
5 HUNGARY

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5.1 Preparation of the Private Law Reform and its Materialization

1.

The reform of private law was always a difficult question in Hungary. The highest level of a reform is the adoption of a civil code, which gives new fundamentals to the private law. In the Hungarian civil law history there was more attempts to create the first civil code of Hungary. The first five drafts of the civil code were created in 1900, 1913, 1914, 1916 and 1928. All of them were the victims of political discussions and the First World War was also a retentive event. However, the drafts and their preparatory works continuously had been proving useful in the latter codification works. After the numerous codification attempts, the first Civil Code which came into force, the Act IV of 1959 was created between 1953 and 1959. Ironically, this era was hostile to the capitalist type of circulation of property, so it confined it within the narrowest possible limits.³³⁵

After the change of political regime in 1990 there was a permanently increasing demand for amendment in order to adapt the Civil Code to the contemporary social and economic circumstances. Four-fifths of the over one hundred and fifty remarkable modifications of the Civil Code were effected in the last 24 years, which fact clearly shows the need of a comprehensive rethinking of the fundamentals and the detailed rules of private law. It is important to see that the new Civil Code is the final step of a very long way, the final step of a 24 years long reform. The personal and financial relations turned up and downs since the enactment of the former Civil Code, and after the change in political regime the changes became faster.

³³³ Part III.

³³⁴ Part I, II, IV, V.

³³⁵ SZÉKELY, László: The Second... (The New Civil Code of Hungary), in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 241.

The text was amended, modified or nullified almost in six hundred subsections. This huge number of modifications inevitably decrease the coherence of an act, it caused logical oppositions and disproportions, plus a so often modified act is not aesthetic and elegant, especially if it is a fundamental source of law. The new Civil Code regulates new legal instruments, which have already existed in the judicial practice (like the leasing, factoring or franchise contracts) but they worth to incorporate into law. Another reason for the reform was to ensure the highest level of harmonization with the law of EU. Hungary always has fulfilled the harmonization obligations, however the way of it was not always the best: the logical clearness of the Code was injured many times.³³⁶

A Codification Committee was set up under the leadership of Tamás Sárközy in 1989. After 1990 Attila Harmathy and Lajos Vékás were co-presidents of the Committee, but the work of the working group slowly stopped. A new impetus was given by the Government Decision Nr. 1050/1998 (IV.24.), which prescribed to create working groups for specified topics within the scope of the concept of new Civil Code.³³⁷ The concept - without detailed text - was adopted by the Government Decision 1009/2002 (I.31.) and it was communicated to the public for professional discussion. The Drafting Committee - led by Lajos Vékás - published the first text-version of the new Civil Code by the end of the year 2006. The Ministry of Justice and Law Enforcement couldn't accept every method of the Drafting Committee. On the 30th of August 2007 the mandates of the members of the Drafting Committee were ceased and the Ministry took over the codification tasks. After further consultations with the private sector, the final version of the new Civil Code draft was created in 2008, which was adopted by the Government and was submitted as a draft of act. The Parliament adopted the new Civil Code on the 21st of September 2009 in the Act CXX of 2009, but László Sólyom, President of the Republic

³³⁶ *The conceptual questions of the New Civil Code - interview with Ministerial Commissioner László Székely*, <http://ptk2013.hu/interjuk/az-uj-ptk-koncepcionalis-kerdesei-interju-szekely-laszlo-miniszteri-biztossal/942>, 2014.02.23.

³³⁷ SÁRINÉ SIMKÓ, Ágnes: Az új Polgári Törvénykönyv megalkotásának jelenlegi helyzete Magyarországon [The Current Situation of Creating the New Civil Code in Hungary], in *Romániai Magyar Jogtudományi Közlemény*, Issue 2006/3., 87., <http://rmjk.adatbank.transindex.ro/pdf/006Sarine.pdf>, 2014.08.27.

and former President of the Constitutional Court did not sign it and sent back to the Parliament for further considerations. The Parliament partially took into consideration the suggestions of the president and adopted again the new Civil Code and it was promulgated as an act, which first and second book intended to be in force on the 1st of May 2010, the other parts on the 1st of January 2011, and one section only on the 1st of January, 2015. A separate act (XV of 2010) was adopted to have the Civil Code enter into force, it defined these dates. It wasn't signed by the president either, however the Parliament adopted it again without any changes. Seemingly there were not any obstacles before entry into force, until the Constitutional Court nullified this act because of the short *vacatio legis* and the harm of legal certainty because of the nonsense fractional coming into force. Meanwhile there was an election and change in government, so this Civil Code was never in force.³³⁸ As Ferenc Petrik ironically wrote, according to the tradition the fates of the Civil Code drafts were always the same, they did not enter into force.³³⁹

2.

The new government with the Decision Nr. 1129/2010. (VI.10.) set up a new structure of Codification Committees for the New Civil Code. The members of the Committees was the same as before 2007, and Lajos Vékás got his presidential status back. The Decision shared the tasks of codification between three committees. The Civil Law Codification Main Committee was responsible for the decisions in important, conceptual questions. The Civil Law Codification Editorial Committee was responsible to ensure the coherence of the text and to decide in theoretical questions. The Civil Law Operative Professional Committee was responsible also to work out theoretical questions and to create the draft of the Code with explanation.³⁴⁰

³³⁸ SZIKORA, Veronika: *Az új Polgári Törvénykönyv kodifikációjának folyamata* [The Process of the Codification of the new Civil Code], 1-3., http://jog.unideb.hu/documents/tanszekek/polgari/uj_ptk/kodifikacio_tortenete_2013.pdf, 2014.02.23.

³³⁹ PETRIK, Ferenc: *Az új Polgári Törvénykönyv tervezetivel kapcsolatos dilemmák* [Dilemmas Concerning to Drafts of New Civil Code], in *Magyar Jog*, Issue 2011/2., 65.

³⁴⁰ The members of the Committees in different formations were: Zoltán Csehi, Attila Harmathy, István Kemenes, András Kisfaludi, András Kőrös, Tamás Lábady, Attila Menyhárd, Ferenc Petrik, Tamás Sárközy, László Székely, Lajos Vékás, Emilia Weiss, György Wellmann, János Zlinszky.

The codification process after 2010 was quieter than in the previous decade. Two reasons were behind that. The first factor was the decreasing interest from the media. In 2010 the Parliament adopted a new act about the freedom of press and contents of media, which consists the main rules about the liability of press and press rectification. In the previous decade the media was interested in the codification from a selfish reason, because the newspapers and internet providers were directly affected through the Civil Code draft. In 2010 these rules were transferred into separate acts, so the codification became less interested. The second fastidious factor was the right for voting of the persons, whose legal competence is limited or completely precluded. Until 2005 these people were automatically excluded from the elections. This rule affected cca 60.000 persons of legal age. In 2005 this provision was nullified. The new acts about the parliamentary election (CCIII of 2011) and election procedure (XXXVI of 2013) brought a significant turn: these people are not automatically excluded from the elections, but when the court limits or precludes their legal competency, it has to make a decision obligatory case by case about the right for voting. This change drew the teeth of a very problematic question concerning to guardianship.

The Civil Law Codification Main Committee on the 16th of December 2011 adopted the final version of the Code, which was adopted also by the Government without changes on the 15th of February 2012. The Parliament discussed the text of the new Civil Code in the end of 2012, and after some changes it was adopted on the 11st of February 2013 (Hereafter I mean under new Civil Code the Act V of 2013). The Code entered into force on the 15th of March, 2014. This date is symbolic, it is the national holiday of the 1848-49 revolution which meant the end of the feudalism.

The structure of the former Civil Code became outdated, the jurisprudence has overwrite it in many points what was condensed in the legal education. The last 24 years is very rich in scientific researches and studies, the judicature has developed the civil law through the legal interpretation. This way an enormous knowledge was piled up which the Codification Committees could use. Especially because the members of the Committees and the additional experts were those academics, scholars and judges, who shaped our

jurisprudence in the last decades. Therefore there was no need for special investigations to identify the crucial problems, they came up previously in the academic sphere.

During this codification the Committees focused only on the new Civil Code. The starting point was that the existing law can be maintained in general and just those necessary changes have to be done, what are justified by the changing economic and social circumstances. Therefore where it was possible, the new Civil Code preserved the rules of the older one, and integrated some separate laws in total (like the family law and corporate law), and some other laws partially, only the substantive rules of them (like the rules of real estate register). The new Civil Code integrated also the judicial practice of the high courts. The Code has a careful attitude, because it doesn't accept the innovative and alternative solutions, when it would cause unnecessary instability in the legal system. Instead of these risky solutions it chose the traditional ways.

Beside the Code there was a need to adopt more major statutory instrument which were prepared by the Ministry of Justice. The Act CLXXVII of 2013 contains the interim provisions concerning the entry into force of the Code. The main role of the act is to ensure the harmony between the former and new Code and to define which rules of the new Code can be used in the prior legal relations or in the pending proceedings after the 15th of March, 2014. Next to the definition of interim provisions this act repealed the former Civil Code and the acts of family law and corporate law. It also has some authorizing provisions for the Government to create private law regulations. The Act CCLII of 2013 contains the amendments of every act, which were affected by the entry into force of the new Code. It is called "salad act", because it is such a mixed act, like a salad where one can find almost everything. The act amended cca 180 acts, including the new Code itself. Besides there are some minor amending act focusing on a narrower field, like real estate register or insurance.

Some rules of the Code got separate regulation in an independent law. It is a quite strange solution, that the lawgiver adopted the Act CLXXIV of 2013 about the neighbors' servitudes. Previously the rules of them had a place in the Code, now they are just named in the new Code, and the rules are

in the separate act. The solution is strange, especially when we see the length of the act, it has only eleven short sections, which have really important substantial provisions. However it is true that these rules have lower level of abstraction comparing to the other parts of the property law, and keeping these casuistic provisions in the highly abstract property law would cause some editorial discrepancy. The Act CCXXI of 2013 regulates the register of loan security, what testifies authentically the statements of the debtors, who gave security in a contractual relation. The trust is a new institution in the Hungarian private law, so it was required to adopt the Act XV of 2014 about the trustees and the rules of their activities. The Act CLXXV of 2013 refers to the register of the preliminary legal statements and the persons under guardianship. The reform of the guardianship brought more changes. One of them is the preliminary legal statement, what provides the opportunity to name or to exclude somebody from the role of guardian in the case of a possible future placement under guardianship. These statements have to be recorded in a register as well as the persons who are standing under guardianship. The register is maintained by the administration of the courts. Other result of the reform is the introduction of the supported decision making, which provides help without the affection of the legal capacity. The Act CLV of 2013 expands the short rules of the Civil Code, it regulates the appointment and the activities of the supporter and the termination of their status. It also has provisions on the professional supporters. The Act CLXXVI of 2013 specifies the rules of the transformation, merger and demerger of legal entities. The act is concerned with all types of legal entities named in the Civil Code, except the foundations and associations. The act should be applied for the additional types of legal entities, if the special act has not own provisions, just recalls the rules of the Civil Code or this act.³⁴¹

The Civil Code was adopted by the Parliament on the 11th of February 2013, and it was promulgated on the 26th of February. The length of *vacatio legis* was more than one year, the Code entered into force on the 15th of March 2014. The lawgiver has learned from the failure of the previous codification

³⁴¹ RÉPÁSSY, Róbert: Jogalkotási feladatok az új Ptk. hatálybalépésével kapcsolatban [Legislative Tasks Concerning with the Entry into Force of the New Civil Code], in *Magyar jog*, 2013/11., 641-648.

attempt, and provided long enough *vacatio legis* to avoid the harm of legal certainty. According to the previous unconstitutional solution in 2009, the then version of the codex would entered into force fractionally, what was an obviously confusing choice, but this time the whole Code entered into force at the same time. During the *vacatio legis*, the chamber of attorneys, the courts and prosecutors' offices and other organizations organized continuously various training sessions in order to prepare the person in judiciary to know and to apply the new Code properly. This period was long enough to reach this goal, the further questions will arise in the practice, what will be discussed in newer trainings.

5.2 Foreign and European models

The new Civil Code has not an explicit foreign model, however it considered and applied many solutions from the foreign codexes. The Austrian, German and Swiss influence affected the Hungarian private law earlier, because the first codification attempts in the beginning of the XX century took into account the codex's of these countries. The ABGB was in force from 1853 to 1861 directly in Hungary, however it has left deep marks for a long time in the Hungarian private law. The ABGB was used by the courts for many decades, even also after its abolishment in Hungary.³⁴² The codex drafts in 1900, 1913, 1914 and 1916 were based on the BGB and ABGB, and the exemplar of the most important draft in 1928 was the ZGB. The approach of ZGB aims to reduce the legal loopholes and prefers the high level of abstraction, what was preserved by the new Civil Code. Many solutions of these codexes were built in the Hungarian private law, so we can say, that the traditional Hungarian private law contains many elements which were created by them.

Next to these classical acts the Civil Code was affected by the most modern codexes, like the Dutch civil code, the *Burgerlijk Wetboek* and the codex of Quebec State in Canada. These codexes gave an example of defining the scope of the Civil Code and building up its structure. The most obvious influence can be seen in the so-called Quebec-clause at beginning

³⁴² BÍRÓ, György - LENKOVICS, Barnabás: *Általános tanok* [General doctrines], 2013, Novotni, Miskolc, 42-43.

of the Code, but it was used by the former Code as well. In spite of these influences, none of these codexes have a model role in the codification process.

The legislation of the EU affects some fields of private law directly, like the corporate law or consumer-protection law. More and more directives were born on these fields, which resulted the enormous size of the European private law. The codification committees didn't intend to build in all of these rules into the Code, because they are very fractured, casuistic and frequently changing, and these attributes can't serve the aims of a long standing fundamental legal instrument. Therefore the Code implements only the stable core of the European consumer-protection contract law, and it leaves the other rules of the directives in separate acts and regulations. This way the Code takes over – amongst many others - the rules of unfair conditions in general contract terms and warranty from the EU law.³⁴³

The Civil Code utilizes the results of the international legislation as well. Within this circle the followings worth a mention: the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of International Commercial Contracts by the UNIDROIT, the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR). The effects of these international legal sources and the implementation of EU directives will be described in the following part.

5.3 The Subject Matter Aspects of the Reform

The theoretical and practical starting point of codification was that the new codex shall only change the 1959 Civil Code there and to that extent “where it proves to be necessary according to today's social and economic requirements”³⁴⁴. The constructing legal works mapped modern society's needs, for which throughout investigation of jurisdiction was indispensable, as well as getting to know the tension and contradictions – and of course their reasons – between statutory law and juridical practice. The new civil

³⁴³ VÉKÁŠ, Lajos: O novom maďarskom Občianskom zákonníku [About the New Civil Code of Hungary], in *Právny obzor*, Issue 2013/4., 317.

³⁴⁴ Ibid. 313-325.

law codex almost raises the message of juridical practice to normative level, the message which shall be set as an example in the future; however, if it does not suit the modern age's requirements, it wanders off the previously accepted path with an explicit rule.

The new codex thrives to make the norms included in it clear, transparent, understandable and evident not only for people who studied law but for laic readers, too. Where it is possible, the legal code uses simple notions, of course, perfectly keeping the requirements of correct civil law terminology in mind.

Now, we are attempting to present the new codex's spirit through showing some content innovations and their dogmatic reasons. Due to content boundaries, it is obviously not our aim to investigate all changes in detail.

1.

Regarding legal consequences which are independent from the imputation of violation of personal rights, the new codex provides opportunity for the injured party to demand the assignment of financial advantage acquired with the violation of law according to the rules of unjust enrichment. Furthermore, the new Civil Code introduces the civil law claim for grievance fee, which excels from the circle of compensation based on its content, too. Proving financial disadvantage is not a substantive condition for demanding grievance fee that is, the court can oblige the violator to pay the grievance fee even if the injured party does not prove the disadvantage caused against him/her but considering the case's circumstances, gratification is justifiable.³⁴⁵

2.

Deviating from the solution of the 1959 Civil Code, the new codex integrates legal rules referring to business organizations differently. The codex writing's theoretical base was to include those legal norms into a single frame which collective regulation serves the simplification of law enforcement through unified terminology, compaction and methodological homogeneity

³⁴⁵ JOBBÁGYI, Gábor: Personality Rights, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 287-290.

of rules. In harmony with all these, integrating business organizations' legislation into the civil law codex was given by the boost that business organizations' legal relations are realized in the field of civil law, besides, civil law rules are perfectly suitable for ensuring business organizations' legal frame from methodological point of view, as well. Business organizations' rules perfectly suit the norms of legal persons, hence, the new codex places the rules referring to business organizations in the Third Book on legal persons. The structural solution by no doubt expresses that the general rules of legal persons give the subsidiary-like legislation of business organizations. Thanks to the legal rules included in a unified frame, inner contradictions and unjustifiable duplicity of rules is preventable. The Swiss, the Dutch and the Italian codification stepped onto the road of corporate law codification.³⁴⁶

3.

For the sake of completeness we note that with taking the above mentioned codification principles into account, the new codex also builds family law in. The material of family law's integrity demands that the new Civil Code adequately expresses family law relations' individual characteristics which differentiate them from financial circulation. The new Civil Code corresponds to this new requirement in a way that at the beginning of the book on family law it exclusively presents principles only prevailing in frames of family relations.³⁴⁷

4.

Besides the right of property norms, in its Book of Right in Rem, the code – in more detail compared to previous rules – presents the regulation of tenure law and limited right in rem. The most important substantive law rules

³⁴⁶ SZEGEDI, András: Outlines of the New Regulation of Hungarian Company Law, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 349-358.

³⁴⁷ REIDERNE BÁNKI, Erika: Changes in Family Law, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 291-304.

of land register can be found in this book.³⁴⁸ In the previous Civil Code rules of lien were placed in the part on law of obligations. The new Civil Code alters this solution and places the conceptually unified rules in the book on the right in rem. The reason for the structural modification is in connection with those circumstances that nowadays right in rem side of mortgage law appears in a more decisive form than the nature of law of obligations. The book on the right in rem does not “follow the traditions” either, the new codex’s Fifth book is not entitled as “Property law” but the “Right in rem”.

5.

The circumstance that the new codex raises the prohibition of fiduciary collateral to legislative level via taking juridical practice and the results of legal theory into account, conceptually stands in close connection with the rules of mortgage law. For the adequate ensuring of creditor’s needs gaining right of property for the creditor is hardly necessary, especially referring to that the new codex creates mortgage law rules serving the justifiable interests of the creditor. Thanks to the balanced mortgage law rules, taking the right of property away from the creditor is not necessary for the ensuring of creditor needs.³⁴⁹

6.

Compared to the 1959 codex, it is a significant change that law of obligation rules excels from contractual law rules. The new standard text lists the common rules referring to all obligations in the part of right of obligations – obviously, including contracts, too.

7.

The basic idea of changes in connection with contractual law is that contracts are necessarily connected to risk and fair grouping of risks is the task of civil law rules. We also have to mention that according to requirements

³⁴⁸ About the protection of land see: HORVÁTH, Gergely: Protection of Land as a Special Object of Property (New Directions of Land Law), in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 359-366.

³⁴⁹ About the invalidity see: MENYHÁRT, Ádám: Invalidity of Contracts in the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 317-328.

of the modern age, contractual law has to correspond both to professional participants of business relations and also to the interests of not vendor private people. The questions whether the increased needs of contractual legal norms can be fulfilled with unified rules referring to the whole of financial relations, and whether the duplication of rules – on the part of special needs of traders – is necessary, become inevitable. The new codex consequently follows the monist thinking. Well, let us see based on what consideration have the codex's creators decided besides contractual rules. The basic question of individual commercial private law's existence is whether traders have such needs which the civil law codex which is up-to-date from structural and content point of view, cannot fulfill. We did not find such needs. Moreover, foreign examples indicate that the legal innovations of the last decades show into the direction of the commercialization of civil law that is, civil law rules are becoming more and more commercial law-like. The strengthening face of consumer law protection created the realization that holding special rules is not necessary in order to fulfill the special needs of traders but for the interests of the consumer, who is the weaker party in the interest justification battle. The new codex's basic principle is that contractual law follows traders' level of needs (both regarding general rules and individual contracts), and special rules are only worded where they are inevitable regarding consumers' needs. The new Civil Code's orientation is perfectly presented by those named contract types which were previously only parts of commercial law (factoring, financial leasing, franchise, confidential property management contracts or trust). For the sake of completeness, we refer to that commercial private law is the product of feudalism when particular-like, untransparent braces of civil law was not borne by commercial law cases requiring quick procession. Besides, taking monist thinking through was more important because doubled rules along traders would have practically turned contractual law into three-level, in which the third level would have been composed of rules of consumer contractual law. Contractual law experiences regulated in commercial law codex show that individual commercial contractual law is burdened by delimitation and interpretational difficulties in practice. The Codification Committees tried to avoid these troubles.

8.

During the rulemaking of contractual law, we have to take the questions of consumer contracts' content and taxonomical situation into account. By no doubt, one-sidedly cogent rules of consumer contracts seem to be alien elements in contractual law, which professes the widest justification of private autonomy, however, in spite of all these, Hungarian legislators have the standpoint according to which rules tailored to consumer contracts being present in not a negligible weight in the object of property, cannot be left out from the codex. We cannot leave out that the European Union's legislation has reached civil law, into which it mainly interferes through directives, for the sake of consumers. Through the comprehensive reform of civil law, the question that which products of the extremely wide directive making shall be part of the regulation frame of the new codex, also remained unanswered. The Codification Committee had the standpoint that only those directives can be built into the new codex which surely prove to be future proof. Codex creation is a venture affecting more generations, which "notion" is stability and reliability, with which requirements a law code which shall nervously answer the Union legislation often unprincipled and complicated changes, would not be compatible. Based on this consideration, the new civil law codex builds the Council's 93/13/EEC principle on unfair conditions applied in contracts made with consumers, 1999/44/EC principle of the European Parliament and the Council on consumer products' bill of sale and connecting warranty and some rules of 2011/83/EU principle into law of obligations.³⁵⁰ During the European Parliament and the Council's 1999/44/EC principle's implementation, answering two questions became inevitable: legislators have to decide on the technique of implementation and have to choose the degree of increased legal protection, as deviating from the principles' rules can happen for the sake of consumers, not to mention that increased legal protection can be spread to contractual legal relations falling outside of consumer contracts. From the point of view of legislation, more opportunities exist: beside a separate legislative act, on the top of legislators' convenience (which is proved by a great num-

³⁵⁰ FAZEKAS, Judit: Recodification – Integration – Modernisation: Consumer Protection Rules in the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 329-340.

ber of legislative products from Brussels), the principle of private autonomy's sanctity also exists. Its obvious disadvantage is that it "enriches" private law rules of legal institutions serving to remedy deficient compliance. It is questionable whether to what extent will law enforcement become easier for the recipients, the consumers, with this solution. The Hungarian legislator regulates the principle's law protection toolbar among the general rules of deficient compliance in the 1959 and the new Civil Code as exception next to main rule, in a coherent frame with them. The same element of both codices is that they fulfill the obligatory principle task, namely that they do not impart consumers in a higher degree of protection than it is obliged to do so.

9.

The juridical practice of the last quarter century has gone through a constant change regarding the question of determining responsibility for causing damage with breaching of contract. Jurisdiction has gradually used that thinking of legal policy that there is no place for the investigation of subjective condemnation in contractual relations and that this type of investigation would not be practical as finding that link in modern goods relation for which damage could be blamed on, is hardly possible. Instead, the juridical practice takes the following as a base: entering into contracts means risk for all contracting parties and contracting parties shall make a stand for circumstances being present in their venture circle – independently from the imputability of their behavior – that is, ensuring circumstances falling outside of the party breaching the contract's investigation sphere could give reason for being exempted from the compensation obligation. The new codex sanctioned juridical practice. It separates the previously united contractual and tort compensation claim's rules along the conditions of extraction, refundable consequence damage and different conditions of back profit. Responsibility for damage caused by breach of contract becomes an individual responsibility figure in statutory law, which is regulated among the general rules of the breach of contract in the new Civil Code. Based on the developed exemption rule of the new codex – via taking CISG, PECL, UNIDROIT principles into consideration –, the person causing the damage

is exempted from the legal consequences of causing damage if three conditions hold at the same time. For being exempted, the person who caused the damage has to prove that

- the causal circumstance falls outside of the sphere of the person causing the damage,
- the causal circumstance falling outside of the causal party was not objectively foreseeable at the time of entering into contract,
- it is not expectable at the time of breaching the contract from the causal party to avoid or cease the damage.

The verification constraint shall be carried out by the person breaching the contract in order to be exempted from the responsibility.

Consistent emergence of a stricter responsibility system – especially taking the aim of locating market viewpoints and damage consequences of the breach of contract into account – would lead to misshapen results regarding the degree of compensation. Regarding back profit and damage consequences, in the new Civil Code – as these damages are dependent on not known factors for the obligant in the lack of informing the entitled – the normative consequence of foreseeable clause will prevail: in this circle, damage has to be compensated to such degree, in which degree the harmed party proves that the damage, as the possible consequence of the breach of contract, was foreseeable at the time of entering into contract. The new codex fixes that the damage caused in connection with the provided service has to be fully compensated as damage caused in the contractual obligation is fully foreseeable.³⁵¹

Objective compensation and limitation of the degree of compensation on foreseeable damage creates a balanced system in contractual relations between the parties in the field of risk-sharing. The foreseeability clause perfectly suits the market viewpoint as well, as it incents the potential causal to think over the risks, and the other contractual party to reveal risk factors deriving from entering into contract.

³⁵¹ KÓHIDI, Ákos: Major Changes in Tort Law in the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 342-343.

10.

In the circle of liability for defects, jurisdiction mainly surpassed unrealistic, strict limitation deadlines. The main problem was caused by that services accessible in the field of market are impossible to be categorized in a way that the interest of the entitled for perfect fulfilment is not unduly harmed. The need that validation deadlines referring to warranty rights shall be in harmony with the period expectable regarding the products' technical aspects, was formed in juridical practice. Behind limitation deadlines the following thought is present that the dependent legal situation after having fulfilled the contract shall be closed sooner or later for the sake of the obligant, as it would be unfair to keep him/her uncertain for an especially long time regarding whether the entitled has demands against him because of deficient fulfilment or not. The new codex terminated deadlines in the circle of warranty demands, so courts will judge whether - via taking the service's nature into account - demand validation falls outside of the service's expected service life, or not. The Civil Code also takes the circumstance into consideration that the obligant's contractual covenant spreads to that the service's service life shall correspond to the period expectable regarding the products' technical aspects. It is indisputable that the obligant is obliged to fulfill the warranty needs that were validated in time, however, it cannot be stated that increased value due to increased service life coming from repairing or replacing belongs to the sphere of failed compliance. The dilemma of increased value is solved by the new codex on the level of legislation: if the goods are replaced after most of the time of the liability for defect has passed, and it results in a great deal of increased value for the entitled party, the obligant shall demand the reimbursement of the enrichment. The new Civil Code favors the consumer, as the cited civil law rule cannot be applied in the circle of consumer contracts.

11.

The new codex introduces the institution of product warranty in the circle of consumer contracts. Emerging from the relative system of the contract, consumers can demand remedy directly at the service provider: repair or

– in case of fulfilling replacing conditions – replacing. Only personal property belongs to the effect of product warranty and the producer has to deal with product warranty within two years of releasing the product.

12.

During the legal works, the legislators put special attention to that the previous rules of the law of inheritance is only modified to the smallest degree as traditions have the most important part in the law of inheritance. Modifications in the law of inheritance mirrored the economic and social changes after the transition. The new codex excludes the surviving spouse from general fruition-inheritance, instead, children inherit. Another important change is that in case of no descendants, besides the surviving spouse, the dead person's parents also inherit.

5.4 Experience with Exercising the New Regulation in Practice

At the time of writing this article, we don't have any experience at the courts, because the Code is so new that this short time wasn't enough to carry out court decisions based on the Code. The Act CLXXVII of 2013 contains the interim provisions concerning to the beginning of the term of validity of the Code and the existing legal relations. As a general rule the act prescribes, that the Code shall be applied on those facts, legal relations and legal statements, which were born after the entry into force. This way the majority of the cases where the judge can decide on the basis of the new Code could be in a very embryonic period, the first wave of the decisions will arrive a few months later. Furthermore, the former Code shall be applied in the bigger part of the current court cases, so up to a few years the two Code will be used simultaneously. An interesting provision in the above mentioned act, that the former Code shall be used for those obligations, what were established after the entry into force of the new Code but were based on a fact or legal statement originating from an older obligation during the effect of the previous Code. In addition, the act gives retroactive effect for multiple provisions of the Code, so the valid and/or applicable private law is a quite diffuse material, because they don't overlap each other.

This regulation method surely weakens the legal certainty and the predictability of a court decisions and it burdens the judges with the difficult task that they have to synthesize many provisions to find the applicable law.

5.5 New Civil Code

1.

The new Civil Code of Hungary, just like the previous one, is the constitution of private law because of its codex format. The 1:2. § (2) paragraph says, that the other regulations concerning to private law shall be interpreted in harmony with the Code. This solution is known as the so-called Quebec-clause, which creates an interpretation priority for the Code against the same level of legal sources, which would be normally equal to the Code. The Code tries to regulate the widest spectrum of the civil relations, what can be seen on the thickness of the Code. “This method, of course, must not be used for its own sake, it must cope with the continued presence of private legal regulations even in the case of the most successful codification attempts.”³⁵² The Code regulates the fundamental personal and property relations, so there are necessarily other sources of law in the private law, which are special regulations compared to the Code. The Code gives the subsidiary background for these special fields eg. intellectual property rights³⁵³ or agricultural law. The Code provides the maximum coherence for the private law, the established terminology must be guaranteed in the separate laws.

The Hungarian private law accepts the monist theory of the commercial law, which means there are no separate regulations in the Code for commercial activities. Of course there are special type of contracts and consumer protection provisions which inevitable refers to commerce, however this origins

³⁵² Székely: *op. cit.* 241.

³⁵³ The Part IV. of the Russian Civil Code was adopted in 2006, which incorporated the rules of intellectual property law. Hungary didn't choose this way, the intellectual property law remained a relatively independent, specific field of civil law, ruled by separate acts. See in more detail: SZALAI, Péter: Intellectual Property Rights in the Hungarian Legal System, with an Overview of the New Civil Code, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 305-315.

from the nature of these legal institutions and doesn't mean the duplication of civil law regulations according to commercial and non-commercial activities.

The Code incorporates the previously separated family law. In the socialist era the main ideology held incompatible the family law with the core private law, because the family relations can't be treated like any other proprietary relations in the bourgeois private law. Nowadays this transcended theory couldn't prevent the incorporation of this classical part of private law into the Code. Of course family relations have specialties, which are articulated in special principles which have to be applied in this area.³⁵⁴

2.

The structure of the Code is a brand new solution in the Hungarian legal system, what is justified by the huge size of the codex. It is divided into books, these create the first level of the division, and it gives the opportunity to increase the structural units in order to arrange the parts of the Code properly. Under the books there are parts, titles and chapters. In the chapters there are numbered subtitles which refers to the legal institution what is regulated (eg. sale contract), and every section has an own title after the section number, which makes very transparent the structure of the concerned legal institution.³⁵⁵ The numbering of the structural units and the sections begins anew in every book. The first number of a section is a reference to the number of the given book, and after a double-dot stays the section number (eg. 5:14. § means the fourteenth section of the fifth book). The Books of the Code are the followings:

- First Book: Introductory provisions [6 sections],
- Second Book: The individual as a legal entity [4 parts, 12 titles, 55 sections],
- Third Book: The legal person [7 parts, 27 titles, 44 chapters, 406 sections],
- Fourth Book: Family law [5 parts, 16 titles, 22 chapters, 244 sections],
- Fifth Book: Right in rem [4 parts, 13 titles, 34 chapters, 187 sections],

³⁵⁴ SZÉKELY: op. cit. 243.

³⁵⁵ Ibid. 244.

- Sixth Book: Law of obligations [6 parts, 36 titles, 74 chapters, 592 sections],
- Seventh Book: Law of inheritance [5 parts, 16 titles, 100 sections],
- Eighth Book: Final provisions [3 parts, 6 sections].
- The Code consists 1596 sections in total, what makes it the longest act in Hungary.

3.

In the 1:2. § (1) the Code establishes a new connection between private law and public law. According to this rule, the provisions of the Civil Code shall be interpreted in harmony with the constitutional order of Hungary. Under the term of constitutional order one can find the norms of the Fundamental Law, especially the basic human rights, the cardinal acts adopted on the basis of delegation rules of the Fundamental Law, and the decisions of the Constitutional Court. Through the Fundamental Law, the Civil Code got additional principles, which were always considered as private law principles, but the Code doesn't articulate them explicitly. The Article 28 of the Fundamental Law says: "in the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good."

4.

The Code keeps the procedural provisions on a minimum level, it regulates only the main cornerstones, which are more or less substantial questions. The most typical procedural provisions are the enumeration of the persons who are entitled to commence an action in a specific case. For example the placement under guardianship can be requested by the spouse, companion, lineal relatives, sibling, legal representative, guardianship authority and the prosecutor. The Code lists the same way those entities, who are allowed to file an *actio popularis* in order to find invalidity of an unfair condition in a general contract terms of a consumer contract. The general procedural rules can be find in the Act III of 1952 about civil procedures, and there

are some additional sources of law, which specifies the procedural steps of a substantive subject matter of the Civil Code. For example the Code defines the basic conditions of the presumption of death, but the detailed procedural rules are placed in a ministerial regulation. Similarly the substantial rules of placement under guardianship take place in the Code, but the procedural rules are specified in a government regulation. The procedural rules may change very often, so it is justified to keep them separated from the Code in order to maintain its stability.

5.

The First Book of the Code, the introductory provisions contain the scope of the act and those principles, which are applicable not only within the Code but in any sources of private law. The number of the basic principles has been reduced compared to the former Code. The Hungarian civil law literature splits the principles into two groups: declarative and operative principles. The declarative principles don't have *expressis verbis* normative basis, however they can be read out from the whole text of the Code. Such principles are justice, reasonableness and legal certainty. These pervades the material of the private law, and a judge can grasp them as interpretation tools, however he can't justify a decision solely with these principles. In contrast, the operative principles are listed amongst the introductory provisions and they can serve as a legal ground of a decision. These principles are: the interpretation of legal regulations, the requirements of *bona fides* and honesty, reasonable conduct and the prohibition of the abuse of rights.³⁵⁶ "Supplementary principles are articulated at the beginning of each Book, e.g. separate principles are applied in relation to the specifics of family legal relations contained in the Book on Family Law."³⁵⁷ Special principles can be found in contractual law. Such is the principle of mutual cooperation, what was a general requirement in each private legal relationship in the previous Code, now it is enforced primary in the contractual relations. However one can find a lot of references to mutual cooperation outside of the law of contracts, so actually it has an effect in every fields of private law.

³⁵⁶ BÍRÓ – LENKOVICS: *op. cit.* 65-70.

³⁵⁷ Székely: *op. cit.* 245.

The Code maintains the basic principle of bona fides and honesty the same way as it was in the past, which is an acknowledged rule of conduct in several national codes and law harmonization bills. It gives a minimum level of morality to the legal relations, what can provide mutual trust between the parties.³⁵⁸

The Code applies the premise of reasonable conduct, what acquired solid foundations thanks to the judicial custom and interpretation, this way it is flexible enough to give space to the judges.³⁵⁹

The prohibition of the abuse of rights means the borders of the free exercise of civil rights. The Code defines the prohibition as a general rule, and defines a special case, where the abuse of rights is realized in denial of a legal statement, and this conduct does injury to an important public interest or a particular substantial private interest. In this case the court judgment may be substituted for a statement.

6.

The decisions of the courts have special role in the Hungarian legal system. In the narrow sense, legal sources of private law are only the Fundamental Law, the acts adopted by the Parliament and the different types of regulations (governmental and ministerial decrees, local government ordinance). However, the court decisions have importance in the forming and development of private law, therefore we can consider them as quasi sources of private law.

On the highest level of the court system is the Curia. The whole court system, leading by the Curia are not merely automatons, they interpret and use the law, this way they also develop it necessarily. In formal sense, the “*praetor ius facere non potest*” doctrine still exists, however in a concrete case the judge creates “case law” (but not in the Anglo-Saxon meaning), as the roman said “*praetor ius facit inter partes*”. The private law is a living law if the courts interpret their rules and fill the sentences with real content. The decisions of the courts establish the connection between the very

³⁵⁸ Ibid. 246.

³⁵⁹ Ibid. 246.

abstract norms and the very concrete facts.³⁶⁰ When the Code or other legal sources don't have an exact provision for the real situation, the judge can bridge these legal loopholes with the use of above-mentioned principles. This isn't laid down in the Code, it originates from the nature of the private law. Of course, judges don't like to justify their decisions solely with principles, because they can find themselves easily in the field of natural law, where the legal argumentation can be turned from judicature into philosophical jurisprudence.

The Fundamental Law and the Court System Act have made provisions for the Curia in order to guarantee the uniformity of judicature. In order to achieve the consistent judicature the Curia is entitled to adopt uniformity decisions and to formulate opinions by its departments.³⁶¹ The uniformity decisions are obligatory, the courts have to use them from the time of their publications. Formally, the opinions aren't obligatory, but their informal binding effects are statistically proven. The unique case-by-case decisions have also an orientation role, however those aren't obligatory either.

The Curia had been adopted many uniformity decisions and different types of opinions before the entry into force of the new Code. The Curia listed those previously adopted decisions in the 1/2014 uniformity decision, which shall be applied henceforward, because the affected substantial law remained the same. More than 60 theoretically important decisions were sustained and many annulled because their normative basis had changed or they had incorporated into the Code explicitly.

The decisions of the Constitutional Court are additional quasi sources of law, mainly as a negative legislation, but the Constitutional Court also interprets the norms of the Fundamental Law. For example in the decision 17/1992 (III.30.) it analyzed the meaning of property on the constitutional level, in turn the decision 64/1993 (XII.22.) made a distinction between the different meanings of property on the constitutional and private law levels. It was a spicy situation, when the Constitutional Court

³⁶⁰ BÍRÓ - LENKOVICS: *op. cit.* 118.

³⁶¹ OSZTOVITS, András: The New Organizational System of the Hungarian Courts, in SMUK, Péter (ed.): *The Transformation of the Hungarian Legal System 2010-2013*, 2013, Wolters Kluwer, Budapest, 137.

in the decision 7/2014 (III.7.) nullified a passage in the Code just before its entry into force. The 2:44. § amongst the personality rights prescribed, that the protection of personality rights of public figures can be restricted in the name of freedom of speech from equitable public interest, according to the test of necessity and proportionality, without the prejudice of human dignity. The Constitutional Court found the “equitable public interest” part unconstitutional, because it meant an unjustified additional requirement for the exercising of free opinion and it limited the freedom of expression.

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