff sued the bailiff for not fulfilling their duties appropriately. He claimed some additional costs for a loan. He argued that, in consequence of the bailiff's dereliction of their duties, some debts could not be enforced and therefore he needed to take out a loan with a bank in order to buy a special vehicle for his wife who could not use public transport due to her disability. The plaintiff stated that if the bailiff had fulfilled their duties properly, the debt would have been enforced and there would not have been a necessity to take out the loan to buy the adapted car. The court dismissed the lawsuit due to lack of foreseeability. This court referred explicitly to foreseeability as part of the proximate cause considerations (GYIT-H-PJ-2012-33).

[28] Fuglinszky (n 26) 96–105.

[29] H.L.A. Hart, Tony Honoré, *Causation in the Law* (2nd edn, OUP 1985, Oxford) 256–257 with reference to other scholars too.

Neither of the above-mentioned extremes is acceptable and helpful when shaping a flexible, fair and predictable law. As far as the Hungarian legislator's intentions can be abstracted, the *type* and the *order of magnitude* of the loss have to be foreseeable in order to hold the wrongdoer liable.[30] Both notions, however, the 'type' and the 'order of magnitude', need interpretation. The broader the categories, the more damages will be foreseeable and vice versa. The common law experience might serve as a pattern on this point (focusing on the 'type of consequence' but not on the 'specific consequence', in other words on the 'class or character of the injury').[31] Moreover, it is not always fair and sound to require the foreseeability of both factors. In the common law jurisdictions the so-called *thin skull doctrine* prevails, by which, with regard to personal injuries, the foreseeability of the type suffices; the defendant cannot exculpate themself from liability by reference to their lack of knowledge of the weaknesses and health preconditions of the plaintiff.

It does not turn out from the wording ('the tortfeasor could not and should not have foreseen') whether the loss must be foreseen as a 'possible consequence' of the wrongful conduct or the application of a probability criterion should be considered. The latter approach would provide a useful tool to keep the floodgates closed. However, it would raise several questions. Is the degree of probability a question of fact, i.e. that of natural sciences requiring expert evidence, or is it an issue of law and policy? Where should the bottom line of the required *minimum degree of probability* be positioned? (The criterion of real risk was mentioned in an earlier version of the Statement of Reasons to the draft Civil Code, but in the official materials of the NHCC, this is no longer the case.)[32] Whatever the trend in the Hungarian judiciary is going to be, the practical usefulness (or to the contrary, its superfluity) of the foreseeability doctrine must be argued out through meticulous case law.

4 Did we Tie up all of the Loose Ends?

An overwhelming reform of the codified private law is a good occasion to evaluate the court practice, to review all uncertain issues and to assess the needs where the amendment of the statutory law is sought. There are several open issues in the court practice of extra-contractual liability, where the legislator's intervention should have been at least considered; in this way the legislator should have traded off the gains of inserting new solutions into the Civil Code against the disadvantages, thereby restricting the free discretion of the judge among them. The Hungarian legislator seems to have missed this chance, as is highlighted here by reference to a couple of examples.

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[30] Cf. Lajos Vékás, 'About Contract Law in the New Hungarian Civil Code' 6:1 (2010) ERCL 95–102, 101. (Vékás refers to the foreseeability as part of the new contractual liability regime, however his statements in this respect are relevant to extra-contractual liability as well.)

[31] See for example *H Parsons (Livestock) Ltd v Uttley Ingham & Company Ltd* [1977] EWCA Civ 13, [1978] QB 791 (although this was a contractual matter). The *Hughes v Lord Advocate* [1963] UKHL 1 (21 February 1963) this was a negligence case.

[32] Cf. *A T/5949 sz. törvényjavaslat indokolása* (2008) § 5:477, 1265.

a) Does partial causation exist?

According to the Hungarian concept of causation, a loss is either causal consequence of the wrongful conduct or not, but there is no 'more-or-less' causation. An apportion of liability (or that of the damages) between the wrongdoer and the aggrieved party is possible only if the aggrieved party also contributed (at least negligently) to their own losses or failed to mitigate them as required by law.[33]

In the court practice of damage claims filed by employees against their employers under the Labour Code,[34] the prior condition (predisposition) of the victim, i.e. their state of health, is considered and the damage to be paid is reduced accordingly if predispositions or earlier injuries fatefully contributed to the injury.

Over and above, there are some published judgments wherein the court divided the damage in proportion to the involvement of the wrongful conduct in the causal chain on the one hand and of the natural event therein on the other hand.[35] There is no statutory basis for passing such a verdict. The court should have decided on whether there was either proximate (or adequate) causal connection between the wrongful conduct and the loss suffered or else that the natural event was simply the predominant root of and reason for the damage incurred.

The efforts of the court not to reject the claim but not to admit it *in toto* either are understandable: the losses were partly caused by the wrongful conduct and it really seems unfair to follow the 'all-or-nothing' approach in this kind of case. However the statutory basis of the respective court practice is still missing. For this reason, it would have been useful if the legislator had provided the courts with a hint, possibly even with an express option, that it can divide the liability (damages), as is already practised on rare occasions.

b) Is loss of chance an autonomous head of loss?

The notion of 'loss of chance' is not completely unknown in Hungarian legal scholarship and practice. However, the Civil Code (neither the former not the new one already in force) does not mention this category. The court practice could not avoid facing cases wherein the loss of chance had to be addressed. The respective court did not have any other choice but to decide whether the loss of chance should be acknowledged at all as a head of loss and if yes, whether

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[33] Cf. s 6:525 NHCC.

[34] Act I of 2012 on the Labour Code. Cf. Supreme Court BH 2006. 241., similarly in medical malpractice law, cf. Curia BH 2013. 267.

[35] Cf. Judgment No. DIT-H-PJ-2008-24., Pf.II. 20.617/2007/4. of the Debrecen Regional Court of Appeal. The forest of the plaintiff had been already weakened by inland waters as, at a later date, in the course of spraying chemicals on the neighbouring fields (conducted improperly by the defendant) some spray (harmful to trees) was blown by the wind over to the forest. Neither the inland waters nor the chemical spray alone would have been sufficient to kill the forest. The court ordered damages to be paid proportionally. In another case (cf. Pécs Regional Court of Appeal PIT-H-PJ-2008-86, Supreme Court BH 2010. 64.), the exterior wall of a house cracked due to the extreme amount of rainwater on the one hand and to the municipality's omission, it not having completed the rainwater pipe system, on the other hand. The court, instead of rejecting or admitting the claim *in toto* (i.e. applying the 'all-or-nothing approach'), here also ordered the payment of damages proportionally.

it should be considered as a pecuniary or a non-pecuniary loss. The legal literature distinguishes three case groups.[36]

The first group covers cases wherein the *loss of profit* could not be proven with sufficient probability; in other words, the causal connection between the wrongful conduct and the loss suffered was seen as rather loose. The courts seem to be reluctant to recognise any loss in the respective cases. They reject the claim due to lack of evidence.[37] There is a special liability rule in s 165 para 2 of Act No CVIII of 2011 on Public Procurement, which states that if the rules on public procurement had been infringed and the (unsuccessful) tenderer claims only their expenses incurred in connection with the preparation of their tender and with their participation in the award procedure, it shall suffice to provide proof to the extent that the other party (i.e. the tendering authority) breached the rules on public procurement, this was really connected to the contract and, finally, that the infringement had a direct impact on their chances of winning the contract. However, this eased requirement of proof covers the claim for expenses only. If the tenderer claims the loss of profit beyond their expenses (that they would have gained if they had won the tender), it is still their task to present sufficient evidence that they would have won if the tendering authority had not infringed the rules. To give sufficient proof of this is hardly ever possible.

If an *attorney* fails to meet the deadline for filing a statement of claim, an appeal or revision, the client loses the chance of winning the case. It never emerges whether they would have won the case or not. The client definitely lost the opportunity. The prevailing view (represented also by the Supreme Court, now Curia) is that the claim is to be rejected, because the plaintiff cannot prove the causal chain between the attorney's omission and the loss suffered. The client may have lost the case, even if the attorney had not missed the deadline.[38] Additionally, the courts emphasise that the court procedure on the damage claim cannot be equivalent to a kind of appeal whereby that particular procedure will be concluded in a disguised form (wherein the defendant is not the original one but the negligent attorney), which could not take place due to the omission of the attorney.[39] In recent practice however, the courts do not want to let the client go without some compensation and so they tend to qualify the wrongful conduct (omission) of the attorney as an infringement of personality right which can be seen as a basis for awarding non-pecuniary damages (pain and suffering or *solatium doloris,* as it is called in the NHCC). The amounts awarded are very low, particularly in relation to the value of the original claim, which cannot be pursued due to the attorney's default.[40] As such, the courts do not recognise

[36] Jójárt Eszter, 'Az esély elvesztése, mint kár' (2009) 12 Jogtudományi Közlöny 518–533.

[37] If the plaintiff lost the chance to participate in a competition for subvention (or the rules of the tender were not obeyed by the contracting authority), they cannot claim any damages (loss of profit), because it was not absolutely certain that they would have won the competition if the rules had been obeyed (Supreme Court BH 1991. 74., similarly EBH 2005. 1220.). There is no evidence that the plaintiff would have been hired if they had received the language-course certificate on time (the language school had delayed sending it to him, cf. Supreme Court BH 1999. 551.).

[38] Cf. Supreme Court BH 2009. 355., BH 2013. 89.

[39] Cf. Supreme Court BH 2012. 90.

[40] 100 000 Hungarian Forints (HUF, i.e. approx. EUR 330) in the Supreme Court case BH 2012. 90., HUF 150 000 (approx. EUR 500) in the Curia case BH 2013. 89.

loss of chance as a standalone proprietary position or good, which also deserves protection via the law of damages. They do not even seem to think of applying a proportionate award, i.e. to award damages to the client in proportion to the chances lost, projected to the original value of the claim. The personality right approach represented by the Curia is not perfect either because, on the one hand, the amounts awarded as non-pecuniary damages are completely unrelated to the original value of the claim and, on the other hand, the withdrawal of the chance to win the case is not really an infringement of any personality right.

Finally, the third case group, that of *medical malpractice* cases, is to be dealt with. In the typical scenario, the doctor makes a diagnostic mistake (they do not recognise the illness the patient succumbs to) and therefore does not opt for the appropriate therapy which might have cured the patient. The patient might have recovered, or at least they might have lived longer, or in other cases: they might have recovered earlier, might have remained and lived longer without the symptoms; the residual injuries might not have occurred, etc.[41] The courts give three different answers to this type of claim. Either they reject it because the plaintiff could not provide sufficient evidence to expound with convincing probability that the injury would not have occurred but for the doctor's default, or they lower the required level of probability and award damages in full, or, sporadically (i.e. very rarely) some courts award damages in proportion to the estimated chance that the failed or omitted treatment might have helped the patient.[42] This third solution is equivalent to the implied acceptance of the loss of chance as a position of value protected by the law, which might be useful as it spares the parties from producing evidence on hypothetical situations.[43] This approach seems to cut the Gordian Knot indeed but there is just one problem with regard to this: there is no legal basis to pass such a verdict. In other words, no matter how convincing this view is, it represents a contra legem approach. Nowadays, the prevailing view developed by the Szeged and Pécs Regional Court of Appeal is to consider the loss of chance of recovery as a personality right infringement and to award non-pecuniary damages again (solatium doloris in the new Code), where there setting the exact amount is at the free discretion of the judge.[44] A guideline provided by the legislator regarding this case group would also have been useful.

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[41] As to the groups cf. Bodonovich Klára 'A gyógyulási esély elveszítése mint kár, a bírói gyakorlat tükrében' (2014) 3 Iustum Aequum Salutare 29–49, 31.

[42] Cf. the comparative analysis of Dósa Ágnes, 'A gyógyulási esély csökkenésének értékelése a kártérítési jogban', in Nótári Tamás (ed), *Ünnepi tanulmányok Sárközy Tamás 70. születésnapjára*, (Lectum Kiadó 2010, Szeged) 49. To the three possible solutions see also Bodonovich (n 41) 32–35, 37, 45–46, 48. She cites a judgement of the Bács-Kiskun County Court, wherein the court awarded 30% of the claimed damages, in proportion to the estimated chance of recovery (which had been lost).

[43] Cf. Dósa (n 42) 55–57.

[44] Cf. Szeged Regional Court of Appeal SZIT-H-PJ-2007-12 and SZIT-H-PJ-2007-61, and also the Supreme Court BH 1999. 363.

c) Does the victim's contributory negligence apply to the claims of the dependants for loss of maintenance?

According to s 6:529 para 1 NHCC, if the tort results in death, any person who was supported by the person who died in consequence of the wrongful conduct can claim the loss of maintenance. S 6:525 para 1 prescribes that if the aggrieved party fails to fulfil their obligations to prevent and mitigate the losses, an apportionment of damages shall be ordered according to the degree of their fault; if the proportion of the fault cannot be determined then in the proportion of the tortfeasor's and the victim's involvement in the causal chain; and finally, if the proportion of their involvement cannot be assessed either then the tortfeasor and victim shall cover (and bear) the damages equally.

Both the former and the new Code are silent on the issue of whether, if the primary victim dies, and they contributed negligently to their death (for example through acting with fault as a joint causer of the accident wherein they lost their life, or as they jumped down from a moving train etc.), the rule on apportionment of damages in s 6:525 para 1 applies to the loss of maintenance claim of the dependants. Shall the contributory negligence of the (dead) primary victim be projected and thereby attributed to the dependants? There is also an important theoretical question in the background, of whether the claim for loss of maintenance is a kind of accessory claim stuck to the loss suffered by the primary victim or, to the contrary, this is a standalone and independent claim of the dependants which is however affiliated to the death of the primary victim on a factual basis but not in the sense of law. The Code does not give answers to these questions.

The views of the Budapest-Capital Regional Court of Appeal and those of the Curia (the highest court in Hungary) diverge. According to the former, it is about a completely independent claim. The family members who were supported by the late primary victim did not contribute to the losses they suffered through the death of their supporter in any way. As such, there is no reason to divide or apportion the damages, and full compensation is to be awarded.[45] The Curia gives the contrary point of view, namely that the claim for loss of maintenance is still affiliated to the accident in which the primary victim died, i.e. it is in close logical connection with their contributory negligence.[46] Both approaches can be represented; for us, the latter is more

[45] The point of view of the Budapest-Capital Regional Court of Appeal is summarised by one of the judges, cf. Csóka István 'A károsulti közrehatás értékelése hozzátartozói károk esetén' [2013] Fővárosi Ítélőtábla döntései, Különszám a Fővárosi Ítélőtábla megalakulásának 10. évfordulójára, 31–32. According to the assessment provided in two commentaries on the new Civil Code, the court practice seems to have a tendency to follow this former concept, despite the approach to the contrary represented by the Curia, cf. Orosz Árpád, in Osztovits András (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja*, Vol. IV (Opten 2014, Budapest) 86–87, and Harmathy Attila, in Wellmann György (ed), *Az új Ptk. magyarázata VI/VI., Kötelmi jog, Harmadik, Negyedik, Ötödik és Hatodik Rész*, 2nd revised and expanded edition (HVG-ORAC 2014, Budapest) 506.

[46] Cf. Csóka (n 45) 31–32, with reference to the following judgements of the Curia: Pfv.III.20.983/2010/6.; Pfv.III.20.760/2009/3.; Pfv.VIII.21.850/2011/4.; Pfv.III.20.238/2007/5.; Pfv.VIII.21.175/2011/3., Pfv.III.20.394/2012/6., Pfv.IV.21.760/2012/9., BH 2012. 151. i.e. Pfv.III.22.053/2010/5. Similarly Tőkey Balázs, 'A LB ítélete az egészségügyi szolgáltató felelősségéről' (2011) 2 Jogesetek Magyarázata 27.

convincing. It would be difficult to accept that, if the primary victim survives, their contributory negligence is taken into consideration to their disadvantage in the form of division or apportionment of the damages, but if they die, the same contribution will be not be reflected in any way. If the dependants enjoyed the support of the primary victim, they should also share the consequences of their contributory negligence. Of course, the opposite view also deserves deliberation. Due to this uncertainty, it would have been helpful if the legislator had decided on this point.

d) Are losses caused by 'wrongful legislation' claimable?

It remains to be seen whether legislation can ever be considered as a wrongful act under the new Civil Code. The question is even more relevant if an Act enacted by the parliament or a decree given out by the government or by a government minister is declared to be unconstitutional and therefore the Constitutional Court annuls the respective statute.

During the socialist era this question was not asked at all. After the democratisation of the country a few judgments on this issue have been published. According to the prevailing view (represented also by the Supreme Court so far) the process and result of legislation underlies public law only. Legislation does not lead to the emergence of a private law relationship of any kind, even less to the accrual of a claim for damages on the basis of extra-contractual liability. If the judicial power awarded damages to somebody and ordered the legislature to pay these damages then that would be a gross violation of the constitutional principle of separation of powers. This would also mean the restructuring of budgetary resources, which belongs to the exclusive competence of the legislator.[47]

The Codification Committee, led by Lajos Vékás, did not share this view, and in order to make a clean sweep on this point and to disambiguate that the liability of the legislator cannot be *per se* excluded, proposed to introduce a new rule, which would have explicitly prescribed the lawmaker's liability if a statute had been declared to be unconstitutional and had been annulled by the Constitutional Court retroactively to the time of being enacted. (If the annulment had taken place *ex nunc*, the liability would have applied only to losses incurred after the date of the annulment.) Liability would have been imposed on the lawmaker also if they had omitted to enact a statute despite the fact of being ordered to do so by the Constitutional Court. The draft of NHCC provided by the Committee was silent on the issue of whether this was meant as a fault-based liability or a kind of strict liability. However, this and other details have lost their importance, as the respective rules were eventually left out of the new Civil Code as it has been enacted.[48]

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[47] Menyhárd Attila, 'Az állam kártérítési felelőssége és állami immunitás' in Nochta Tibor, Fabó Tibor, Márton Mária (eds), *Ünnepi tanulmányok Kecskés László professzor 60. születésnapja tiszteletére* (PTE ÁJK 2013, Pécs) 400–403. See also the practice of the Supreme Court: BH 1994. 312., BH 1998. 334., BH 2002. 264. (with reference to the omission by the state of enacting a statute), EBH 2010. 2130.

[48] Lábady Tamás, in Vékás Lajos (ed), *Az új Polgári Törvénykönyv Bizottsági javaslata magyarázatokkal* (Complex 2012, Budapest) 514–515.

Being aware of the reluctance of courts to rule against the legislator, and regarding the fact that the specific rule on the legislator's liability was taken out of the draft Civil Code, the legislator made an unexpected observation in the Statement of Reasons to the new Code. The legislator namely takes the view therein that it is possible to claim damages for losses incurred by the impacts of unconstitutional statutes or by the legislator's omitting the duty of member states to implement an EU directive. The legal basis of the claim is nothing else but the general rule on extra-contractual liability (i.e. the big general clause in s 6:519, which is a fault-based liability with presumed fault). It is more than questionable whether the courts will follow this statement, as they have rejected the damage claims so far. A specific rule could have definitely changed this judicial attitude.

We take the view that the legislator's liability does not infringe the principle of the separation of powers. Only the private law consequences of enacting unconstitutional statutes would be drawn. However, we support the view to conceptualise this liability regime as a fault-based liability, because the lawmaker cannot always foresee that a statute will be declared unconstitutional. It happens that a very narrow majority (of the Constitutional Court judges) makes the decision on the constitutionality or unconstitutionality of a particular set of regulations and the minority approach is also reasonable. The decision depends sometimes on discretion, for example if two fundamental rights collide and the collision can be dissolved only by the careful running of the so-called test of necessity and proportionality. In this view, unconstitutionality is a necessary but not always sufficient precondition of the lawmaker's liability. Liability is to be imposed only if the legislator (i.e. their employees, agents, etc.) was at fault,[49] for example if the reason for the act's being declared unconstitutional was of a procedural nature (cf. the so-called public law invalidity), or of a substantive nature, but in the latter case only if the unconstitutionality was or could have been foreseeable to the legislator due to the structure, principles and rules of public law, to the enactments of the EU or to the ECJ case law or, last but not least, due to the published judgements of the Constitutional Court.[50] Scholarly consensus can also play an orienting role in this respect.

5 Did we Consider all the Risks and Side Effects?

The legislator sets the goals and objectives as they decide on the introduction of new laws. However, care should be taken: besides the effect sought by the lawmaker, side effects can occur. In our view, the legislator has to identify and evaluate the possible side effects carefully in order to avoid that the new law results in more disadvantages than advantages. We do not intend to assert that, with regard to the so-called 'Non Cumul', the balance is negative; however this particular rule is a good example of how some undesirable side effects can be highlighted.

[49] Similarly Petrik Ferenc, *Közigazgatási bíróság – közigazgatási jogviszony* (HVG-ORAC 2011, Budapest) 172. He emphasises correctly that the unconstitutionality of an act does not necessarily include fault.

[50] Similarly Karsai Dániel, 'A jogalkotással okozott kárról' (2014) 6 Jogtudományi Közlöny 315: the unconstitutionality must be unambiguously foreseeable on the basis of the former judgments of the Constitutional Court.

a) The objectives of 'Non Cumul' in the new Civil Code

According to s 6:145 NHCC, where there is a contractual relationship between the plaintiff and the defendant, *parallel damage claims in extra-contractual liability are excluded.*[51] There was no explicit rule on the relationship between contractual and extra-contractual liability in the former Code, and the distinction was of little relevance at all, because there were no significant differences between the two liability regimes. However, for various policy reasons, there are some essential differences between the two in the new Code and so it does make sense to draw a strong dividing line between them, in order to exclude the contracting party from eventually bypassing the rules of contractual liability and opting for the extra-contractual liability regime if it might be more favourable to him. Let's site some examples.

Although the foreseeability limitation on damages is present in both regulations, the time of reference of the foreseeability is different. It is the time of concluding the contract as far as contractual liability matters,[52] while there is no explicit rule on the time of foreseeability under the rules of extra-contractual liability. It is assumed that the time of reference cannot here be anything other than the time of conducting the wrongful conduct.

Moreover, according to s 6:174 Para 2 of the new code, the creditor can claim in the event of defective performance so-called direct damages (loss caused directly to the subject of the contract) only if the special prescription times provided for by the code for warranty claims had not yet elapsed and they could not get the defective performance remedied by specific performance (repair or replacement). The special prescription time is one year for a non-consumer contract and two years for consumer contracts, thus significantly shorter than the general prescription time, which expires in five years. (Nevertheless a five-year prescription period applies even to direct damages if the contractual object is an immovable; hence, there is no difference in the latter case.) All in all, the creditor could evade, via the extra-contractual bypass, these shorter prescription times and also their duty to claim specific performance first; in other words, they could evade the right of the defendant to remedy the defect in kind before being obliged to pay damages (i.e. to remedy it in terms of money) by the choice of extra-contractual liability.

b) The foreseeable side effects of 'Non Cumul'

There are, however, some crucial side effects which the lawmaker might have not considered. Before giving an overview on them, let's start with one possible side effect, which has been successfully counteracted by the legislator. The legislator recognised that the exclusion of parallel claims in tort can induce *difficulties in distinction* between obvious breaches of contract

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[51] S 6:145: [Exclusion of parallel compensation claims]
The obligee shall enforce their claim for compensation against the obligor in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation, even if the obligor's non-contractual liability also exists.

[52] Cf. s 6:143 para 2: 'Other pecuniary losses beyond the contractual item and the loss of profit must be compensated for to such an extent as the other party proves that the loss was foreseeable as a possible consequence of the breach at the time of conclusion of the contract.'

and other damaging occurrences, 'accidents' related to the contract but not having the clear character of a breach. For instance, if the painter or a mechanic doing repairs in the house breaks a valuable Ming vase, is it still a breach of contract connected compulsorily and exclusively to the contractual liability regime or does it qualify instead as an independent actionable wrong giving rise to an autonomous damage claim in tort after all? In order to avoid such harsh distinction issues, the legislator supplemented the Code with an additional interpretive rule (section 6:146 NHCC), which assigns (pecuniary) damage claims for all losses that occurred *in the course of the performance of the contract* compulsorily to the contractual liability regime. As a result, there is no distinction issue in the above mentioned example: the 'accidental destruction' of the Ming vase and all similar losses entitle the creditor to claim damages in contract only, but not in tort. Damages that occurred 'in the course of the performance' is a much wider notion than damages 'caused by the breach of contract'. Now let's focus on the side effects seemingly overlooked by the legislator.

Through the implementation of 'Non Cumul', the scope of the strict extra-contractual liability rule (for extra dangerous activities, s 6:535 et seq.) is going to be significantly restricted and many cases must be solved on the basis of contractual liability instead,. although in these cases the injuries were caused by an *extra hazardous activity* (operation), but also in the course of the *performance of a contractual service*. For example: coming flying out of a waterslide or off a summer toboggan run was seen as being injured through an extra hazardous operation, and the operator of these kind of facilities was held liable for the injuries suffered on the basis of extra-contractual (strict) liability, irrespective of the contractual nature of the parties' relationship. According to the rule on dangerous activities, the operator could be only relieved of liability by proving that the injury was due to an unavoidable event that fell outside or was beyond the scope of their (extra dangerous) activity. From now on, these waterslides, summer toboggan runs and similar cases will underlie only and exclusively contractual liability due to the Non Cumul principle (section 6:145). However, there is a difference between the exculpation prerequisites of the two liability regimes. While for breach of a contract, 'an impediment beyond the control' of the party in breach suffices (provided it was unforeseeable and the party could not be reasonably expected to avoid it), an unavoidable event 'beyond the scope' of the dangerous activity requires relief from liability. The two formulations, 'beyond control' and 'beyond the scope of activity', do not necessarily mean the same. Exculpation can be easier if only the former is required. There are many events which are beyond the control of the operator but not beyond the scope of the extra hazardous activity in question.

One might say that the waterslide and the summer toboggan cases are of low relevance; however, the same reflections come into one's mind regarding all *passenger transport contracts!* Meeting with an accident and suffering injuries as a passenger thereby was designated to the strict extra-contractual liability for dangerous activities, as operating a car (taxi), coach or train was unambiguously qualified by the courts as performing a dangerous activity. From now on, the contractual and only the contractual liability regime is applicable, because there is an onerous or gratuitous passenger transport contract between the operator and the passenger, and the delictual bypass is closed and forbidden by s 6:145 NHCC. This is going to raise several questions. First, the difference in the exculpation clause of the two rules must be brought to mind

again ('beyond control' v. 'beyond the scope of activity'). For example, mechanical failure or the driver's sudden unconsciousness – depending on the circumstances of the case – can be considered as not being beyond the scope of the activity, but beyond the control of the operator. Second, serious policy inconsistencies arise in connection with gratuitous passenger transport contracts, such as giving a lift for free, taking a hitchhiker, etc. In the case of a gratuitous contract, there is no liability for breach of the contract without fault.[53] Hence, if the operator causes an accident but they are not at fault, the passenger's damage claim cannot be successful against them. Again: the extra-contractual bypass has been closed by the legislator in s 6:145, and so there is a possible combination of facts and circumstances where the victims of car accidents remain without any (legal) coverage. It might happen that the legislator recognises this gap and tries to fill it with a special rule re-qualifying the operation of a car as always performing an extra-hazardous activity, hence redirecting it in all cases very consequently to the domain of tort law,[54] according to the motto. Despite the fact that there might be a contract in the background, the outcome could be a more justifiable one if a tort law claim were allowed, but this solution – as any medicine – could have considerable side effects, too. First is the fragmentation of law: some situations wherein a car would be involved would be still subsumed under extra-contractual (strict) liability for extra-hazardous activities. Other dangerous activities, by contrast, would be deemed as contractual if carried out within the context of a contract and so fault-based liability would apply if the contracts were gratuitous ones. This solution would treat similar cases differently. By comparison, it seems to be better to outsource all harms occurring in car accidents and to bring them under a no-fault plan maintained by social security or private insurance companies.

III Conclusions

It is definitely too early to provide a general evaluation on the amendments of the rules on extra-contractual liability. It remains to be seen how the judicial interpretation and discretion is going to reflect the new rules. It cannot be excluded that the respective rules will undergo significant

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[53] Section 6:147 [Liability for damages in connection with gratuitous contracts]
(1) In the case of gratuitous performance of a contract, liability for damages in the subject matter of the service shall apply if the obligee is able to prove the obligor's actionable conduct in non-performance, or that the obligor failed to provide information concerning any material characteristics of the service of which the obligee was unaware.
(2) In the case of gratuitous performance of a contract, the obligor shall be liable to provide compensation for any damage caused to the obligee's property by performance. The obligor shall be relieved of liability if able to prove that their conduct was not actionable.

[54] Such an attempt can be discerned from the Statement of Reasons on Section 121 of the Act No. CCXXXVI of 2013 on the amendment of specific financial acts related to EU law harmonisation; see also the Reasons at page 74 of the Draft Act T/13082. It is aforesaid by the reasons (with reference to the amendment of Act No. LXII of 2009 on Compulsory Third-Party Vehicle Insurance), that 'the injuries caused by the operation of a motor vehicle qualify as losses caused by extra-contractual conduct.' However, is a sentence obiter dictum in the reasons for an act with a completely different subject sufficient to break through the Non Cumul principle provided for by the new Civil Code? Such solutions are definitely sources of legal uncertainty and should therefore be repudiated.

changes while they become part of everyday court practice. That's why we restrict our faint-hearted forecast to answering our five questions on the basis of our first impressions.

1 Did we really codify the case law? One of the legislator's main objectives was to implement the sound solutions developed by court practice into the new Civil Code. In some cases this happened indeed without reservation, for example through the codification of the notion of *lacking capacity of discernment* (non-culpability) due to mental illness or minor age; the principle of *'compensatio lucri cum damno'* and as *compensation in terms of money* was codified as the rule instead of in integrum restitutio in kind. However the lawmaker did not succeed every time. In this article the notion of the 'operator' was emphasised as the liable person for damages caused by extra-dangerous activities. The flexible and complex system developed by the court practice (consisting of various criteria from which the appropriate cocktail could always be mixed in accordance with the particular case to be judged) has been replaced by the sole decisive factor of *in whose interest* the hazardous activity is carried out. This might wield significant and in some cases absurd influence on the court practice on liability for dangerous activities.

2 Do we really know what the 'new' tools are for? This is unfortunately not always the case. The legislator's intentions and instructions are not clearly comprehensible relating to the new rule on the *liability* (of the legal person) *for the tortious conducts* of *executive officers and on their personal liability (jointly and severally with the legal person).* This new rule launched a very lively discussion among scholars and practitioners, first and foremost because three different interpretations came up regarding this rule. According to the broadest interpretation the legislator might have created the legal basis for the direct and personal liability of executive officers for a company's debts. The special and restricted liability rules of the Bankruptcy and Insolvency Act can be evaded thereby (at least according to this view). The members of the Codification Committee represent a much narrower interpretation: it is not the executive officer who is personally and directly liable for the company's debts but the other way round: it is the company who is responsible for the personal (delictual) wrongful conduct of the officer. It is their capacity as an executive officer that enabled them to carry out the (delictual) wrongful conduct. There is also a third interpretation to be placed somewhere between the two: if any kind of wrongful conduct whereby third parties (not being in a contractual relationship with the company) suffered any harm or loss was ordered by the executive officer themself, or by someone else but the officer knew or should have known all about it, the company and the officer are liable jointly and severally. (Cartel cases, illegal software download and storing hazardous waste on the premises of third parties are mentioned as examples.) The first approach cannot be acceptable; nevertheless, it remains to be seen where the borderline is going to be drawn between the two other interpretations.

3 Are the 'new tools' really necessary? Some of the new rules seem to provide sound solutions and that's why they will probably find a ready welcome. For example, the three-stage guideline to the *apportionment (division) of damages* (proportion of fault, proportion of involvement in the causal chain, equal shares) in cases of contributory negligence of the aggrieved party; of joint tortfeasors as they account between themselves the damages already paid or as they pay damages to the victim if the court decided to set aside the joint and several liability. The same applies to *cumulative* and *alternative liability,* as well as to the free choice of the judge to

appreciate the amount of damages in accordance with their value *at the time of passing the verdict* (if they have changed significantly since the harm occurred). Although there is some doubt on the compatibility and usefulness of the *foreseeability doctrine* and on its transplantation into the Hungarian Civil Code, we are convinced that this rule will come up to expectations and will be a useful tool in the judges' hands to keep the floodgates closed.

4 Did we tie up all of the loose ends? Far from it. The legislator did not use the opportunity for an overwhelming reform to open all the boxes and to raise all the questions related to torts. Opening the boxes and raising the questions does not necessarily mean that all problems must be explicitly reflected in the Civil Code, i.e. far from all issues raised in and by tort law must or can even be regulated by codified rules. Tort law was and still is a judge-made law to a greater or lesser extent in all jurisdictions. Even so, it would have made sense to check whether there were some more or less crystallised case groups from which general solutions could have been derived, which reach the high level of abstraction needed to formulate a rule in the Civil Code; and it also might have some logic to come to the conclusion, in connection with other problems and cases, that it is still judicial practice which can handle these the best and develop the law step by step, i.e. case by case. This is because the diversity of life (and tort law cases) never can be covered in full by abstract written statutes. Our concern is that these kinds of questions have not been asked. As examples, we elaborated on *partial causation* (wrongful conduct and natural event together in the causal chain), *loss of chance* (in general and in particular in medical malpractice law and in connection with the professional liability of attorneys), on taking into consideration the *contributory negligence of the primary victim* to the disadvantage of the dependants who claim damages for loss of maintenance and, last but not least, on the case group at the frontiers of public and private law, of whether damages can ever be claimed for losses caused by *(wrongful) legislation* (if the respective source is declared to be unconstitutional and is annulled by the Constitutional Court).

5 Did we consider all risks and side effects? Our understanding is that the legislator has certainly not considered all risks and side effects. This statement was underpinned by a short analysis of the 'Non Cumul' principle (exclusion of parallel tort law damage claims between contracting parties). It is an understatement to say that the Non Cumul doctrine will induce significant changes in many aspects. In this article, the restructuring and the reassignment of cases from the strict extra-contractual liability regime for damages caused by extra-dangerous conducts to contractual liability was highlighted, if performing any kind of dangerous activity takes place within the context of the performance of a contract (for example operating an adventure park, a waterpark, cf. the waterslide and toboggan cases; operating a taxi, train or coach service). In this case, the possibility of exculpation is different ('beyond the activity' as it is regulated within the strict liability regime, will be replaced by 'beyond the control' as it is formulated in contractual liability). Passengers of gratuitous transport contracts who suffer injuries in the accident might stay without compensation if the operator (and the driver) was not at fault, because the contractual liability for losses caused by the breach of gratuitous contracts is a fault-based liability. The legislator seems to have considered enacting special rules on that group of cases. The issues discussed here might lead in the midterm even to the scholarly rethinking of the notion and concept of contract in Hungarian private law.

Jiří Hrádek*

Regulation of Liability for Damage in the New Czech Civil Code

I Introduction

The provisions on liability for damage are systematically arranged at the end of Act No. 89/2012 Coll., the Civil Code ('NCC'), namely in s 2894 ff., and besides the general provisions on damages the legislation consists of some cases of liability for damage that were regulated in other laws until 2013, in particular product liability set forth in Act No. 59/1998 Coll., or compensation for damage caused by unfair competition, which was subject to the legislation of the Commercial Code.

This approach is the result of the opinion that legislation of liability for damage in the Czech civil law should be reduced to only one basic law and only very specific areas should be subject to special laws.

The most fundamental exception is Act No. 260/2006 Coll., the Labour Code, which is the basic legislation for labour law and which establishes separate legal regulations whose origination dates back to 1965 when the first socialist Labour Code was adopted. Another exception is the regulation of state liability laid down in Act No. 82/1998 Coll., on Liability for Damage Based either on Maladministration or on Illegal Decisions ('State Liability Act'),[1] which remained outside of the regime of the new Civil Code due to the historical tradition of human rights protection. The State Liability Act is directly derived from the Czech constitution as a result of the democratic movement of 1968 and, under this notion, its subordination to the general regulation of liability would be rather problematic.

It is not the purpose of this article to present the new regulations in detail but to present a general overview and provide for basic information about damages for a person who will deal with Czech NCC.

This article will deal with the most important issues relating to damages which are subject to more or less fundamental changes, namely (i) prevention, (ii) basis of liability and the current approach to contractual and non-contractual liability, (iii) causation, (iv) fault, (v) scope and means of compensation for damage and finally with (vi) satisfaction for non-pecuniary damage.

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[1] Zákon č. 82/1998 Sb., o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem a o změně zákona České národní rady č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád).

II Concept of Prevention

The NCC considers prevention as one of the topical concepts which play a fundamental role in the law of damages. The regulations of the NCC are based on the principle of *neminem laedere,* expressing the duty to prevent damage as its main principle.[2]

It broadly takes over the approach of s 415 of former Civil Code when it states that, if required by the circumstances of the case or the habits of private life, everyone is obliged to behave so as to avoid unreasonable harm to the freedom, life, health and property of another. In contrast to the former law, however, it also explicitly sets out the information duty of the wrongdoer and the duty to act for the protection of a third party, which is directly inspired by Art. 4:103 of the Principles of European Tort Law (PETL).

Under this notion, prevention duties to prevent damage are differentiated between cases of impending damage and cases of specific prevention defined by law.

As regards the impending duty, s 2901 of the NCC[3] provides that anyone who creates a dangerous situation or who has control over it, or if justified by the nature of the relationship between people, is obliged to intervene to protect another. However, this rather traditional approach requiring protection of third parties against risk resulting from the wrongdoer's sphere is amended by a duty to act actively in general. The same obligation relates specifically to a person who can, based on their capabilities and opportunities, easily prevent harm, the impending severity of which clearly outweighs what is needed to act.

The provision on active behaviour towards third party interests is a revolutionary regulation, even though the case law already tried in the past to shift the borders for active protection in this direction using the interpretation of s 415 of the former Civil Code. However, the current wording sets forth explicit rules.

Despite this surprising duty, we cannot qualify such a rule as unlimited or opening the floodgates. Academia understands this duty as one which clearly prefers the helper's own interests above any risk and only in such a case it does it impose the duty to act actively. This might be a situation when a person walking around a house sees a fire just starting and may easily call the fire brigade, i.e. it is possible to protect third party interests without putting his own security, health and life in danger.

As regards the information duty, s 2902 of the NCC[4] sets forth that whoever breaches a legal obligation or who may and must know that they are in breach shall, without undue delay, notify the person who may suffer such harm and warn them about the possible consequences. If the

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[2] S 2900 NCC: If required by the circumstances of the case or the habits of private life, everyone is obliged to behave so as to avoid unreasonable harm to the freedom, life, health or property of another.

[3] S 2901 NCC: If required by the circumstances of the case or the habits of private life, anyone has the obligation to act to protect another who creates a dangerous situation or who has control over it, or if it is justified by the nature of the relationship between the parties. The same duty pertains to a person who can, according to his capabilities and the ability to easily avert harm that he knows or should know that the impending severity clearly exceeds what is needed to make the action.

[4] S 2902 NCC: Who breaches a legal obligation or who may and has to know that he breaches it, shall without undue delay notify the person who may suffer such harm and warn him about the possible consequences. If the notification

notification obligation is met, the injured party has no right to compensation for the injury, which could have been prevented after the notification.

The breach of the duty to notify has always been considered as breach of prevention duty. However, it is new that failure to do so results in the loss of title to compensation. As a result, the wrongdoer no longer needs to prove all the conditions of contributory negligence on the part of the injured party, but only the fact that the intervention did not occur. The procedural position of the primary wrongdoer has therefore been significantly strengthened as regards their allegation that they did not cause the whole damage incurred.

III Basis of Liability

1 Overview

Unlike the former Civil Code, which was based on a general clause on damages, which was inspired by the French and Austrian systems of compensation for damage, the NCC establishes a new basis of liability based on differentiation between contractual and non-contractual damages. Moreover, the NCC establishes as a new concept pre-contractual liability, which reflects breach of duties of parties in negotiation about their future contractual relationship (s 1728–1730 of the NCC).

Nevertheless, the most fundamental change consists in the division between contractual and non-contractual damages which is directly inspired by s 823 of the German BGB. This regulation brings not only the establishment of several new facts to establish liability for damage, but also compensability in the event of breach of the relative and absolute rights of the injured party.

Basically, the difference between the two types of liability is that while tortious liability is based on fault, liability for breach of contract is qualified as strict liability, where the potential wrongdoer can exempt themself if they prove that they were temporarily or permanently prevented from the fulfilment of their obligation under the contract by an extraordinary unpredictable burden that occurred independently of their will. The inspiration for such a type of liability results from former Czech Commercial Code and Convention on the international sale of goods.

Tortious liability for fault is supplemented by additional strict liabilities which (as with contractual liability) are subject to special defences. The basic difference in both cases is that strict liability only arises in enumerative cases referred to in the NCC or in special laws.

obligation is met, the injured party has no right to compensation for the injury, which could have been prevented after the notification.

2 Liability in Delict

Provisions for non-contractual liability are laid down in s 2904, 2909 and 2910 of the NCC. They establish liability for an accident, liability for breach of good manners and liability for breach of law.

The provisions of s 2904 of the NCC,[5] which establish liability for a coincidence, are very specific, as Czech civil law traditionally follows the principle of *casum sentit dominus.* A coincidence means a circumstance in which no one is responsible, as the damage occurred on the basis of force majeure, i.e. circumstances which could not be foreseen and that could not be avoided. In contrast, a mixed coincidence which is subject to s 2904 *(casus mixtus)* is a culpable act and is based on the fact that the wrongdoer breached their legal obligation by means of a culpable act or omission and, in causation, damage occurred. Under this new provision harm caused by coincidence shall be compensated by the person who initiated the coincidence, in particular by breach of a command or damage to a facility that should have prevented the harm.

Another case of liability that is not fundamentally different from the current concept is the liability for breach of good manners set forth under s 2909 of the NCC.[6] Pursuant to s 2909, a wrongdoer who causes damage to the victim by wilful breach of good manners is obliged to compensate the victim, unless they were acting in the exercise of a right, in which case they are obliged to compensate the damage only if they intended to damage another.

The third case of liability for delict is based on s 2910 of the NCC,[7] which sets forth liability for breach of a legal duty. The duty to provide compensation for breach of legal obligations under the law is, as in the former Civil Code (s 420 para 1 and 3), associated with the culpable breach of that duty. Nevertheless, the main difference is in the relevance of the rights which became subject to the breach.

The NCC newly includes a differentiation of cases where a violation of legal obligations affects absolute rights and cases where another law is subject to interference. If absolute rights are breached, the law requires a culpable breach of legal duties by the wrongdoer. If a relative right of the injured party is harmed, the injured party has a claim if this happened due to a culpable breach of a legal duty which was laid down in order to protect such a right *(Schutznorm).*

This distinction, which is directly inspired by s 823 of the German BGB and art. 6:163 of the Dutch Civil Code, has been justified by the nature of the rights in question: absolute law, whether personal or property rights, affects everybody and therefore does not require any further condition to become a subject of compensation. By contrast, due to the nature of relative

[5] S 2904 NCC: Damage caused by an accident shall be compensated by the person who gave the incentive to the accident, in particular by breaching a command or damaging equipment which should prevent accidental harm.

[6] S 2909 NCC: A wrongdoer who causes damage to the injured party by an intentional breach of good morals is obliged to compensate it. If he exercises his rights, the wrongdoer is obliged to compensate the damage only if he purposefully intended to cause damage.

[7] S 2910 NCC: A wrongdoer who breaches an obligation under fault set by law and thus interferes with an absolute right of the injured party shall compensate what he has caused by so doing. The duty to provide compensation also arises towards a wrongdoer who interferes with another right of the injured party by breaching a legally stipulated duty set by law for the protection of such right.

rights, only a limited number of rights-holders will be affected and, therefore, any breach must be understood as qualified.

3 Liability in Contract

Liability in contract must be divided between cases specifically regulated under particular types of contracts, such as liability under purchase agreements etc., and a general provision stipulated in the Part on obligations in delict, in particular under s 2913 of the NCC.[8]

Pursuant to the general provision, if a contractually obligated party incurs damage due to breach of contract, the victim is entitled to compensation regardless of the fault of the wrongdoer and the liable party can exempt themself from liability only if they prove an extraordinary unpredictable burden that occurred independently of their will.

As regards the strict liability approach, the new codex is based on the former concept of s 373 of the Commercial Code, which also did not require fault for liability in a contractual relationship. Even though such an approach is understandable in contractual relationships where the parties are closely connected and should pay respect to the interests of the other party, it is true that the former regulations predominantly applied only to entrepreneurs, whereas the NCC shall apply to all civil law relationships. As such, for a number of people the new type of liability will present not only fundamental but also a very risky change.

Moreover, according to the provision of s 2913 of the NCC, the right to compensation also arises to the person in whose interest the agreed obligations obviously should have served. This provision is a reaction to the decision of the Czech Supreme Court under which a contracting party is not liable only *vis a vis* the other contracting party but also with regard to each person who incurs damage. However, the conclusion derived from the case law is so broad that the legislator laid down liability based on the interest approach.

As a result, when concluding a contract, in relation to third parties the wrongdoer must now at least take into account the possibility that the other party is interested in the protection of a third party or that the fulfilment should have served the interests of the third party. However, the scope of the protection of third party's interests is especially disputable. It is namely the fact that contracts on public infrastructure might particularly be deemed to be in favour of third parties and, thus, any third party using motorways, for example, will be entitled to compensation under s 2913.

In cases where damage is caused to a third party while fulfilling contractual obligations and the above conditions are not met, the question of whether the wrongdoer is obliged to compensate shall be considered pursuant to the provisions on tort liability.

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[8] S 2913 NCC: (1) If any party breaches an obligation under a contract, it shall compensate the damage caused as a result thereof to the other party or even to a person whose interests the fulfilment of the obligation should have apparently served. (2) Anyone can exempt himself from the duty to compensate if he proves that he was prevented from fulfilling the contractual duty temporarily or permanently by an extraordinary unforeseeable and unavoidable obstacle that occurred independently of his will. An obstacle that occurred from the wrongdoer's personal circumstances or that occurred when the wrongdoer was in delay with the fulfilment of his contractual obligation as well as an obstacle that the wrongdoer was obliged to overcome under the agreement shall not exempt him from liability.

IV Causation

Causation, as one of the basic assumptions of liability, is not described in the NCC, with two exceptions. As such, it can be assumed that both the doctrine and case law will continue to apply the current concept of causation, which is based predominantly on the theory of adequacy. The theory of adequacy uses the criterion that damage is considered to be a result of wrongful activity if, besides being the condition of the damage, the wrongful act or wrongful event is, due to its general nature, or, according to the usual course of events and experience, a common cause of the damage. For the theory of adequacy, therefore, a cause of a wrongful result is only such a wrongful act or event which would have been objectively foreseeable to an average person, that is, also to the person to whom the relevant cause is attributable.

As regards explicitly stipulated cases of causation, these relate to alternative and partial causation.

The first exception to the explicitly stipulated causation rule is the instance of alternative causation, which at the same time changes the long-term rule on standard of proof. Under s 2915 of the NCC,[9] if more than one person commits a separate unlawful act, each of which could cause a harmful result with probability approaching certainty, and it cannot be determined which person caused the damage, each of them shall be found liable for full damage. Moreover their liability is joint and several.

With this particular provision on causation, the legislator not only confirms the previous opinion in the legal theory that cases of alternative causes shall be considered under cases of joint and several liability, but also strengthens the position of the injured party by weakening the current rule of proof of certainty.

Another exception contained in s 2915 of the NCC[10] is based on the fact that, if the particular share of the wrongdoer cannot be decided, the court shall take into account the probability of the cause being attributable to them. This shall be regarded as a case of partial causation and again is a revolutionary approach directly inspired by PETL.

[9] S 2915 (1) NCC: If multiple wrongdoers are obliged to provide compensation, they shall compensate the damage jointly and severally. If any of the wrongdoers is obliged under law to provide compensation only to a certain amount, he shall be obliged with the other wrongdoers jointly and severally in this scope. This applies also if multiple persons commit independent illegal acts, any of which could have caused the wrong result with a probability reaching certainty and it cannot be determined which person caused it.

[10] S 2915 (2) NCC: If there are circumstances meriting special consideration, the court may decide that the wrongdoer shall compensate the damage pursuant to his share in the wrongful result. If the share cannot be determined exactly, the probability shall be taken into account. This decision cannot be made if any wrongdoer took part knowingly in the activity of another wrongdoer or if he incited or supported him or if damage can be attributed to each of the wrongdoers even though they acted independently of each other. The same applies if the wrongdoer shall compensate damage caused by the helper and the duty to compensate also arose to the helper.

V Fault

The regulation of tortious liability is based on the principle that anybody who is at fault for breaching their legal duty shall be obliged to compensate for damage. If the injured party proves other conditions for the establishment of the wrongdoer's liability, the fault of the wrongdoer shall be presumed, even if only in the form of negligence.[11]

The definition of fault is not explicitly provided; however, the NCC qualifies negligence as violation of the required standard of care, which is stipulated in s 2912 of the NCC.[12] The rebuttable presumption of fault is formed in such a way that a person is considered negligent if they act carelessly and without the knowledge and skills typically expected of a person of average abilities. If a certain person shows special knowledge, skills or accuracy, the person is consequently at fault if they do not make use of such qualities.

Under this notion, negligence is established on an objective standard of behaviour that is required by the average reasonable person in the position of the wrongdoer. The provision in question is a key rule for the application of fault within the duty to compensate for damage which arose as a consequence of the wrongdoer's behaviour in contradiction to the law.

However, at the same time, the NCC establishes a clear division between fault and wrongfulness, as an inevitable condition for negligence is the breach of legal duty, similarly to the regulations in Germany and Austria.

VI Compensation for Damage – Scope and Means

Compensation for damage is based on the concept that proprietary damage shall be compensated, whereas non-material harm shall be subject to compensation only in special cases determined by law. This dualistic approach is also strongly reflected in the terminology used when s 2894 (1) of the NCC[13] provides for a legal definition of damage while non-pecuniary harm qualifies as a 'rest-clause'.

Under this rule, damage shall mean harm to the assets of the injured party whilst any other harm is dedicated to non-pecuniary damage which is subject to specific provisions on compensation of damage to health (pain and suffering, worsening of social position and other harm), interference with natural human rights etc.

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[11] S 2911 NCC: If a wrongdoer causes damage to the injured by breaching a legal obligation, it shall be deemed that he caused damage with fault.

[12] S 2912 NCC: (1) If the wrongdoer does not act in a way that could be reasonably expected from a person of average abilities in private relationships, it shall be deemed that he acted negligently. (2) If the wrongdoer demonstrates specific knowledge, ability or diligence or if he commits to perform an activity for which a specific knowledge, ability or diligence is required, and he does not make use of this specific knowledge, ability or diligence, it shall be deemed that he acted negligently.

[13] S 2984 (1) NCC: Obligation to compensate loss to somebody always includes the obligation to compensate damage to assets (damage).

As regards the scope and manner of compensation, the NCC is based on the approach that restitution in kind must take precedence over monetary compensation.[14] If restitution in kind is not possible or if requested by the injured party, the wrongdoer shall be obliged to provide damages in money. Hence, if restitution in kind is possible, the type of compensation for damages shall depend on the will of the victim and the court cannot consider whether the chosen method of compensation is 'useful' or 'usual' as it currently can.

Damages are recoverable also in cases of non-material harm and include negative results of all interferences with personality rights.[15] The reimbursement of costs of reasonable and useful medical treatment, costs of burial, lost earnings and pension, and compensation for the maintenance of survivors shall be provided from the proprietary elements of the damage to health. Explicit mention is also made to the duty to compensate a third party by repeated payments for work of the injured party in the household or enterprise or for harm caused to the liberty of the injured party.

Like the past Civil Code, the NCC enables in s 2953[16] the discretionary power of the court to limit damages to be awarded. However, there is considerable modification as regards the possibility to exercise this right. The moderation right comes into consideration only when the wrongdoer is an individual and does not cause the damage intentionally. Judicial consideration of any reasonable reduction of the damages must take into account whether there are exceptional circumstances justifying such a solution, in terms of how the damage occurred and the personal and financial circumstances of the wrongdoer and the injured party. The possibility to reduce damages is, however, excluded in the case of individuals if it was caused by a breach of professional care of a party who claimed special knowledge or ability as a member of a particular profession.

In contrast to the recent legislation of damages, the general ban on the waiver of rights that may arise in the future will no longer be contained in the NCC, so parties can exclude liability by mutual arrangement. This presents a significant change, as the past case law strictly denied any similar possibility in civil law relationships and commercial law enabled explicitly such a waiver in 2012. Nevertheless, as regards liability for intentional or grossly negligent damage or damage to natural human rights, these cannot be waived before their establishment.[17]

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[14] S 2951 (1) NCC: The damage shall be compensated by restoring to the previous condition. If this is not reasonably feasible or if requested by the injured party, the damage shall be compensated in money.

[15] S 2951 (2) NCC: Immaterial loss shall be redressed by a reasonable satisfaction. Such satisfaction shall be provided in money, unless the actual and sufficient redress of the loss caused is provided for in another manner.

[16] S 2953 NCC: (1) The court adequately reduces the compensation for damage on grounds deserving special merit. In such case, the court shall take into account, in particular, how the damage occurred, the personal status and property of the person who caused the damage and is liable for it and to the injured party's situation. The compensation may not be reduced if the damage was caused intentionally. (2) Paragraph 1 shall not apply if the damage has been caused by a breach of due care by a person claiming professional performance as a member of a specific profession or occupation.

[17] S 2898 NCC: An arrangement shall be disregarded that in prior precludes or limits the obligation to compensate for damage caused by a person to his natural rights or caused intentionally or through gross negligence. Disregarded shall be also an arrangement that in prior precludes or limits the right of the weaker party for compensation for any loss. In these cases, the right to compensation cannot be validly waived.

VII Satisfaction for Non-pecuniary Damage

Damages for non-material harm shall also be recoverable, but only in special cases. Compensation for non-material harm must be granted especially in cases of interference with the personality rights of an individual or a legal entity (in this regard it follows the regulation in s 11ff of the former Civil Code) and if it is justified by the special circumstances under which the wrongdoer caused damage by an illegal act.

The NCC sets a basic provision that non-material harm shall be compensated by provision of satisfaction. Monetary satisfaction may be provided if no other method of satisfaction ensures that the harm incurred will be actually or sufficiently made good.

The manner and extent of the reasonable satisfaction must be determined in such a way that circumstances, which merit special consideration, are compensated. This term encompasses causing harm through the use of deceit, threats, abuse of the victim's dependence on the wrongdoer and public attacks, as well as discrimination with regard to gender, health, ethnic origin, belief or other similarly serious reasons. Also relevant to the determination of the satisfaction shall be whether the victim reasonably fears death or serious injury as a result of threats attributable to the wrongdoer.

These provisions are new and correspond with the case law of both the Supreme and Constitutional Courts, which in the past specified only the above-mentioned circumstances establishing the seriousness of any breach of personality rights.

Like the past Civil Code, the NCC also contains explicit provisions on compensation of harm to health and life. However, there will no longer be a stipulated denomination of the damage incurred to the injured party's health under which the amount of compensation for aggravation of social position as a result of damage to health was determined on the basis of the total valuation of harm (in points pursuant to Decree No. 440/2001 Coll.)[18] provided by a doctor. This regulation also contains specific rules on reasonable increases in the compensation awarded based on personal reasons. The court will now be forced to set the damages awarded according to its own estimation, taking all personal and factual circumstances into account.

The reasonableness of the change in the legislation is currently a topic of heated debate as the previous regulations had many positives. In order to overcome the lack of a uniform approach to damage to health, the Supreme Court's working group established joint and objective criteria to tackle the lack of factual guidelines. These criteria refer to the WHO classification of illness and bodily harm, which provide a detailed determination of wrongful results. In this way, despite the wish of the legislator, the case law returned to a very similar system to that which was cancelled by the adoption of the NCC.

[18] The compensation for pain and suffering and aggravation of social position was based on a classification system for each injury on a point-scale basis. The injuries were considered on an objective basis and are assigned a point on the scale, where every point was equivalent to CZK 120 (EUR 4.00). The judge applied this scheme to the particular case (the value is determined by a doctor). In exceptional cases, special circumstances can be taken into account, whereupon the judge may use his discretionary power to increase the amount of compensation payable.

VIII Conclusion

The NCC is a code which brings the Czech legislation in civil law matters back to modern European regulations. Even though one can find discrepancies and mistakes, the fact that the part on damages was inspired by the regulation of BGB, ABGB and PETL enables the argumentation to be used in the doctrine in the countries in question.

For the time being, however, the biggest role will be played by the Czech Supreme Court, which will interpret the new rules and apply or deny the former case-law relating to the former Civil Code. A crucial duty also relates to the scope of damages or satisfaction of non-pecuniary damage, which changes fundamentally, and where the Supreme Court must build up indisputable limits and principles of the amounts awarded.

The doctrine must also point out unclear rules or obsolete opinions. One of them is the causation issue, which may take over the conditio sine qua non approach or stay with the theory of adequacy or the general system of division between cases of damages based on fault and regardless of fault, which must be duly split and differentiated due to the substantial divergences of both liability schemes.

Attila Menyhárd*

Unjustified Enrichment in the New Hungarian Civil Code

The law of obligations in Hungarian private law rests – as with European private laws in general – on the trichotomy of sources of obligations: contract, tort and unjust enrichment. Although we try to draw border lines between them, in practice they prove to be overlapping categories. The policy behind contract law and tort law can clearly be delimited and is clearly distinguishable: contract law is for protecting trust in promises; tort law is (basically) for prevention and compensation. The policy behind unjust enrichment is far less clear. It may be seen as a kind of justice, but, at the very end of the day it is about the general control of the state over the transfer of or shifts in wealth between members of society.

I Unjustified Enrichment in Hungarian Private Law

The idea that no one shall be enriched at another's expense is rooted in ancient Roman law[1] and is part of the concept of justice which is inherent to European culture.[2] Legal systems, however, may differ in how they assess whether the shift in wealth from one person to another is to be restored on the basis of unjustified enrichment. The difference in terminology, i.e. *unjust* enrichment in Anglo-American law, while *unjustified* enrichment in continental legal systems, reflects the conceptual differences as well. Requiring *causa* in continental legal systems for transfer of property or as a prerequisite of enforceability for contractual obligations is the manifestation of the control of the state over changes in the wealth of individuals on the basis of their own will. If there is no *causa,* or the causa is illicit, the transfer is not enforceable and the shift in wealth is not recognised by the state. Sticking restitution to absence or incompleteness of *causa* in continental legal systems results in the difference between the continental and the Anglo-American approach. Continental legal systems focus on the question whether there is a legal basis on the side of the defendant for retention of a transfer or performance, while the

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1 *Nem hoc natura aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem* [By the law of nature it is right that nobody should be *unjustly enriched at another's expense*] (Pomponius).

2 Aristotle, *Nichomachean Ethics,* Book V on rectificatory justice.

common law approach requires the claimant to point to a particular unjust factor or grounds for restitution to support their claim.[3]

For restitution of unjust enrichment, the Hungarian Civil Code provides a general clause without specifying the circumstances or factors which may make the enrichment unjustified. This general clause is the same as the rule provided in the Civil Code (1959). According to § 6:579 (1) of the Civil Code (2013), if someone was, without legal grounds, enriched at the expense of another, they shall be obliged to return the gain to the aggrieved party. No typical scenarios or *condictiones* are specified in the Civil Code, nor are such categories used in theory or in practice. As a general clause, however, restitution of unjust enrichment is to apply in all kind of patrimonial relationships. The *typical cases* of restitution of unjustified enrichment – in contrast to the common law approach where distinction between enrichment by wrong and enrichment by subtraction is used – are if the claimant rendered a performance (money or other) to the defendant for which there was no legal basis; if the defendant encroached on the claimant's property or interfered with the claimant's other protected right (especially personality rights or rights to intellectual property); or if the value of the property of the defendant increased due to expenses incurred by the claimant or if the claimant paid the defendant's debt.

II The Prerequisites of Restitution

There are *three prerequisites* for establishing the obligation of the defendant for restitution of unjustified enrichment: the defendant was enriched; at the expense of the claimant and did it without any legal basis (without legal title). As a further, negative prerequisite, there can be the absence of recognised defence.

1 Enrichment

Enrichment can be described, in a way, as the *mirror image of damage:* while damage is a negative change in the patrimony of the victim (loss), enrichment is a positive change in the wealth of the enriched person (gain). This *gain* can be *manifested* in a lot of ways. It can be an increase in the value of property, acquiring property, possession or other rights, decrease or termination of obligations, benefit from using another's property, or saving costs. It can be the result of different behaviours as well. The cause of enrichment can be the act of the claimant (performance), the act of the defendant (processing, conversion, or merging things belonging to the claimant with his own) or a natural event. The cause of the enrichment can be either direct or indirect. The indirect nature of enrichment does not preclude the obligation for restitution. The enrichment is indirect if, for example, the claimant provided alimony to persons to whom the defendant was obliged to provide alimony.[4]

[3] Charles Mitchell in Andrew Burrows (ed), *English Private Law* (3rd edn, Oxford University Press 2013, Oxford) 18.01 – 18.05.

[4] Supreme Court, Legf. Bír. Pfv. II. 20.416/2010. – EBH 2010. 2228.

2 Absence of Legal Ground (Causa)

The legal basis of the increase of wealth of the defendant is missing if it is not justified by the law, with a *causa.* This shall not be restricted to searching for a valid legal title for shifting the gain to the defendant. If the plaintiff benefitted the defendant in the absence of any legal title but on a moral basis, as performing an existing or assumed moral obligation, the enrichment shall be justified.[5] It shall be assessed, on the basis of the legal title *and* on the basis of the general values accepted in society, if the enrichment is justified or not. Thus, if the party performed a *naturalis obligatio,*[6] he is prevented from claiming it back on the grounds of the rules of unjustified enrichment. The enrichment can be the result of the act of the plaintiff (e.g. performing without any existing obligation) or of the defendant (e.g. this is the case if the defendant's gain was acquired as the result of interference with the plaintiff's protected rights (property or personality rights).

3 Restitution

The enriched person is obliged to restore the gain but only if he acquired the gain to the detriment of the aggrieved party (and without the proper *causa*). This determines who is the claimant of the value to be restored as well; it can be only the person to whose detriment the gain was acquired. 'To the detriment,' however, does not mean that a loss suffered by the plaintiff was sufficient to establish a claim for restitution. The enriched party shall be obliged to restore the enrichment if he acquired a gain that was allocated to the aggrieved person by the law, even in the absence of decrease in the latter's wealth. Hence, using or making a profit on using items or positions that belong to the property of the aggrieved person may establish the claim for restitution on the basis of unjustified enrichment, even if the aggrieved person did not suffer a loss by this. The same holds for exploiting information or a business opportunity which belonged to the aggrieved party, even if the aggrieved party could not make the same profit for himself. Hence, e.g. the director (manager) of a company or one of his relatives makes a profit by concluding a contract in violation of the rules covering conflicts of interests[7] and exploiting a business opportunity that belonged to the company; he shall be obliged to restore the gain according to the rules of unjustified enrichment. This obligation does not depend on whether the company was in the position (e.g. by availing of the required resources to be invested) to exploit the same opportunity or not.

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[5] Supreme Court, Legf. Bír. Pfv. II. 21.402/1998. – EBH 1999. 103.

[6] Claims that are neither invalid nor enforceable, such as claims originating from gambling or betting, except if the gambling or betting operation has been authorised by the relevant authority; claims originating from a loan promised or granted explicitly for the purposes of gambling or betting; claims that may not be enforced by judicial process, as expressly excluded by law (e.g. as a consequence of limitation); claims arising from contracts or terms guaranteeing or confirming such claims § 6:121 Civil Code 2013.

[7] § 3:115 (2), § 3:346 (5) Civil Code 2013.

III Typical Scenarios

1 Payment in Absence of Debt

This situation occurs if the aggrieved person performs a non-existent obligation. This may be the case either if the aggrieved person performs an obligation which never existed[8] or performs an obligation which originally existed but had already been terminated at the time of providing performance (payment).[9] An obligation never existed if there was no accepted source of obligations (typically contract, tort or unjustified enrichment) that could have created it. The Hungarian system is unique in so far as there are specific rules provided for restitution of performances on the basis of an invalid contract. Legal systems, in general, provide the restitution of performances with the rules of unjust(ified) enrichment if an invalid contract was performed. That was the traditional solution of Hungarian private law before the 2nd World War too. In the 1959 Civil Code, however, a specific regime was provided as the consequences of performing an invalid contract. This system has been maintained in the 2013 Civil Code, too. The idea behind creating a specific regime for restitution of performances that were provided on the basis of an invalid (either null and void or unenforceable) contract was that direct rules covering the consequences of invalidity may result in a simpler system. Not only could problems of set-offs with performances of a different nature be simplified with a direct regime but also the traditional defences of restitution of unjustified enrichment (especially change of position) could be excluded from the regime.[10] This specific system of direct consequences of invalidity did not prove to be perfect in court practice, as courts had to apply the rules of unjustified enrichment also amending the regime of direct restitution, especially if there was a change in the value of mutual performances.[11] In spite of the critics of the solution of the 1959 Civil Code the legislator upheld the specific system of restitution of performances of invalid contracts but maintained and extended the application of rules of unjustified enrichment as well.

According to the rules providing the specific regime of restitution with regard to performing an invalid contract, the primary consequence is restitution in kind. Thus, each party has the right to reclaim the service they provided from the other party in kind, if that party also returns the service they received in kind. The obligation to return what was received applies to the party requesting restitution, irrespective of whether the time of prescription or the duration of adverse possession has lapsed. In the process of restitution, the original value-service ratio must be maintained. If restitution in kind is not possible, the court shall order payment for the monetary value of the services yet uncompensated. The court may also invoke that sanction if restitution is likely to harm the relevant lawful interests of either party. A party shall not be

[8] Supreme Court Legf. Bír. Gf. IV. 30 040/1980. – BH 1981. 370.

[9] Supreme Court Legf. Bír. Pfv. IV. 21.351/1996. – BH 1997. 395., Supreme Court Legf. Bír. Pfv. VIII. 21.421/1998. – BH 2000. 300., Supreme Court Legf. Bír. Pfv. VIII. 21.649/1999. – BH 2001. 371., Supreme Court Legf. Bír. Pfv. VIII. 20.207/2007. – BH 2008. 63. (EBH 2007. 1606.).

[10] Lajos Vékás, *Parerga – Dolgozatok az új Polgári Törvénykönyv tervezetéhez* (HVG-ORAC 2008, Budapest) 175 et seq.

[11] Supreme Court, Resolution no. 1/2005 PJE on the restitution of invalid transactions.

required to provide payment for the monetary value of the services yet uncompensated if able to prove that the reason for their inability to return the service they received is attributable to the other party. If the party paid for the service, they may request to have it returned even if they are unable to return the service received, and provides proof that the reason for their inability to return the service received is attributable to the other party. The parties shall provide compensation for proceeds and interest not restored according to the principle of wrongful possession. The party who did not perform their service, or received the service without compensation shall provide compensation for proceeds and interest according to the principle of unjustified enrichment.[12] Thus, the rules of Civil Code 2013 provide for returning the monetary value of the service – as a restitution of unjustified enrichment – if restitution in kind is not possible. The main goal of maintaining this specific regime was to exclude the possibility of getting relief for the enriched party on the grounds that they lost the gain and were in good faith (change of position).

The payment can also be claimed back as a restitution of unjustified enrichment if there was an enforceable contractual relationship between the parties but the performed payment exceeded the contractual obligation. Not only overpayments,[13] but also performing a service of a value which exceeds the value of the contractual obligation in general,[14] providing additional services falling outside of the contractual obligation[15] or performing obligations depending on conditions precedent (e.g. contingency fees)[16] in the absence of conditions precedent materialising are also typical cases of restitution of unjustified enrichment.

Even if the payment or other service was performed in the absence of a legal or moral obligation, the aggrieved party shall be prevented from restitution if – at the time of providing the service (payment) – they were aware of the absence of obligation (i.e. that the debt does not exist). As in such cases performing the service is up to the choice of the party, it would be against the requirement of good faith and fair dealing to let them go back on his own conduct and claim for restitution.[17] The situation is, however, different if the party was aware of the absence of obligation but had a legitimate reason to perform, e.g. if they never accepted the claim but were not able to prove its non-existence at the time of performance or if they performed under duress. In such cases, they are not deprived of the right to claim the performance back on the basis of unjustified enrichment. The same is true if the party was mistaken about the existence of the claim as they performed.

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[12] §§ 6:112., 6:113 and 6:115 (1) Civil Code 2013.

[13] Supreme Court, Legf Bír. B. törv. II. 586/1977. – BH 1977. 275.

[14] Supreme Court, Legf. Bír. Gf. V. 31 070/1978. – BH 1979. 217.; Supreme Court, Legf. Bír. Gf. VI. 30 751/1979. – BH 1981. 204.; Supreme Court, Legf. Bír. Gf. V. 31 202/1991. – BH 1992. 412.

[15] Supreme Court, Legf. Bír. Gf. II. 30 151/1979. – BH 1980. 253.

[16] Supreme Court, Legf. Bír. Gfv. IX. 30.041/2010. – BH 2010. 333.

[17] According to § 1:3 of the 2013 Civil Code in exercising rights and in performing obligations the parties are required to act according to the requirement of good faith and fair dealing. The same provision also provides that it shall not be in compliance with the requirements of good faith and fair dealing if the party's exercise of rights is contradictory to their previous actions which the other party had reason to rely on.

If the performance, provided by the aggrieved party, was to transfer property to the enriched party and it later turned out that there was no obligation to transfer property due to non-existence, invalidity or ineffectiveness of the contract which should have been the source of obligation, there is no title of passing of property.[18] As a result, property could not be passed to the enriched person. As such, nothing prevents the claimant from claiming the property back as an *in rem* right with a property claim. In such cases, the claim on the basis of the *in rem* right is *parallel with that of unjustified enrichment* and the plaintiff has a choice as far as the ground of the claim. If the enriched person or third parties acquired ownership due to property law (which is the case if money, for example, was transferred), only the claim of restitution is open to the claimant.[19]

If the performance was not a transfer of money or other thing but a personal service, the value of the service can be claimed back as restitution of unjustified enrichment.[20] If, however, personal services were provided without an obligation, the case should be assessed as a *negotiorum gestio.* Court practice does not seem to be taking this into account so far,[21] but it certainly has to be revisited in the future. The rules of *negotiorum gestio* may result in the application of rules of unjustified enrichment, but if the *gestor* was aware of the fact that they were acting on behalf of the other without any kind of legal ground for agency, they can enforce a claim for restitution on the basis of the rules of unjustified enrichment for the value of their services only as a set-off if the other party had a claim against them, but not as an independent claim.[22]

In Hungarian court practice, the claims of national health insurance agencies and the claims of the state and of the local municipalities against parties drawing allowances, benefits and subsidy illegally emerge as a separate group of cases. The same holds for maintenance paid to a person who is not entitled to that anymore[23] or allowances provided by private parties.[24]

2 Title Ceased after Performance

In Hungarian court practice and legal literature, a separate group of cases of unjustified enrichment is where the party performed an obligation which existed at the time of performance but after performance the obligation has ceased. According to the generally accepted view, the retroactive termination of the obligation (title) results in the performance becoming – due to the missing legal ground – unjustified. This is the case if the parties terminate the contract with

[18] The same holds if the title of transfer was compensating damages or restitution of unjustified enrichment.

[19] Supreme Court, Legf. Bír. Fpk. VI. 33.544/1995. – BH 1997. 87.

[20] Supreme Court, P. törv. IV. 20. 13/1978/5. – BH 1979. 175.

[21] Supreme Court, Legf. Bír. Gf. I. 30 940/1978. – BH 1979. 161.; Supreme Court, Legf. Bír. Gf. V. 30.986/1994. – BH 1996. 163.; Supreme Court, Legf. Bír. Gf. V. 30.255/1997. – BH 1998. 39.

[22] Civil Code 2013 § 6:586.

[23] Supreme Court, Pfv. II. 20410/1993. – BH 1993. 613., Supreme Court, Legf. Bír. Pfv. II. 21 392/1993. – BH 1994. 188.

[24] Supreme Court, Legf. Bír. Pf. IV. 20. 534/1991. – BH 1992. 25.; Csongrád County Court of Appeal, Csongrád Megyei Bíróság, 2. Pf. 20 516/1992. – BH 1992. 798., Supreme Court, Legf. Bír. Pfv. II. 22. 713/1994. – BH 1995. 637.

retroactive effect or if they do it with notice but one of the parties has already performed services that would have been due later.[25] The same shall be the consequence of frustration of purpose or other cases of hardship resulting in termination of the contract. Claiming gifts back on the grounds of frustrated expectations or due to the financial hardship of the donor fall under specific rules of contract law.[26] The consequences of termination of a contract with retroactive effect are also covered by specific rules in contract law.[27] These specific rules provide that in such situations performances are to be returned (if restitution is not possible, the parties are prevented from terminating the contract by mutual consent with retroactive effect). In the event of mutual termination of the contract, the specific rules of contract law preclude the application of unjustified enrichment. If the party was entitled to terminate the contract unilaterally then they may exercise this right, even if the other party is no longer in a position to restore the service. In such cases, if the party terminated the contract but the other party is not in the position of returning the service provided to them, they shall return the value of the service according to the rules of unjustified enrichment. The termination of the contractual relationship with retroactive effect also results in termination of the title of acquiring ownership of the transferred thing. In the Hungarian system, title is required for transfer of ownership. As termination of the contract with retroactive effect results in the title being also diminished, the party has *rei vindicatio* as an *in rem* right as well, because the thing possessed by the other party still belongs to them. In such cases, the *in rem* claim of *rei vindicatio* and the *in personam* claim of restitution are parallel remedies; it is up to the plaintiff which one to choose.

3 Restitution of Investments and Other Costs

In general, if someone increases the wealth of another person without an obligation to do so, it creates unjustified enrichment. Thus, if the plaintiff, with an investment performed at his own expense augments another's property although the other (enriched) person did not have a right to demand it, they may claim the value of the investment as unjustified enrichment.[28] However, in such cases it also holds that if the party performing the investment was aware of the absence of obligation then they shall not have the right to enforce the claim for restitution because it would be incompatible with the requirement of good faith and fair dealing.[29] The party may claim back the investments if they performed on the basis of expectations that were later frustrated.[30]

[25] Supreme Court, Legf. Bír. Gfv. IV. 31.406/1995. – BH 1997. 303.
[26] § 6:237 Civil Code 2013.
[27] § 6:212. (3) and 6:213.§ (1) Civil Code 2013.
[28] Supreme Court, Legf. Legf. Bír. Pf. 26.756/2001. – BH 2004. 461.
[29] § 3:1 (3) Civil Code 2013.
[30] Supreme Court, Legf. Bír. Pfv. IX. 21.648/2005. – BH 2006. 193.

4 Enrichment as a Result of Interference with Protected Rights of Others

Enrichment may result not only from providing services or transferring goods but also by taking advantage of interference with the protected rights (either personality or proprietary rights) of others. One of the typical scenarios of this is disposing of goods belonging to others and another typical case can be interference with others' personality rights.[31] Hence, a party who appropriated,[32] sold[33] or utilised[34] another's property without title shall be obliged to return it according to the rules of unjustified enrichment, even if their behaviour was not unlawful. Using another's property is an unjustified enrichment too, assuming that use of the thing has a value (as normally it has). The Hungarian court practice is consequent in awarding a fee as a price for the use if someone used the property of the other without legal grounds but courts award it *per se,* without reference to unjustified enrichment or applying the rules of it.[35] Any gain earned from unlawful interference with intellectual property rights shall be returned as an unjust enrichment according to specific statutory provisions.[36]

5 Triangle Relationships

In a great bulk of cases, the shift of wealth does not occur directly between the aggrieved and the enriched person but results from a transfer between the enriched or the aggrieved person and a third party. The unique problem of these cases is the difficulty of determining the party who was enriched and the one who is the aggrieved person. Such a situation occurs, for example, if the holder of a bill of exchange enforced the claim on the basis of the bill of exchange in spite of the fact that he did not have any claim on the basis of the personal legal relationship between him and the drawer or the previous endorsers.

According to Art. 17 of the Geneva Convention upon the uniform law for bills of exchange and promissory notes (1930) persons sued on a bill of exchange cannot set up against the holder defences founded on their personal relations with the drawer or with previous holders, unless the holder, in acquiring the bill, has knowingly acted to the detriment of the debtor. If, according to the personal relationship of the holder and the previous holders or the drawer, the holder did not have a valid claim according to the rules of private law against the debtor, the debtor shall pay (due to Art. 17 of the Geneva Convention) but will have a claim for restitution on the basis of unjustified enrichment. A triangle relationship also emerges if the lessor sub-leased the

[31] § 2:51. (1) *e)* Civil Code 2013.

[32] Supreme Court, Legf. Bír. Gfv. I. 30.209/2004. – BH 2005. 115.

[33] Supreme Court, Legf. Bír. Pfv. IX. 22.456/2001. – BH 2003. 66.

[34] Supreme Court, Legf. Bír. Pfv. IX. 20.894/2000. – BH 2001. 168.

[35] E.g. Supreme Court, Legf. Bír. Pfv. II. 24.145/1997. – BH 1999. 410.; Supreme Court, Legf. Bír. Pfv. II. 24.145/1997. – BH 2000. 448.; Supreme Court, Legf. Bír. Gfv. X. 30.405/2008. – BH 2010. 99., Supreme Court, Legf. Bír. Pfv. I. 20.573/2010. – BH 2011. 64.

[36] Act LXXVI of 1999 On Copyright § 94 (2) *e)*; Act XI of 1997 on the Protection of Trademarks and Geographical Indications § 27 (1) *e);* Act XXXIII of 1995 on the Patent Protection of Inventions § 35 (1) *e);* Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition § 86 (1) *e).*

leased land or chattel to third parties and collected the rental fee after the termination of their relationship with the landlord. In such a situation the lessor was enriched to the detriment of the landlord, who can claim it from them according to the rules of unjustified enrichment. It can be said, in general, that triangle relationships of unjustified enrichment occur if someone collects a debt which belonged to another person. Thus, if one of the joint and several creditors collects the debt or, in a case of bankruptcy, one of the creditors benefited from violation of the rank of creditors, they are to restore the surplus on the grounds of unjust enrichment.[37] Allowing direct claims among creditors in cases like this would result in difficult scenarios with a lack of transparency. Hungarian courts therefore order restitution not between the creditors but for the creditor to pay the unlawful benefit back to the estate under liquidation.[38]

As with collecting the debt of another creditor, there is a triangle relationship of unjustified enrichment if someone performs without being obliged to do that on the basis of their legal relationship with the original debtor. This may occur if the plaintiff as one of joint and severally liable debtors pays more than his own debt according to the internal relationship between the debtors. Although, *vis à vis* the creditor, the plaintiff was indebted for the whole debt, according to the internal relationship of debtors – as a joint and severally liable debtor – he might have paid for other debtors too. If there was no contract between the debtors about internal allocation of the debts and about the way of compensation if someone pays more than he should according to the debtors' internal relationship, the debtor who paid the debt will have a recourse claim *vis-à-vis* the other debtors according to the rules of unjustified enrichment. This can typically be the case in multiple tortfeasor scenarios. Another typical group of cases is where someone performs their own parallel or security debt because the main debtor failed to perform (surety, mortgagor, pledger, drawer of security bill of exchange, guarantor) or where they offered performance even without being a security debtor.[39] Such scenarios don't create cases for *negotiorum gestio* because, by performing the obligation, the party acted in their own interests. A specific case of payment in place of another person is where the bank restores a bank account as a remedy for erroneous transfer. In such cases it is the bank who becomes the claimant and entitled to collect the unjustified gain from the addressee of the transfer.[40]

6 Enrichment and Judicial or Administrative Failure

A party performing according to a judgement or decision of an administrative body which later proves to be false may claim restitution only if the judgement or decision was cancelled by a judicial or administrative act. Making restitution available on the basis of unjustified enrichment while the judgement (decision) is in force would undermine legal certainty and trust in the

[37] Supreme Court, Legf. Bír. Pfv. XI. 21.933/2006. – EBH 2007. 1614.
[38] Supreme Court, Legf. Bír. Gfv. X. 30.099/2010. – BH 2011. 140.
[39] § 6:57 Civil Code 2013.
[40] Supreme Court, Legf. Bír. Gfv. IX. 30.047/2005. – EBH 2005. 1226.

enforcement of judgements as well as in the decisions of regulatory authorities and the system of procedural remedies. These are why courts do not accept such claims.[41]

IV Subsidiarity of Restitution of Unjustified Enrichment

One of the most sensitive issues regarding unjustified enrichment in Hungarian court practice is its relationship to contracts and torts. Although these categories seem to overlap, unjustified enrichment shall be deemed an independent source of obligations. If the gain acquired by one party to the detriment of the other was the result of performing a contractual obligation then there is no unjustified enrichment, even if the enriched person breached the contract. Remedies for breach of contract that are available to the aggrieved party are to enforce the contract either in kind or in money. From this, it follows that if the party has a claim *vis à vis* the other party which is a remedy for breach of contract (e.g. damages or price reduction), then they are prevented from converting this claim into a one for restitution or using restitution instead of the regime of remedies for breach of contract.[42] The existence of the contract, however, should not exclude restitution of overpayment, contingency fees (e.g. if after paying the fee it turns out that the contractual preconditions of payment did not materialise) or the value of additional services that were performed 'outside' the contractual obligations.[43] The proper approach in this respect could be that the existence of a contractual relationship between the parties does not exclude the application of unjustified enrichment; however, if the contract did not provide a title for acquiring the gain for the party but remedies for breach of contract are not open to the aggrieved party then the gain shall be returned according to the rules of unjustified enrichment.[44] There are some restrictive tendencies in court practice: allowing such restitution only on the basis of an explicit contractual obligation[45] or establishing that the existence of a contractual relationship between the parties excludes *per se* the application of unjust enrichment[46] are clear oversimplifications that should be revised in future.

Courts often rejected claims for restitution of unjustified enrichment, establishing that referring to unjustified enrichment can be acceptable only if the plaintiff could not have any other title (contract or tort) for the claim.[47] Such oversimplified statements cannot be tenable, because if the party submits the claim on the basis of unjustified enrichment, the court is not in a position

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[41] Supreme Court, Legf. Bír. Gfv. IX. 30.047/2005. – EBH 2005. 1226.; Supreme Court, Kúria Pfv. I. 20.885/2012. – BH 2013. 274.

[42] Supreme Court, Kúria Pfv. I. 21.479/2011. – EBH 2012. P.11.

[43] Supreme Court, Legf. Bír. Pfv. III. 22.615/1998. – BH 2001. 68.

[44] Supreme Court, Legf. Bír. P. törv. V. 20 620/1977. – BH 1978. 338.; Supreme Court, Legf. Bír. Gfv. IX. 30.041/2010. – BH 2010. 333.

[45] Supreme Court, Legf. Bír. Gfv. IV. 30.468/1998. – BH 2000. 70.

[46] Supreme Court, Legf. Bír. Pfv. VI. 22.261/1993. – BH 1996. 93.

[47] Supreme Court, P. törv. IV. 20 586/1984. – BH 1985. 230.; Supreme Court, Legf. Bír. Gf. II. 31 011/1989. – BH 1990. 308.; Supreme Court, Legf. Bír. Pfv. IV. 20.403/1996. – BH 1997. 483.; Supreme Court, Legf. Bír. Pfv. II. 21.853/2008. – BH 2010. 39.

to consider if any other claims – which were actually not brought to the court – could be awarded or not. The court may only consider whether the defendant has a title to acquire the gain (e.g. it had been transferred to them on the basis of a valid contract) but cannot consider if the plaintiff did have a right (claim for damages or remedies for breach of contract) which is not part of the procedure. Especially sensitive is – from this point of view – the relationship between restitution and damages. Hungarian courts seem to have the starting point, in this respect as well, that liability and restitution cannot be established together.[48] This doctrine, however, is not supported by the rules of the Civil Code, nor is there any policy that would prevent the plaintiff from choosing either of them or to submit the claim – alternatively – for both. Restitution of unjustified enrichment and liability for damages have different prerequisites; in essence, because restitution does not require unlawful behaviour and fault, different circumstances are to be considered and while damages requires a loss-based approach, restitution requires a gain-based one. From this point of view, unjustified enrichment could be seen as a kind of minimum of damages. The mere fact the plaintiff might have made a claim for damages cannot be sufficient grounds to reject a claim for restitution. The same holds for the relationship between enforcing property rights and unjustified enrichment. As – due to absence of title – the enriched person could not acquire ownership over the assets he came to, the plaintiff, as owner, may claim them back with a *rei vindication* as an *in rem* right. It is, however, also true that the defendant can be enriched simply by possessing the thing. As such, both unjustified enrichment and possession without title have to to be established. Claims for restitution of unjustified enrichment, however, cannot be rejected on the grounds that the plaintiff could have claimed it on the basis of his proprietary rights or with a *rei vindicatio* according to the rules of protecting possessions. As such, the plaintiff cannot be deprived of choice as of the basis of the claim.

V Restitution and Change of Position

Restitution shall be performed, primarily, in kind. If in-kind restitution is not possible, the value shall be returned.[49] In-kind restitution is excluded if the thing acquired no longer exists or the enriched person lost the ownership over it because a third party acquired its ownership. In so far as restitution in kind is excluded, the enriched person shall provide the value of restitution in money. This obligation covers not only the gain acquired originally but also the profit and its surrogates (e.g. damages, restitution, insurance-based compensation) it brought to the enriched person. The claim for restitution falls under prescription but, if the aggrieved party claims to return a thing (including land), the restitution in kind would be identical to the *rei vindicatio* as an *in rem* right. Proprietary *(in rem)* rights – including right to possess – do not fall under limitation in Hungarian law and can be enforced without time limits. If restitution is a restitution of value, the claim is due at the time when in-kind restitution became impossible, because that

[48] Supreme Court, Legf. Bír. Pfv. VIII. 20.051/2009. – BH 2009. 296.
[49] § 6:580 Civil Code 2013.

is the moment when the proprietary *(in rem)* right was converted into an *in personam* claim. That is the outset of the five-year limitation period, normally required for claims under the law of obligations.[50] If the claimant was not aware of the impossibility of restitution in kind (that is, impossibility of claiming to return it on the basis of property rights), this may be a ground for tolling of limitation periods. If enrichment is the consequence of the behaviour of the aggrieved party and this behaviour is incompatible with the general moral values of society (e.g. it was a benefit provided as the price for illicit advantages, such as bribery) the claim for restitution is to be rejected as to the requirement of good faith and fair dealing.[51] The court shall not assist in correcting shifts in wealth which are reprehensible in the eye of the society.

Restitution is independent from the unlawfulness of the behaviour of the enriched person as well as independent from fault.[52] The change of position of the enriched person may be a basis for rejecting the claim for restitution. The enriched person shall not be obliged to return the gains if he has been deprived of them before they are reclaimed, unless the gains were acquired in bad faith or he acted wrongfully as regards the loss of the gains. If the enriched person consumed the gains or exploited them for his own interests, it shall not be considered as losing the gains in the court practice. Thus, in such cases the enriched person is deprived of relying on the change of position defence.[53] The enriched person acted in bad faith by acquiring the gains if he knew or should have known that he does not have the right to acquire them. It is very difficult to assess if the party acted wrongfully as regards losing gains, because wrongfulness (fault) can be established only if the party had to envisage the opportunity of returning the gain, even if this is not explicitly provided in the 2013 Civil Code. Otherwise, there is no point of reference for establishing the required standard of conduct. If the party considered the gain, on proper grounds, as definitely his own, he could not be expected to act according to the interests of others (that is, the claimant) and could be free to dispose over it. If the gain was awarded by the court, the claimant performed but the judgement was reversed in the course of supervision, he cannot rely on not being at fault by losing the gain because the party must be aware of the possibility of the judgement being reversed while the procedural rules leave it open.

The Civil Code provides one general exception from restitution of unjustified enrichment. If the gain was provided and also used for subsistence, it can be claimed only if it was acquired by the enriched person via committing a crime.[54] In practice, in cases like this, it concerns limitations on returning alimony and maintenance.

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[50] § 6:22 (1) Civil Code 2013.

[51] § 1:3 Civil Code 2013.

[52] Supreme Court, Legf. Bír. Gf. III. 30 046/1974. – BH 1975. 190.

[53] Supreme Court, Legf. Bír. Pf. 20 946/1986. – BH 1987. 312., Supreme Court, Legf. Bír. Pf. IV. 21 166/1992. – BH 1993. 500.

[54] 6:581 § Civil Code 2013.

VI Conclusions

The 2013 Civil Code did not introduce significant changes to the system and rules of unjustified enrichment. The regime of unjustified enrichment remained – at the level of the written norms – as flexible and open as it was designed in the 1959 Civil Code. The court practice, however, is too rigid and too formalistic in some aspects, especially with the doctrine of subsidiarity. This oversimplified approach may be the remnant of the socialist era and certainly needs to be improved, at least to the level of flexibility of traditional private law. Without such an improvement, court practice will not be able to give the proper responses of restitution to the challenges of modern life, economy and society. The new Civil Code may give a good occasion to revisit some tendencies in court practice, even if changes in written norms do not enforce it.

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