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THE FUNDAMENTALS OF HUNGARIAN PRIVATE LAW

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THE GENERAL PART OF HUNGARIAN PRIVATE LAW (HISTORICAL AND DOCTRINAL FOUNDATIONS)

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1. A CONCISE HISTORY OF HUNGARIAN PRIVATE LAW AND JURISPRUDENCE

1.1. The History of Hungarian Private Law until its Codifications

Although the process of the Hungarian private law codification has a long duration and it was also rich quantitatively and qualitatively as well, the successful outcomes of this long lasting proceeding are represented by our former *Civil Code of 1959* (this *Hungarian Civil Code* abbreviated as *HCC* or former or 1959 HCC) and our *Civil Code in effect of 2013* (abbreviated as new HCC or *NHCC* or 2013 HCC). Many results of the codification attempts remained, namely, voluntary sources of law, since these were used in the judicial practice, albeit could not come into force legally.

The first meaningful and comprehensive effort of Private Law codification in our country, which has a more than 1100 years old statehood, was the so-called *Tripartitum opus juris consuetudinarii inclyti regni Hungariae* often called simply as *Tripartitum*. This opus contained the systematised conglomerate mainly of the *Hungarian nobility (or aristocratic) feudal customary private law*. It was elaborated by *István Werbőczy* in 1514 under the reign of *Vladislaus II of Hungary* (1490–1516). The Tripartitum had got the royal assent but it had never been promulgated as law, therefore courts could only have been using it as a *de facto* source of law. The key significance of the Tripartitum was the fact that this was the main legal source, which had made Hungarian private law independent of the Roman and of the Canon Law for centuries. Some old institutions have survived the centuries and remained in effect also in the NHCC, such as e.g. the idea of the lineal succession (see Book 7 § 67 = Section 7:67).

Then, the *Corpus Juris Hungarici* was the first complex unofficial body of laws, which incorporated all Hungarian laws from 1000 to 1696. The other meaningful legal source was the *Planum Tabulare*, which was accepted by the Sovereign *Maria Theresa* and the *Full Court of the Curia* (Supreme Court) in 1769. It comprehended the private law practice of Hungarian courts of higher instances.

The next turning point in our history of private law codification was the *Hungarian Revolution of 1848*. The *Act 15 of 1848* of the revolutionary legislation ('*April Laws*') envisaged a Civil Code, which can transform the feudal private law regime into its new order of the *citoyen* symbolizing the spirit of *Equal(ity of) Rights* and that of *Free Property*. This vision had remained a dream, which had come true only partially and in a very different 'mood' in the 20th century, i.e. the era of the communists…

The fall of the Revolution (1849) meant also the declension of the Hungarian private law. The former legal regime had been broken down and the newer one had not yet been elaborated. This vacuum was

filled up or rather obtruded by the private law system of the oppressor State, so by that of Austria. The *ABGB* (*Allgemeines Bürgerliches Gesetzbuch*, i.e. General Civil Code] of the Austrians of 1811 had come into effect by the Emperor's open command in 1852 and had remained in force until 1861. The Austrian Civil Code has opened the door for the influence of Roman and German Private Law Jurisprudence, i.e. the so-called '*Pandektenrecht*'. The door has remained unclosed until these days.

The process of easement between the two countries, which concluded in the *Austro-Hungarian Compromise of 1867* started in 1860. The *Judge Royal* (similar institution to the Lord Chief Justice of England) summoned an assembly of leading judges and jurists in 1861. The *Session of the Judge Royal* adopted the so-called *Provisory Jurisdictional Regulations*, a compendium of written customary laws elaborated for the support of the judicial praxis. The lacunas especially in the Hungarian *contract law* regime and the regime of *law of rights in rem* remained, however, so extensive, that its stand necessitated the use—now the *voluntary* use—of the *Austrian Civil Code* and that of the *German Private Law Jurisprudence* for such cases, which could not be decided upon the Hungarian laws.

1.2. The Process of Hungarian Private Law Codification

Today in Hungary, there is a theoretically and even practically well-established and 'up-to date' civil code, which came into force in the Fifteenth of March, 2014. The law is called the *Act V of 2013 on the Civil Code* (thereinafter: New Hungarian Civil Code, abbreviated as NHCC or New HCC. The former Hungarian Civil Code (abbr. as FHCC or former HCC) was the *Act IV of 1959* in effect from the First of May, 1960 until the Fourteenth of March, 2014. However, these two codes are the only laws in the long duration period of Hungarian private law codification process, which could come into effect. The reasons lay in historical and political circumstances not to be detailed here.

We shall now turn to the outcomes of the century-long procedure of the Hungarian private law's codification—in a 'modern' sense of codification. Our first thesis is that the codification of the Hungarian private law is preceded by that of the commercial law similarly to many other countries of the European Continent. Our first code in effect in the wider area of private law was, namely, the *Act XXXVII of 1875 on the Commercial Code*, which was based on its German predecessor, i.e. the *Allgemeines Deutsches Handelsgesetzbuch* (ADHGB otherwise as the General German Commercial Code of 1861).

The Hungarian Commercial Code was then followed by the many unsuccessful codification attempts in the field of 'pure' private law. The process of codification had continuously been escorted by the huge efforts of the *Justices of the Hungarian Royal Curia* (Supreme Court). Their results were meaningful jurisdictionally and in the sense of the jurisprudence as well. The Justices could therefore give a great inspiration for the codification, too. Some private law institutions were born just in this very era (e.g. the liability for hazardous operations).

The next turning point in the history of codification is the *Bill of Hungary's Private Law Code* (abbreviated in Hungarian as '*MTJ*') of 1928 drafted by *Béla Szászy* (1865–1931). The MTJ was preceded by the Drafts of the two official Bills of the *Hungarian General Civil Code* (1900, 1913) and some newer readings of the 1913 Draft. Albeit it had never come into effect as a law code, the MTJ had played a significant role as a written, codex-like canon for the jurisdiction, which, through the praxis of the courts, took then a part as the main source of the new Hungarian written customary private law. The scholars elaborating the draft of the code greatly respected the achievements of the *Swiss* and the *German* private law codification and jurisprudence, although in many questions they consciously rejected to follow them. In these laws, namely, some inherent practical and theoretical or dogmatic problems had already emerged, such as the question of an '*Allgemeiner Teil*' (General Part) being enthroned onto the apex of the certain civil code. As a post-war effect of the tragic and unfair dismemberment of the Kingdom of Hungary by the Treaty of Trianon (1920), the country had no more interest in accepting the MTJ and giving it legal effect as a law code. A homogeneous new private law would have legal effect only within the new tight borders of the State. Therefore, it would build a deeper distance between the former parts and Peoples of the country instead of narrowing them to each other. Thus, the MTJ failed in the 1935 Parliament. However, even Trianon could not stop the evolution process of the private law, nevertheless the legislation's 'tool' was that it accepted many specific laws such as the Act V of 1923 on the *Unfair*

Competition or the Act XXXV of 1927 on *Mortgages*. Until the end of the 1940's, there were two periods of different intermediary obligatory laws: the one was the *crisis law* in the early 1930's, the other was the *laws of war* (*martial* law) and the *anti-Semitic* laws right before and during World War II. As such these laws limited the contents of the basic constitutional rights of ownership and confined the substances of natural persons' most important legal capacities.

The following period of greater extent in Hungarian private law history is the era of the *communist* and then on that of the *socialist* private law. This epoch had started also as an intermediary period of time in 1948, however, it had lasted more than four decades, until 1989. The epoch's first period until the codification of the 1959 HCC was not less obligatory (mandatory) and not less restrictive with respect to the rights to private property, freedom of contract, freedom of entrepreneurship etc., which was maintained also in the 1959 HCC. However, this Code was not clearly communistic but it could support also the legislative demands of the *simple commodity production*, because the drafting scholars of the 1959 HCC, such as *Gyula Eörsi* (1922–1992), *Miklós Világhy* (1916–1980), *Lóránt Rudolf* (1904–1979), *György Csanády* (1917–1986), *Endre Nizsalovszky* (1894–1976) had a wide knowledge of the European Legal Culture and European Private Law Tradition.

The so-called *New Economic Mechanism*, which had started in 1968, tried to renovate and change the *central planning system* as the basis of socialist economy to a new economic policy, which could create special market relationships among State firms and other embryonic market firms, and which could use prices more freely as allocators. This made firms to maximise their profit, and this profit could create a more valuable budget for newer and newer investments. These efforts obviously necessitated certain changes also in the paradigms of codified private law. The result of this process of comprehensive modification (i.e. Novel) was the HCC's *1977 Novel*. The 1959 HCC had several other Novels until and after the period of the *Political Transition in 1989*, such as the *1996 Novel* on mortgage law, and its *last comprehensive modification* on consumer protection law in *2006*.

The *re-codification process* of the HCC started in 1998. The Head of the Civil Law Codification's *Main Committee* (MC) and the Civil Law Codification's *Editorial Committee* (EC) was *Lajos Vékás* (1939–) from 1999 to 2012 with interruptions. The members of the MC were incumbent political potentates and the legal professions' coryphaei. The EC's members were, however, professors of private law and justices of courts of higher instances. These leading jurists were *György Boytha* (1929–2010), *András Kisfaludi* (1958–), *Tamás Lábady* (1944–2017), *Ferenc Petrik* (1933–), *Tamás Sárközy* (1940–), *Emília Weiss* (1927–2014) és *János Zlinszky* (1928–2015). The outcome of the Committees work was the so-called *Experts'* (otherwise as *Academic*) *Proposal* (2008).

The first *proclaimed* law on the (New) Civil Code of Hungary was the Act CXX of 2009. The then Ministry of Justice—because of some clearly detectable political reasons—ignored Committees' President and Members, thus the result was structurally *inconsistent* and *problematic* in the details. The *Act on Giving Effect to this Code was annulled by the Constitutional Court* with respect to the reason of an *insufficient preparatory period*. In 2010, the new Government adopted a Decision on the re-erection of the former Committees (MC and EC) adding to them the *Civil Law Operative Technical Committee*. December 2011, the *Draft Text* was handed over to the Ministry of Justice, which brought it unchanged to a *Social Debate* in 2012. With a few amended proposals, the Parliament accepted and enacted then the new HCC, i.e. the *Act V of 2013*. The new HCC has *eight books* such as (1) *Introductory Provisions*, (2) *Natural Persons*, (3) *Legal Persons*, (4) *Family Law*, (5) *Law of Rights In Rem*, (6) *Law of Obligations*, (7) *Law of Succession*, (8) *Closing Provisions*. The Chapter on the *law of mortgages* (Book 5) has already been comprehensively modified in 2016 as well as the *law of securities* (Book 6) in 2017.

1.3. A Concise History of Hungarian Private Law Jurisprudence

The *communistic* and later on *socialistic* private law jurisprudence between 1948 and 1988 (1990) was an ideological counterpoint of the so-called '*modern*' Hungarian private law jurisprudence, the deepest direct roots of which were born in the middle of the 19th century. This period was the era of attempts to cease the post-feudal legal regime, the undoubted *opus magnum* of which was *Werbőczy's Tripartitum* elaborated in the 16th century (see above). Our contemporaneous private law jurisprudence is based on the outcomes

of its mentioned 19th century 'modern' period. The starting point of our 'modern' jurisprudence is *Ignatius Frank* (1788–1850), whose 'Principles of Hungarian Civil Law' of two volumes printed originally in Latin ('*Principia juris civilis hungarici*'; 1828–1829) is very meaningful with respect to four reasons:

- the *first* one is the work's high standard of *scientific and abstract* intensity, by which it disunited the private law and the law of civil process;
- the *second* one is that it *examined hundreds of years of judicial practice*;
- the *third* one is its *synthesizing character*, which was capable of building bridges between the threesome fundament of those days' Hungarian legal regime, which were the *Post-Feudal*, the *Pandectist* and the *Austrian* legal basis of it;
- the *fourth* one was that it was *translated into Hungarian* establishing a *new Hungarian terminology of private law*; albeit its language became very obsolete and hardly comprehensible nowadays, its true worth would deserve a much deeper research in connection with the 18–19th century Hungarian process of *Language Reform*.

The *independent Hungarian Private Law Jurisprudence* started in the 1880's, and lasted some six decades until the end of the 1940's, when communist ideology ceased not only Hungarian State independency but also that of legal thinking. According to *Nizsalovszky* (see above), our independent jurisprudence had three different tendencies:

- The *national* trend, the leading authority of which was *Béni Grosschmid* (1852–1938). His monumental collection of essays of two rotund volumes, which is headed as '*Chapters from Our Law of Obligations*' showed a totally new thinking on the subject in a wider European sense, too. Its essential character is well conveyed by the fact that his also prominent disciples—especially *Károly Szladits* (1871–1956)—wrote the '*Gloss*' of three huge volumes for interpreting his legal thoughts to the after-world.
- The *liberal* school was counterpoint trend to the national one in a sense of the differences between the *oeuvre* of *Savigny* and that of *Jhering* in Germany: if the 'Hungarian Savigny' was Grosschmid, it was *Gusztáv Szászy-Schwarz* (1858–1920), who undoubtedly shared—also as his disciple—the role of Jhering. The liberal school supported the idea of private law codification in a special Hungarian manner. This surprisingly meant that the German direction of private law codification is to be avoided, since the Hungarian school denied the necessity of codifying a '*General Part*' ('*Allgemeiner Teil*') as the primal part of a new code. They held that the *Swiss* codification admired also by the *social* tendency (see below) would be a very useful 'tool' for supporting the '*civil liberties*' during the process of the Hungarian private law codification.
- The *social* trend's main goal was to enforce *Social Justice* in private law by expanding it to a much wider range of *immaterial* and *personality rights*. The leading authority of this school was *Artúr Meszlény* (1875–1937), who warmly respected the outcomes of the Swiss private law codification's efforts.

The next period of Hungarian Private Law Jurisprudence was dominated by the mere trend of the *Socialist Civil Law*, which was based on the Hungarian dictatorial political regime supervised, directed and manipulated by an abroad force, i.e. the military and political supremacy of the Soviet Union. Since the theoretical basis was such, the Hungarian Socialist Civil Law did not tolerate either liberal or national 'excursions' in legal thinking. It is not less meaningful that the first effective civil law codification in Hungary was masterminded by the leading authorities of this era. The 1959 HCC (see above) supported the political regime through *emptying the legal notions of private property*, *individual liberties* and *personality rights*. However, its *law of obligation* has been able to offer a legal basis for the period of the *political transition* in 1988–1991 and onwards as well with severe modifications until NHCC (in force from March 15, 2014).

Since this historical chapter of our textbook does not consider its job to review and evaluate the outcomes of the living contemporaneous jurists' *oeuvre*, we finish our survey of Hungarian Private Law Jurisprudence at the beginning of the 1990's.

2. Basic Doctrines of Hungarian Private Law

2.1. The Concept of 'Private Law' and 'Civil Law'

Since the set of the Private Law traditionally incorporated the set of the Civil Law, the previous category had a wider scope than the latter. The main territories of the *historical* issue of Private Law were, namely:

- *Civil Law* including
  - first, the *hardly translatable* category of the German "*Vermögensrecht*" which is *circumscribed* here by the *artificial* notion of *Law of Possessions* composed of the *Law of Rights In Rem*, the *Law of Obligations*, and the *Law of Succession*;
  - and later on including also the *Law of Persons* composed of the *Law of Individuals*, the *Law of Legal Persons*, and, by the codification of the NHCC, the *Family Law*, too;
- and then: *Company Law*; *Commercial Law*; *Private International Law*; *Labour Law*, *Law of Civil Procedure*.

Because of two facts, such clear differentiation of *Private* Law and *Civil* Law cannot be accepted these days. Therefore, *we use these two notions in this book as parallel concepts* with equivalent legal contents. The two reasons, because of what *distinctions* between Private Law and Civil Law *became evanescent*, are as follows:

- The *first* fact was a historical process started from the end of the 19th century, during which *Labour* Law, *Civil Procedural* Law and *Private International* Law *became independent* branches of law due to their public law character intensifying from decade to decade.
- As the *second* reason for the fading distinctions between Private Law and Civil Law, it was the codification of the NHCC, which *in toto* integrated:
  - The complexity of the *Law of Possessions* with that of the *Law of Persons* (see the content of these notions above), and with this broad complexity
  - *Company* Law and *Commercial* Law were also merged.

Therefore, the content of the legal notion of 'Civil Law' is today identical with the scope of the new Civil Code. According to this, we can make a use of the NHCC's introductory norm defining the scope of the Code for the determination of the Civil Law as legal term. This says: "*This Act governs the essential property and personal relations of persons under the principle of interdependence and the principle of equality*" (see NHCC Section 1:1). Correspondingly, *Civil Law is the branch of law, which regulates every essential question of property and personal relations either of an individual or of a legal person by using a regulatory style composed of the Principle of Interdependence and that of Equality*.

2.2. The Sources of Private Law

1. So far as the *main source of Hungarian legal system*, the *Fundamental Law of Hungary* (henceforth: *FLH*) is concerned, it declares that "*the rules for fundamental rights and obligations shall be determined by special Acts*" (Art. I § 3], and, "*subjects of law established by an Act [viz. legal persons—my remark] shall have the fundamental rights and obligations that by nature not only apply to natural persons*" (Art. I § 4].

2. This means that a *legal institution connecting directly to a fundamental right* can be regulated *exclusively in an act*. Therefore, indirectly and more remotely affiliated institutions may be regulated in *derived* legal norms. With respect to these principles, we can divide up the legal norms into two classes:

- norms, which *indisputably* are *direct* and *general* sources of private law, and
- norms, the *direct* and *general* source-character of which *is debated* in private law jurisprudence.

a) According to this, *unarguable direct general sources* are as follows (the extent of the norms' legal scope is top down continuously decreasing):

- The direct and general *primary sources* of private law are the *Acts of Parliament*, the *EU Regulations*, and the *International Agreements*.
- The direct and general *derived sources* of private law are *government decrees*, *orders by the Prime Minister*, *ministerial decrees*, *orders by the Governor of the National Bank of Hungary*, *orders by autonomous regulatory bodies*, *local ordinances*.

b) There are, however, other sources of law—be these either *legal norms* or the FLH itself which is *per definitionem not* a legal norm, viz. it stays *above* them) or such sources which merely *behave as legal norms*—, the direct and general source-character of which, in the sphere of the private law, is *contested*:

- The *Fundamental Law of Hungary* is itself a debated source of private law since there are only a *very few provisions*, which indeed have a *direct* effect also on private law and civil procedural law matters, i.e. for example:
  - *liability for damages caused by authorities during the performance of their duties* (Art. XXIV § 2],
  - *inviolable right of human beings to life and dignity as the direct basis of rights relating to personality* (Art. II),
  - and the *general principle of application of laws* (Art. 28).
  - The *major part* of FLH-articles and paragraphs have a mere *indirect* scope in private law matters.
- *Decisions of the Constitutional Court* (see below as CC) can both *indirectly* and *directly* affect a certain private law *dispute* between the subjects of law [cf. Art. 24 § 2 b)–d), and Art. 24 § 3 a)–b) of FLH]:
  - at the *proposal of judges*, CC reviews any piece of legislation applicable in a specific case for conformity with the FLH, and annuls any piece of legislation which conflicts with it;
  - by a *constitutional complaint of a participant* in a concrete case,
    - CC also reviews any piece of legislation applied in the specific case for conformity with the FLH, and annuls those which conflicts with it;
    - CC reviews any court ruling for conformity with the FLH, and annuls any court ruling which conflicts with.
- Hungarian Supreme Court—called the *Curia* (*Kúria*)—makes *Decisions on the Uniformity of Law* for ensuring uniformity in the judicial application of laws. With respect to this duty, these decisions are binding on courts (cf. FLH Art. 25 § 3] applying e.g. the sources of private law. Since Decisions on the Uniformity of Law do not directly bind the subjects of law, they are not legal norms. However, as courts are to apply these Decisions mandatory, they have an indirect effect on the legal stand of subjects of law, therefore the CC stated that Decisions on the Uniformity of Law *behave as legal norms* [CC Decision 42/2005 (XI. 14).
- There are other *judicial* remedies for the purpose of ensuring uniformity in the judicial application of laws, too. Such are the *Opinions*, and the *Commitments of Judicial Collegiums* and the *published case-by-case decisions* either of the *Curia* or that of the *Regional Courts of Appeal*. These courts can enforce the use of their legal reasoning for similar cases through the review procedures (Curia) and the appeal proceedings. Courts of lower instances, such as the courts of justice and the district courts, therefore, deliberately follow the legal reasoning of the courts of higher instances.
- The *Directives of the EU* undoubtedly have effect upon private law institutions and regulations (e.g. consumer protection law), although this scope is merely indirect.
- The *Case Law of the European Court of Justice* and that of the European Court of Human Rights also can influence civil law matters, albeit in a more remote way. Case-by-case decisions can directly concern the special rights and obligations of subjects of law participating in the very legal process of the named courts.
- The problem, according to which *customary law* also functions as a source of private law, is an important and debated issue, too. However, the NHCC itself defines matters, in which the usages of the parties can behave as a special source of law, if they are judicially approved. Some of these cases are as follows.
  - Minors of limited capacity shall, without the involvement of their legal representatives, be entitled to conclude contracts of minor importance aimed at satisfying their everyday needs (cf. Section 2:12 § 2 b).
  - With exception of everyday dealings, an executive officer and his close relatives may not conclude any transactions falling within the scope of the main activities of the business association in his own name and on his own behalf (cf. Section 3:115 § 2].
  - Separate property of a spouse shall include personal effects and articles of personal use of customary value (cf. Section 4:38 § 1 e).

- When in doubt, ownership shall also extend to parts that are not components but are usually necessary or beneficial for the proper use … of a thing (cf. Section 5:16).
- Unless proven to the contrary, it shall be presumed that the sale of the pledged property is conducted under the principle of reasonable commercial practices if the sale takes place under normal market terms usually employed in the commercial sale of pledged properties (cf. Section 5:133 § 2 b).
- In commercial establishments and in publicly accessible places any person who is presumed under reasonable grounds to be authorised to make pertinent legal statements shall be construed as a representative (cf. Section 6:18 § 1].
- Under the contract the parties shall be bound by any usage which they have agreed on in prior business dealings and by any practice they have established between themselves. Furthermore, the parties shall be bound by a usage which would be considered generally applicable and widely known in the given sector by parties to similar contracts, unless such usages and practices are likely to conflict with contract terms which have been previously negotiated between the parties (cf. Section 6:63 § 5].
- The other party shall be explicitly informed of any standard contract terms that differs substantially from the relevant legislation and from usual contractual practice, except if they are in line with any practice the parties have established between themselves (6:78 § 2].
- If the buyer fails to make the statement within the time limit usually deemed necessary for testing the thing or within the deadline set by the seller, the contract shall remain in effect (cf. Section 6:229 § 2].
- Gifts of ordinary value shall not be reclaimed (cf. Section 6:237 § 5].
- If the agent is entitled to conclude the contract he has negotiated, his right of representation shall cover all legal statements which are usually required in connection with negotiated contracts (cf. Section 6:294).
- Among the provisions of intestate succession, by the obligation to restore gifts, NHCC orders that advancements of common value shall not be treated as advancements even if the decedent expressly stipulates it (cf. Section 7:56 § 3].

– With respect to the principle of '*contractus contrahentibus legem ponit*', which reads as "*a contract for the parties shall be regarded as law*", there is a standpoint, according to which a *negotiated contract* is not only a matter of fact but also a legal source, from which the parties' rights and obligations arise.

2.3. The Doctrine of Private Law Norms

Since private law regulates the ess*ential questions of property and personal relations* either of an *individual* or of a *legal person* by using the *principle of interdependence and equality*, the characteristics of a private law norm shall also have peculiar items, which distinguish these norms from the generally defined and classified notion of 'legal norm'.

Some basic principles and classifications of the *General Theory of Legal Norms* can also be applied within the *Doctrine of Private Law Norms*, too.

– The content either of '*natural law*' or of '*divine law*' norms is *acrosanct*', therefore these are *untouchable by the State's legislative power*, which cannot constitute their merely declarable legal content. For instance, the NHCC declares theoretically that, with some exceptions, „all torts shall be considered as unlawful" (see Section 6:520). The norm constituting the general liability for damages (cf. Section 6:519 below) is directly based on this very declaration. The legal background of the declaration in Section 6:520 is the divine or natural law command (*praeceptum iuris*), according to which „*alterum non laedere*", viz. „not to injure one" (stated Ulpian; cf. Digest of Justinian 1, 1, 10, 1).
– According to *Legal Positivism*, the content of a legal norm is the *command of the State*, thus the expression of the legislator's will for appointing the boundaries of the persons' expected behaviour. See e.g. „any person causing damage to another unlawfully shall be liable for it" (6:519).

- An '*institutional norm*' defines the content of a legal institution's technical term (legal notion) through either *definitive* or *interpretative* norms. A '*behavioural norm*' specifies the substance and form of the anticipated conduct of the subjects of law. See for instance the definition of the "business association", according to which „a business association is a legal person established for the pursuit of business operations with financial contribution provided by its members, where each member has a right to a share of the profit and an obligation to participate in covering the losses" [Section 3:88 § 1].
- There are *autonomous* and *non-autonomous* norms.
  - An autonomous norm contains both *hypothesis* and *legal effect*.
    - The so-called *matters of fact* (*hypothesis*), implies the relevant facts and circumstances of the world surrounding us, under the occurrence of which the norm aims to achieve the expected legal effect motivated by the social standing either to be maintained or to be changed. Hypotheses can be colourfully classified since:
      - there are *general* and *special* hypotheses,
      - there are hypotheses that *declare the rule* and that *declare the exception*,
      - there are hypotheses that are *fully defined* and that use *abbreviated legislative structures* such as *legal fictions*, and either *rebuttable* or *irrebuttable presumptions*.
    - *Legal effects* are *threefold*.
      - Namely, the legal effect called '*disposition*' can constitute either a private law *duty* either for *doing something*, for *doing something else*, for *tolerating something* (*imperative norms*), or for *doing nothing* or *not doing something* (*prohibitive norms*);
      - There is a legal effect called *positive legal consequence*,
      - and another one called '*sanction*', which is a *negative* legal consequence, such as *liability* or *responsibility*. Private law sanctions have a variegated classification since we can distinguish, on the one hand, *reparative*, *restrictive*, and *preventive* sanctions, and, on the other hand, *objective* and *subjective* sanctions.
  - A *non-autonomous* norm is to be implemented either by the content of *other norms*, or by *meta-juristic*, i.e. non-juridical *items* such as *ethical* or *moral* issues (e.g. good faith, morality, equity), and *social customs*. Non-autonomous norms are deficient since these do not have hypothesis or are lack of legal effect or have none of them. Such norms are:
    - the *restrictionary* otherwise *qualificatory* norms, which narrow the scope of the law to be implemented by these (e.g. "The legal capacity of legal persons shall cover all rights and obligations that do not inherently pertain solely to individual human beings."; cf. 3:1 § 2];
    - the *ampliative* alternatively *denotative* norms, which broaden the scope of the law to be applied together with itself (e.g. "the provisions pertaining to things shall apply to animals in accordance with the statutory provisions laying down derogations consistent with their natural characteristics"; cf. Section 5:14 § 3];
    - the outcomes of *framework legislation*, e.g. the so called '*general clauses*', the deficient legal content of which is *implemented by legal and non-legal items* determined either by the parties or by the jurisdiction (such elastic wordings as e.g. "disproportional" or "important ground");
    - an *institutional norm* is either a *definitive* norm (e.g. the definition of LLC in Section 3:159) or an *interpretative* norm (defining how shall be the notion of "consumer" explained when the NHCC uses this term; cf. Section 8:1 § 1 point 3).
- Private law norms can be either *dispositional* or *mandatory* rules:
  - a dispositional norm *permits derogation* by the parties' unanimous declaration;
  - the content of a *mandatory* rule is *binding* irrespective of the parties' common intentions.
- Private law norms have *three different kinds of scope*, namely the *territorial*, the *personal*, and the *temporal* scope. The question of private law norms' temporal scope brings up a constitutional law issue, too. Namely, the problem of retroactive effect is a sensitive item since a novel law may touch legal relationships, which came into existence during the former legal status (*status quo ante*), i.e. before the new law's force. Which are the boundaries of the lawmaker? The constitutional principle of

preservation of acquired rights and the principle of legal certainty shall be guaranteed also in private law matters. Thus, NHCC declares that "*if the contents of an existing contract are to be amended pursuant to a newly adopted legislation, and the amended content of the contract is against the relevant lawful interests of any of the parties, the party so affected shall be entitled to request the court to amend the contract, or shall be entitled to withdraw from the contract*" (6:60 § 2].

2.4. The Theory of Private Law Jurisdiction and Norm Application

The *rights afforded in the NHCC are protected by legal remedies under the authority of courts*. Therefore, these rights may be enforced by *judicial processes*, and no other sources of law but *Parliamentary Acts may provide otherwise* (cf. Section 1:6). Thus, exceptionally, *courts of arbitration* (Act LX of 2017 on Arbitration) and *administrative authorities* (e.g. the *notary* in cases arising from protection of possession) may also be *non-judicial forums* of private law norm application. The *application of abstract norms to concrete cases* which have relevant specific circumstances as well as peculiar facts is an *intellectual effort* sometimes in an 'artistic' high level. The 'forums' for applying private law are of triplex kind:

- Such sophisticated activity of courts is called the '*Jurisdiction*' after the historical Latin phrase of "*ius dicere*", i.e. "to speak the law".
- But if law is applied by non-judicial fora, we call this form simply '*application of law*' or '*private law norm application*'.
- It is also private law application, if *subjects of law unconsciously use private law to form* contracts or other private law facts for obtaining their personal goals.

With respect to the fact that there is no perfect, infallible, and seamless entity created by human intelligence, and, therefore, even legal systems are imperfect, incomplete, and lacunar ("*lacuna legis*" means "the gap of the law"), the role and the *methodology of jurisdiction* and that of private law norm application is a basic problem of jurisprudence. Private law norms' application has three kinds of approaches as follows.

- *Judicial* application of law is a *logic operation* of special kind, during which the judge, who is the subject of the process of applying an abstract legal norm, leads the procedure composed of the following elements:
  - *cognizing the facts* provided by parties or obtained by other licit methods in a legally bound procedural order of probation;
  - detecting and then *separating the relevant facts* from the previously attained mass of data; a fact is relevant since it is significant, substantial, and indispensable for making the decision;
  - settling and *defining the matters of facts* of the special case from the *composition of relevant facts*;
  - *searching the abstract norm* demanding application for the specific case by using different *methods of legal interpretation*, and thereafter subjecting the case's matters of fact to the abstract norm's hypothesis (*subsumption*);
  - after subsuming the case to the norm, there is another operation to be performed, which is the *application of the norm's legal effect* (*disposition* or *positive legal consequence* or *sanction*) to the case.
- The interpretation of private law norms is nonetheless an essential element of the procedure of *application of law*. Jurisprudence holds that there are three kinds of interpretation with respect to the type of the subject conducting it. Namely, laws can be interpreted not only by jurisdiction but also by the lawmaker (*interpretatio authentica*), and likewise by jurisprudence (*interpretatio doctrinalis*), too. Jurisdictional interpretation of law has many different *techniques*:
  - the *grammatical interpretation* examines the text of the norm from the angle of the rules of grammar; if its outcome is dissatisfactory, the next step is:
  - the *logical interpretation*, during which the content of the special law can be detected through the inherent order of the norm; if this method also leads to unsatisfying result, the following approach is:
  - the *systematic interpretation* of the contexts and textual surroundings of the specific law to be applied; the legal context is to be investigated within the same act (order, decree etc.) and in

other acts (orders, decrees etc.) and in the Fundamental Law or in general principles of law as well; if the conclusion of this way of interpretation remains disappointing, the next manner is:

- the *teleological interpretation*, which researches the aim of the lawgiver for making that specific textual appearance of the law, and closely linked to this method:
- the *historical interpretation* of law provides the cognition of the law's socio–economic background by the time of its enactment.
- The Fundamental Law (FL) creates an elegant *combination of methods* of legal interpretation. To follow this direction—let us call it *constitutional interpretation of law*—is the *duty of courts*. The Art. 28 says that 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.* (While examining the purpose of the regulation, the Preamble thereof and then the Motives of its Bill making or amending law, shall be taken primarily into consideration.) *When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good*". (The sentence standing between square brackets above shows the *newly inserted text* through the FLH's *Seventh Amendment* coming into force *from 1 January 2019*.)

– The mentioned *legum lacunae* (*regulatory gaps* or *legal vacuums*) can cause three kinds of defects in the process of application of law. The one unlucky outcome is the applicable norm's inapplicability (*applicatory gap*), and the other dissatisfying result can be either the unacceptable effect (*critical gap*) or the versatile conflicting consequence (*alternative gap*) of the application of law.
– The main method applied for *terminating* such legal vacuums is the *analogy*. Analogy transfers the legal effect of a parallel norm enacted for cases similarly as the case, which shall be decided without any direct law enacted for it (*analogia legis*). If there is no parallel law enacted for similar cases, also general principles of law can be used for making the decision (*analogia iuris*).

2.5. The Doctrine of Private Law Relationships

1. Private law governs the essential *property* and *personal relations of persons* [Section 1:1 of NHCC). These relations can be called 'life situations' (or otherwise life conditions). The mentioned life situations, since they have been regulated by law, transform into '*legal situations*', which can be variously classified.

The one group of legal situations incorporates the *single person's legal position*.

– The one sub-division of this group contains the *single person's legally relevant capabilities* called *capacities of law* such as e.g. the *main capacities*, i.e. *legal capacity* and *ability to act*. There are also *sub-capacities* of persons belonging to one of the mentioned main capacities such as the capacity *to inherit*, the capacity *to contract*, the capacity *of acquisition of property*, the capacity *to commit fault* (with liability for the committed damage), the capacity *of making decision for one's own* etc.
– The other sub-division of this group of legal positions implies the *single person's legally relevant standings* called *status*. In case of human beings (natural person) such is e.g. the gender; the age; the family law status; the name; the intentive, volitive, emotive condition of a person; the physical or mental (dis)abilities; the habitation or residency. In case of legal persons such standings are among others its status of registry, place of registered office as well as its name.

The other group of legal situations involves not the single persons' legal positions but the *interpersonal relationships of two or multiple persons*. This special legal—i.e. legally regulated—situation of multiple persons is called the *legal relationship*. Legal relationships in the territory of private law are named as *private law relationships*. Legal relationships as such can exist only between persons, i.e. *solely between the subjects of law*. Referring also to examples of legal history, some trends in private law theory say that a legal relationship can exist *between subject of law and object of law* or even *between objects of law*, too. This approach is, however, totally misleading and false. This statement is proven by the achievements of ancient Roman law, too. This nearly two millennia old legal system, without any demand for an abstract legal definition of the notions of 'subject of law', 'person' or 'legal relationship', obtained that a legally relevant connection between a subject of law and an object of law is not a legal situation but a *power position* called '*potestas*'. It also achieved that an interrelation between the objects of law is by no means a legal relationship but a

so-called *coherence of things* (called in Greek originally *συνημένον* (*synemenon*) and in Latin *cohaerentia corporum*; cf. Sabinus/Pomponius, in: Digest of Justinian 41, 3, 30 *pr.)*.

2. Private law relationships' four major attributes are *(a)* the *structure*, *(b)* the *subject*, *(c)* the *object* and *(d)* the *content* of the relationship.

Ad (a) With regard to the *structure of private law relationships*, there are *relative* and *absolute* private law relationships. The legal relationship is relative if *every subjects* of the relationship are *certain* (*defined*). Since *only up to one subject is certain*, the relationship is *absolute* in its structure, therefore the other subject of these relationships is theoretically an uncertain mass of people (namely, if the number of mankind is *N*, the number of this side of relationship is *N–1* where *1* is the entitled party). Legal relationships arising from *obligations*—such as *contracts*, *quasi-contracts* (e.g. *unjust enrichment* or *negotiorum gestio*), and *torts*—are generally *relative* but *in rem* legal relationships are usually *absolute*.

In a *relative* private law relationship, parties are *originally defined certain* persons. Without certain subjects of relationship, no relative private law relationship can exist. Therefore, relative private law relationships without two well-defined certain subjects are called *non-existing* or *failed* (*not formed*) legal relationships.

In an *absolute* private law relationship, solely the party entitled by law is defined, and all other persons are obliged to *acknowledge* this party's rights, and to *tolerate* the exercise of these rights, and to *desist from* violating the entitled party while exercising his/her rights as well. An absolute legal relationship *transforms into relative*, if a certain person of the faceless mass of persons standing in the obliged side of the private law relationship wrongfully acts and hurts the position of the other (originally certain) party standing in the entitled side of the legal relationship. The infringement of the obligation of acknowledgement, tolerance, and desistance *creates* an *obligation*—a *relative* legal relationship—between the *infringed* (*injured*) party and the *infringer* (*injurer*) party for the *desistance of infringement* and for the *compensation of disadvantageous consequences of the harm* (i.e. the *conflict of interests* or e.g. a *damage*).

Ad (b) The *subjects of private law relationships* based on *the principle of interdependence and the principle of equality* (cf. Section 1:1 of NHCC) can be classified with respect to their position in the legal relationship:

- the *entitled* party (*creditor*, *obligee*) standing in the *active* side is called '*dominus*' (i.e. 'master'),
- the *bound* party (*debtor*, *obligor*) standing in the *passive* side is called '*servus*' (i.e. 'servant').

This *axiomatic dogma* of *dominus–servus* figuration of private law relationship is, however, *misleading and false* in respect of several reasons, namely:

- The relationship of *dominus* and *servus*—parallel to that of master and servant—is by nature *hierarchical*, which is not at all familiar with private law relationships, which are based on the principles of *interdependence and equality* (cf. Section 1:1 of NHCC).
- In vast majority of private law relationships, and typically in contractual obligations, parties can simultaneously take *both* of these positions with respect to their *main* rights and *main* duties; see the example of the position of a purchaser (buyer, vendee) who is *synchronously* entitled to the purchased thing and obliged to pay the price, and *vice versa* the seller.
- *Activeness* and *passiveness* in different sides of private law relationships can be proper interpreted rather in *absolute*, i.e. *in rem legal* relationships, *not* in *relative* ones; viz. the legal position e.g. of an *owner* (a *proprietor* or a *possessor*)—as the sole certain party of an absolute legal relationship—, which is *rather active* than passive because this party is *entitled to exercise* his/her rights, faces the legal position of the other side of the legal relationship, which is originally not defined, and which is bound *solely to passive* forms of conduct (behaviour): i.e. the acknowledgement, the tolerance, and the desistance from violating). In *obligations*, and especially in *contractual relationships*—where parties usually do take both types of subjectivity (viz. that of *dominus* and *servus*)—*activeness* is characteristic even in the side of the *servus* (debtor, obligor), since it is *bound to act*: i.e. to perform his/her duties, but *dominus* (*creditor*, *obligee*) is obliged typically to a *passive* conduct (behaviour): i.e. to accept the (good, satisfactory, adequate, proper) performance.

Ad (c) Theoretically, the *object of private law relationships*—as in case of every kind of legal relationships—is twofold: *direct* and *indirect*. The *human conduct* (*human behaviour*) is held to be the *direct* object of private law relationships, in the background of which always stands a normatively preferred interest called *legal interest*. The *indirect* object is the asset—tangible property, right or claim—itself, which the human behaviour is directed to. For instance, as a human behaviour, the *performance of a private law duty* is the *direct*

object of a private law relationship, while the *certain asset targeted by that very performance* is the *indirect* object of it. Similarly, the *direct* object of a *personal* or a *family law relationship* is also human behaviour. However, the *indirect* object of such legal relationships is hardly detectable since an *asset* can be the object of these human conducts *very exceptionally*. Therefore, it seems more correct to state that the *indirect* object of a personal or a family law relationship is rather the *legal institution* (e.g. the *marriage*), which is *targeted by the human behaviour* (e.g. the *act of marriage*).

Ad (d) The *content* of the private law relationship is *the composition of substantive rights and duties arising from it*. No substantive right can exist without its subject, i.e. without a subject of law entitled to this very substantive right. The *substantive right of a subject of law* (person) means his/her *possibility to act protected by State powers*. This protection applies through judicial processes and procedures of administrative authorities within the boundaries of substantive and procedural laws. Substantive rights can be classified in multiple ways with the remark that these versions of substantive rights below are often combined with each other from practical reasons:

- There are *material rights*—such as rights *in rem*, contractual rights and inheritance rights defined altogether as "proprietary rights"—, and *immaterial rights* or otherwise known as *rights relating to personality*—such as privacy, personality rights of individuals and inherent rights of legal persons.
- On the one hand, *exclusive rights* (or *rights to exclude*) arising usually from absolute private law relationships grant the exclusion of others from the enjoyment of that specific right. On the other hand, *claim rights* (or *rights to claim*) emerging generally from relative private law relationships allow its subject to seek a certain direct object of legal relationship, i.e. a certain human behaviour—e.g. transferring a certain asset, paying a certain sum of money or giving a defined compensation which are the indirect objects of the legal relationship—from the other, i.e. the bound party.
- On the base of an *active* or *positive right*, the entitled party can claim for the *active behaviour* of obliged party such as *doing, giving, acting something*. On the ground of a *passive* or *negative right*, the entitled one can demand a *passive* conduct or *non-conduct* from the bound one like *doing*, *giving*, *acting nothing*.
- There are moreover *marketable* (or *negotiable* or *transferable*) *rights*, and *non-marketable rights*. I shall emphasise with respect to the *combinations* of substantive rights' genres that marketable rights are by nature usually material positive claim rights, while non-marketable rights are immaterial exclusive negative rights in principle (see above).
- *Perfect rights* are those, which have already come fully in existence, while there are also such kinds of substantive rights, which have not yet completely formed (*prospective entitlements*). These last ones are called *reversions* (see detailed below);
- Some rights can only be exercised with respect to other rights but there are also special substantive rights called *mightiness* or *formative right*, which are totally independent (see below).
- There are substantive rights concerning duties, which can yet be performed *only voluntarily*, but the other part of rights concerns such duties, which can be *either voluntarily performed or claimed in a lawsuit and executed by enforcement procedures* granted by State powers. This one is a *special phase* (or *condition*) of the substantive right called *demand* (*Anspruch*).

Rights can be acquired either with respect to other person's already existing rights (*derivative acquisition of rights*) or regardless of these (*original acquisition of rights*). *Derivative* acquisition is called otherwise *succession*. There are two different types of succession:

- In case of a *universal succession*, a person's *every* transferable asset as whole, is acquired by another person (i.e. *successor*) in a single momentum (e.g. inheritance).
- In the event of a singular succession, a person's specific transferable asset or a defined group of transferable assets is acquired by another person (*successor*) also in a single momentum (assignment).

The acquisition of a right shall be seen as a process. The part of this process, which lasts until the very final point before the perfection of acquisition is called a *pending legal situation*. A *reversion in rem* (or otherwise an *absolute* reversion) is that kind of pending legal position, in which the acquisition of right has not yet become perfect but it also cannot be hindered or interrupted anyhow. The subject of the right in this phase of its acquisition is called *reversioner*.

While a *reversioner* cannot be hindered by others to acquire certain rights for him-/herself, a *subject of mightiness* (or that of a *formative right*) cannot be restrained from causing changes either in his/her legal

position and/or the legal situation of others by his/her own conduct or behaviour. Therefore, the subject of law entitled to a formative right can aim:

- either *his/her own legal position* for *acquiring* rights (e.g. purchase options, cf. Section 6:225; occupation, cf. Section 5:52), for *cancelling* own rights (e.g. right for termination; dereliction), and for *modifying* own rights (e.g. the right to select one from more alternative services; Section 6:134);
- or *other person's legal position* for *acquiring* rights for another person (e.g. right to sell; cf. Section 6:225), and for *cancelling* a right of another (via a counter-right or a counterclaim e.g. of limitation).

As we have seen, the content of private law relationships incorporates two components being in a *co-dependent relation* with each other: the *substantial rights of private law* plain called 'rights', and the *substantial duties of private law* simply called 'private law duties' or mentioned in a more artless way as 'duties'. Private law duties are often identified with '*obligations*'. However, the technical notion of *obligation* means only those private law duties, which arise from *relative private law relationships of the law of obligations*. But, with respect to the fact that absolute private law relationships are to *become relative* ones because of their *harm* (see above), an *in rem duty may indeed transform into an obligation*.

The *way of performance* of private law duties is either *voluntary* or *enforced by law*. The major part thereof is legally—i.e. through State powers—*enforceable*. In the *phase of legal enforceability* of a private law duty, the *subject* of duty is not only bound (obliged) for the performance, but also liable for it.

The phase of *being bound in a private law meaning* (in German terminology called '*Schuld*') is less strict and less oppressive than that of *private law responsibility* (i.e. *liability*; '*Haftung*') which means that the bound party, in the case of *non-performance*, with respect to the *contents of his/her liabilities*, is *oppressed by enforcement law to perform duly*. There are also *non-enforceable* private law duties, these are called natural obligations, e.g. the claim for which has already been lapsed (cf. Section 23 § 1 of NHCC).

The main category of *private law responsibility* has two sub-divisions:

- The one legal situation is, wherein the subject of law is responsible *fully or partially* with his/her *assets* (*accountability with assets* or *asset-liability*). In private law, subjects of law are *typically* liable only *with their assets* (e.g. in the case either of *damage* or of *breach of contract*). There are two kinds of *asset-liabilities*:
  - As a rule, in private law positions, a person is *fully* accountable with his/her/its patrimony (i.e. with the total assets as whole). This kind of asset-liability is called *unlimited liability*.
  - Exceptionally, if law expressively orders, a person may also be liable *partially*, namely, with a certain, i.e. *legally separated part of patrimony*. This version is named as *limited liability*.
- The other legal position is, wherein the natural or legal is responsible with his/her/its personality. This is the legal situation of *personal liability*. For instance, a person may be liable with his/her/its own personality for *giving a satisfaction* as a compensation for immaterial damages [Section 2:51 § 1].

As we have seen, a *demand* is a *special phase of a substantive right*, which emerges when the bound party does not perform his/her duty perfectly. In this special phase of rights, thus in case of a demand, the *content of the right* and its counterpart, i.e. the *content of the private law duty*, is *legally enforceable by means of State powers*: either, typically, by judicial proceedings, or, exceptionally by public authorities or arbitration. The legal nature of demands is basically twofold:

- Demands arising from rights established by *absolute* private law relationships (typically by *in rem* legal relationships), are enforceable *regardless of the duration of time* since the emergence of the specific demand (i.e. since the non-performance of the right). These *do not lapse by passage of time*.
- Demands arising from rights established by *relative* private law relationships (typically by contracts or other obligations such as damages or unjust enrichments), are enforceable *with respect to the duration of time* passed since the emergence of the demand (e.g. the non-performance of the contract). These demands *do lapse by passage of time*, i.e. usually *after 5 years of limitation period*.

3. The major factors adjusting private law relationships are called *legal facts*, which are *legally relevant* matters of fact. Their significance with respect to legal relationships is based on the effects they cause in the legal position of a person through *establishing*, *modifying*, or *terminating rights*, *duties*, *obligations*, or *legal enforcement possibilities*. A certain combination of given legal facts shapes the *facts of the case*, which is to be tallied by the judge with the *matters of fact of the norm* (*hypothesis*) to be applied. *Legal facts are hardly numerable.*

The following *classification* of legal facts is based on a revised and actualised system elaborated by the older Hungarian dogmatic of private law.

– The one major category of legal facts is the main class of *circumstances concerning human being*s.
  - Its major sub-class contains the richly various phenomena of *human behaviours*, which can be further classified as follows:
    - *lawful behaviours*, which are to be systematised in the followings:
      - a so-called *private act* can be
        ⇒ either a *legal act*, which can either be a *legal transaction*—a legal act *establishing*, *modifying*, *or terminating a substantive right*—or a *litigation*—a *legal act for the enforcement of substantive rights*—
        ⇒ or a so-called *real act* (in the meaning of the German notion of *Realakt*), i.e. a special human behaviour, the subject of which *does not consciously* intend to produce or obtain a certain legal consequence, although his/her behaviour as a legal fact *does produce* such by law (see for instance the case of occupation, which leads to acquisition of property irrespectively of intentions or cognition of the occupant);
      - the so-called *acts of public authorities* shape the other part of lawful human behaviours, which are to be taken as the activity of a public body exercising State authority for applying the law (e.g. the court), and, as such, have effect on private law relationships through *State power of compulsion* (*enforcement*). These acts can have:
        ⇒ either a *constitutive* effect shaping directly the legal relationship through forming its content, e.g. the substantive rights,
        ⇒ or a *declarative* effect, which merely declares the existence, the content, the lawfulness or, contrarily, the wrongfulness of a legal relationship.
    - Generally speaking, there are, according to sane mind, *lawful* and *unlawful* human behaviours (see the latter below). However, between them, there is also an interesting *transitional middle class* of human behaviours that are *neither lawful nor unlawful*. This '*grey zone*' contains those demeanours, which *are not unlawful but are sanctioned* somehow. The reason for this specific sanctioning lies in the behaviour's character of being simultaneously not completely unlawful and not totally lawful either. Such is the *behaviour through own personal negligence* (*Eigenverschulden*). The aggrieved party is, for instance, obliged to damage control, prevention and mitigation of damages. Insofar this party breaches one of these obligations through a behaviour not reaching the standard of reasonable conduct, the tortfeasor's liability for damages totally or partially passes to this one (cf. Section 6:525 § 1]. As to the previous example, the so-called *implicit conduct* (*estoppel* is a related institution in English law). If so, the court may order the party to pay damages in full or in part whose wilful conduct has explicitly induced another bona fide person to act in a way from which damages have occurred to him/her without any fault or negligence of his/her own (see Section 6:587).
    - The afore mentioned third group of human behaviours contains *unlawful* otherwise *wrongful* behaviours. There are two ways to classify these legal facts.
      - At first, from the angle of the person *carrying out the conduct*:
        ⇒ *objective wrongfulness*: on the one hand, there are conducts, the unlawful character of which is *independent of* such qualities of the wrongful party as:
          - *consciousness*: *bad* or *good faith* while acting,
          - *volition*: *intentionality* or *negligence* as to the conduct,
          - *the lack of generally expected due diligence under the certain circumstances* (cf. NHCC Section 1:4). Such unlawful behaviour is e.g. the *breach of contract*. It is contrary to law regardless of the defaulting party's here enumerated circumstances, which, therefore, cannot take away any parties' performance liability.
        ⇒ *subjective wrongfulness*: on the other hand, there are demeanours, the unlawful attribute of which *does depend on* the circumstances mentioned above, i.e.:
          - *consciousness*: *bad* or *good faith* while acting, see e.g. wrongful possession (Ss. 5:9–12),

- ♦ *volition*: *intentionality* or *negligence* as to the conduct, see e.g. insurance companies' right of exemption from payment obligation (cf. Section 6:464),
- ♦ *the lack of due diligence*, see e.g. the tortfeasor's liability while being unable to prove that the damaging action was fit to the standard of expected due diligence (6:519).

o Secondly, from the viewpoint of persons *who differ from the one carrying out the conduct*

⇒ *absolute wrongfulness*: such behaviours are unlawful towards *everyone*; e.g. *private law delicts* with respect to the general prohibition of injury) and

⇒ *relative wrongfulness*: these demeanours are unlawful towards *legally defined certain persons* (not against everyone); e.g. the *lack of conformity* which is unlawful merely towards the entitled party (creditor).

- The second main group of legal facts belonging to the major group of circumstances concerning human beings is the pile of *non-behavioural human facts* which can be classified as follows:
  - an *objective human circumstance* is the collection of the person's legally relevant standings which is named together as the '*status*'; such status-element may be e.g. the age, gender, residence, habitation, domicile, family law status, physical and mental health, disadvantageous financial and economic situation, foetal status, and moreover the fact of birth or death;
  - *subjective human circumstances* are:
    - o the human *condition of consciousness*:

      ⇒ a *man of good faith* does not have and must not have any knowledge about the fact that the apparent situation differs from the real one;

      ⇒ a *man of bad faith* has or ought to have knowledge about the fact that the apparent situation differs from the real one;

      ⇒ a *man being in mistaken* is wrong in connection with the factual truth of a circumstance, or has insufficient knowledge about the relevant facts of a circumstance;

      ⇒ *foreseeability*: the *legal expectation* against a person to *have knowledge* about *certain details* of a *future circumstance* (cf. Sections 6:73, 6:142, 6:192, 6:245, 6:521, etc).
    - o the human *standing of volition*: such is e.g. the *blame* or *fault* of a human being, which is the volitional relationship between person and his/her own behaviour or its possible consequences, which can be

      ⇒ the *will* of the conduct's outcome (*intentionality*),

      ⇒ the *acquiescence* of the demeanour's result by omitting the generally expected due diligence (*negligence*);
    - o the *emotional state* of a person, such as e.g. the forgiveness or the distrust otherwise the loss of confidence; these have legal relevance according to family law, law of succession (e.g. unworthiness to inherit), a fiduciary transaction (mandate, or fiduciary asset management), and gratuitous contracts (e.g. withholding and recovery of gifts).

– The other major category of legal facts is the main class of *circumstances being independent of human beings*. It has *two* groups of elements:

- *time* and *course* or *passage of time*: the relevance of these facts emerges in connection e.g. with *time limits*, *dates* and *periods*, and the institutions of *limitation* and *usucapion* etc. (details see there);
- *natural factors* qualified as *Acts of God* (*force majeure*):
  - the *circumstances being not under humans' control* is relevant according to contractual liability (6:142), agricultural services contract (6:255), contract of carriage (6:263, 266), exclusion of indemnification in agency contracts (6:299), damages caused by game animals (6:563);
  - *malfunction* in case of hazardous operations' interactions (6:539);
  - *inevitability* or *unavoidability* in respect of liability for hazardous operations (6:535), damages caused by game animals (6:563).

NOCHTA, TIBOR

FUNDAMENTALS OF THE LAW OF PERSONS

Contents:

1. GENERAL RULES OF LEGAL PERSONS

1. *Legal capacity* of legal persons. The Civil Code recognizes the *legal persons* beside humans as the *subject* of *civil-law relationships*, which means that in civil legal relations, *subjective rights and obligations belong to them*. All legal persons shall have *legal capacity*; they shall be entitled to have rights and obligations. The *legal capacity of legal persons shall cover all rights and obligations* that *do not inherently pertain solely to individual human beings*. As opposed to humans the legal person *has no capacity to act,* however, t*heir legal capacity is equivalent* with that *absolute legal capacity r*egard them in their external relations. Only humans have *personality* as well, legal person have not. The legal capacity of legal persons *shall not cover all rights and obligations that inherently pertain solely to individual human* beings. (the right for dignity, the right for honour, etc.) however several rights and obligations pertaining to humans are interpretable (right for name, right for good reputation, etc.) and to exercise these rights may also be important for a legal person.

2. *Standardization requirement*. Legal persons shall be founded in a *legally determined standard organizational* structure type: *association; business associations; cooperative; union; foundation.* The legal person *shall be founded in a type defined by law, established and in the pursuit of any activity and purpose not prohibited by law, the constitution conflicting with these provisions shall be null and void (mandatory principle).* The legal person *must have its own name, registered office, assets separated from the founders and members, and an organization providing its management and representation.*

3. *Liability for the legal person's debts*. Legal person is an *independent legal entity (stringent asset separation principle) it shall be liable for their debts with their own assets*; members and founders of a legal person *shall not be held liable* for the legal person's debts. In the event of *abuse of limited liability* on the part of any member or founder of a legal person, on account of which any outstanding creditors' claims remain unsatisfied at the time of the legal person's dissolution without succession, t*he member or founder in question shall be subject to unlimited liability for such debts. (Liability transfer principle)*

4. *Foundation*. Legal person by means of a *contract*, *charter document* or *articles of association,* and shall *themselves decide* on the legal person's organizational structure and operation arrangements *(freedom of establishment).*

Partnership agreement	*Charter document*	*Instrument of constitution*
- general partnership, (kkt.) - limited partnership (bt.) - private limited-liability company (kft.) - groupings	- Association - Cooperative - public limited company (nyrt.) - private limited company (zrt).	- Foundation - One person private limited-liability company (kft.) - One person Ltd.

Based on the principle of claudication dispositive as regards relations between members and founders, and between them and the legal person, and as regards the organizational structure and operational arrangements of the legal person, in the instrument of constitution the members and founders may derogate from the provisions of legal persons of the Civil Code.

This dispositive freedom is limited, and may not derogate from the provisions:

- if it is *precluded* by law; or
- where any derogation clearly *violates the interests of the legal person's creditors, employees and minority members*,
- or it is likely to prevent the *exercise of effective supervision* over legal persons.

Legal persons *shall enter into existence upon registration by the court based on the instrument of constitution made out for the type of legal person in question*. The court of registry may *refuse to register a legal person on grounds specified by the relevant legislation.* Legal persons are established for a *definite or indefinite period.* If the instrument of constitution does not provide for the term of the legal person, the legal person come into existence for an indefinite duration.

5. Mandatory layout of the instrument of constitution:

- *the founders' intent to set up the legal person*
- *the legal person's name, registered office, purpose and main activity;*
- *The names of the founders of the legal person, including their home address or registered office;*
- *The capital contributions prescribed, the value of such contributions, as well as how and when such assets are to be made available; and*
- *The legal person's chief executive officer.*

6. *Obligation of capital contribution*. Founders and members of legal persons are *required to provide capital contribution* to the legal person at the time of foundation and in cases where membership rights are otherwise acquired. Capital contributions made available to legal persons are *not recoverable*, and *equivalent compensation may not be demanded*. The reason for this is the stringent asset separation principle.
The capital contribution may be based on legal person type:

Capital	*Equity capital*	*Assets contribution*	*Asset deposit*	*Cooperative assets*
limited company (rt.)	- private limited-liability company (kft.) - charitable corporations	- groupings - general partnership (kkt.) - joint ventures - other organizations	limited partnership (bt.)	cooperative

7. *Form and value of capital contributions.* The capital contribution required from members and founders may be provided to the legal person in the *form of cash or in the form of consideration other than in cash.*
The founder or member may provide asset contribution by transferring *ownership rights of tangible or intangible assets* to the legal person. If, at the time of transfer, the value of asset contribution *does not reach the value indicated in the instrument of constitution, the legal person may demand payment of the difference from the person having provided the asset contribution within five years from the date of transfer. (liability for contribution in kind)*

8. *Registration of legal persons.* An application for the registration of a newly established legal person shall be submitted by the person *appointed to represent* the legal person, thus not the founder or constitutor, who may conflict with the legal person. The representative shall be held liable towards the founders for damages resulting from his failure to submit the application in due time, also if the notification submitted is incomplete or deficient, in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation. The provisions on the nullity of contracts shall apply to the nullity of the instruments of constitution of legal persons insofar as the resolution on the registration of the legal person becomes final and enforceable. After the registration of a legal person by binding decision, nullity of the *instruments of constitution* of the legal person *may not be cited as grounds for removal from the registry*.

9. *Organizational structure of legal person*. The legal person's organizational structure can be divided *into three levels:*

- *Decision-making body*
- *Management*
- *Supervision*

a, *Decision-making body. Members and founders* shall exercise their decision-making powers in a *body* comprised of all members and founders or of *delegates selected* by the members with taking decisions *in session or out of session*. In the meeting of the decision-making body a *quorum* shall exist when more than one half of the members with voting right are present. *Quorum shall be considered for each decision.*

b, Decisions that are related to the *governance* of a legal person and are beyond the competence of the members or founders, shall be adopted by one or more *executive officers* or by a body consisting of executive officers. (*management of legal person)* Thus, it is difficult to identify the specific issues which are the management's competence.

The Civil Code calls *every manager* of the legal person as *executive officer.* This means *special liability status:* The executive officer shall be held liable for *damages caused* to the legal person resulting from his management activities in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation. Executive officers shall perform their management functions *representing the legal person's interests.* E*xecutive officers shall take effect when accepted by the person delegated, elected or appointed.*

c, *Supervision of legal persons on behalf of the owners.* Members -or in case of no members- *founders* may *supervise* management in order to protect the interests of the legal person. Members or founders may provide the *supervisory function* or can create a supervisory board *dedicated to supervision of legal persons on behalf of the owners.* The law specifically orders in some business organizations (public limited company (nyrt.) private limited company (zrt.)) the establishment of supervisory board. The supervisory tasks shall be done *expedient in accordance with social, economic and legal criteria.* Members of the supervisory board *shall be held liable for damages* caused to the legal person resulting from their *omission of supervisory responsibilities* in accordance with the provisions on liability for damages for l*oss caused by non-performance of an obligation.*

10. *Representation of Legal Person*. In order to the legal person to be able to *participate in the business traffic relies on the representation of a natural person:*

- *Legal representation* is implemented if the representation is *without* any special activity, statement belongs to a person based on the law. The responsibility for providing legal representation of legal persons lies with the executive officer.
- *If the legal person's instrument of constitution* or its *internal policy relating to the organization* and functioning of the legal person provides for an office vested with power of representation. (organizational representation)
- In specific cases management may *delegate powers of representation.*

Any restriction of the *power of representation vested upon* the legal person's authorized *representative* shown in the registry of legal persons or rendering such representative's actions conditional or subject to approval *shall not be effective as against third parties,* except if the third party knew, or should have known about the restriction or about the condition or approval requirement, and the lack thereof.

11. *Safeguards for the lawful operations.* Judicial oversight of legal persons shall in general be *carried out by the competent court of registry.* Judicial oversight shall not apply to cases that are *normally subject to other court* or administrative proceedings. The *scope of judicial oversight shall not cover the business decisions* of legal persons in terms of *economic feasibility and efficiency.*

The juridical review of the decisions of the legal person is not aimed at the replacement of organizational *decision-making with juridical opinion*, but to be used if the resolution is alleged to be *unlawful or to violate the instrument of constitution*. The judicial decree still shall not replace the legal person's business decisions, however, it may be necessary for the court to order a *new decision* of the appropriate body of the legal person, and the law grants this possibility to the court. Members of the legal person, or the founders (in the case of non-membership) legal persons shall be *entitled to bring court action seeking annulment of resolutions.*

The statutory auditor audits the *financial-accounting activity according to legality* (from the outside) to ensure protection of the public interest. This audit activity shall not cover the business decisions in terms of *economic feasibility and efficiency.* Should the statutory auditor *detect any changes in the legal person's assets that are*

likely to jeopardize its ability to satisfy any claims filed against the legal person, or learn of any circumstance which entails the liability of the *executive officers or supervisory board members with respect to their activities performed in that capacity, he shall forthwith request management to take immediate action to the extent required* for enabling the members—or the persons exercising founder's rights in the case of non-membership legal persons—to take the necessary decisions. In the event of non-compliance with his request, the auditor shall *inform the court of registry* exercising judicial oversight over the legal person concerning the situation at hand.

12. *The transformation* of legal person. According to the Civil Code transformation is the *process of changing the legal person's type*, which means, that the legal person undergoing transformation will be *dissolved*, and its *rights and responsibilities shall be transferred* to the legal person established by way of the transformation, as the general legal *successor*. As the transformation means the *establishment* of a *new* legal person in every case, that shall be *registered*, and the *rules of foundation* shall be applied to the transformation as well, namely the foundation rules of the *specific type* of the new legal person. *Restrictions of transformation*: The Civil Code does *not allow transformation, if*:

- undergoing dissolution without succession or bankruptcy proceedings;
- indicted in *criminal proceedings* carrying possible criminal sanctions, or if subject to any criminal sanctions
- the members or founders *fail to provide the capital contribution* prescribed in the instrument of constitution.

The decision on going into transformation, is an essential matter *affecting* the *status* of the legal person, so it cannot belong to the *decision-making of the executive body*, lies with the members or founders of the legal person, according to the legal rules. The transformation of a legal person may *change the system of settlement obligations* for the legal person's debts or *modify the assets available* to a legal person and therefore seriously affect the *interests* of the *creditors* of the legal person.

Since the transformation necessarily means the *termination* of a legal person and the *creation of a new* legal person, both of which are subject to entry in the *Register of Legal Persons*.

Merger of legal persons: A legal person may combine with other legal persons as o*ne legal entity* by way of *merger* or *acquisition*. In the case of merger, the *merging* legal persons are *terminated*, and a *new* legal person is *established* by way of *universal succession*. In the case of merger by *acquisition*, the acquired legal person is *terminated* and all its *assets* and *liabilities* are *transferred* to the *acquiring* legal person by way of universal succession. Even different legal person types can merge with each other.

Demerger: Demerger means when a legal person is *split into two* or more legal persons by way of *division* or *separation*. Division means the operation whereby, after being terminated, a legal person *transfers* all its assets to *more than one legal person.* In the case of *separation*, the legal person shall continue to operate *in its previous form* and *part of its assets are transferred* to the *successor* legal person established by the separation.

13. *Dissolution of legal persons without succession.* A legal person shall terminate without succession if:

- it was established for a *fixed duration, and such period of time expires;*
- it was subject to *termination upon a certain condition, when this condition is met*;
- *declared terminated by its members or founders; or*
- *terminated by a body so authorized*
- provided in all cases that the legal person is *cancelled from the registry following completion of the appropriate procedure for the settlement of the legal person's financial affairs.* The choice of the procedure depends on the legal *entity's solvency, or insolvency*
    - if the legal person's assets exceed the claims rate, *it is solvent*, then the *voluntary liquidation* proceedings take place.
    - The commercial court orders *compulsory liquidation*, if:
        - the company is *declared terminated,*
        - the company did *not finish the voluntary liquidation* within three years, and did not submitted for cancellation
        - a cause for the company's termination *without a legal successor* occurred and there is no place for liquidation

- the legal person is *insolvent*, if the claims rate is higher than its own property. In case of the insolvency of a legal person without legal successor the liquidation procedure takes place. The members and founders of the terminated legal person without legal successor are *liable for the unsatisfied claims* of the legal person until the limits of their *rate of share.*
- From the three procedures discussed above the *bankruptcy proceedings* is distinct, during which the debtor's -in order to conclude a *bankruptcy settlement*- receives a *delay* in pay and attempts an *agreement with creditors.*
- If *after the removal from the register*, there is *property* owned by the legal person, which status is *not settled, property settlement procedure* shall be conducted.

14. *The basic terms of group of corporation law*. Recognized group of corporations means a form of *cooperation featuring a common business strategy* between at least one *dominant* member that is required to draw up *consolidated* annual accounts and at least *three members controlled* by the dominant member under a *control contract.* A group of corporations may consist of *limited companies, private limited-liability companies, associations and cooperatives*. The control contract lays down the *common business strategy* for a corporate group. If the conditions for the control contract *prevail for at least three consecutive years*, at the request of either of the parties with legal interest the court may order the *de facto dominant* member and the controlled companies to conclude the control contract and to apply to the court of registry for the registration of the group of corporations.

2. The Rules of Particular Legal Persons

2.1. The Common Rules of Business Associations

1. *Concept*. Business associations are l*egal persons established for the pursuit of business operations with financial contribution provided by its members, where each member has a right to a share of the profit and an obligation to participate in covering the losses.* The *four elements* according to this:

- *the pursuit of business operations*
- *financial contribution provided by its members*
- *business organization with legal personality*
- *share of the profit and an obligation to participate in covering the losses.*
- *At least two members is compulsory for all business associations except for private limited-liability company and limited compan*y

2. *Company form cogency*. According to the international practice a business association may operate -according to the Civil Code- in the form of:

- *general partnership,*
- *limited partnership,*
- *private limited-liability company or*
- *limited company.*

This rule is *cogent, there is no possibility for the association to be founded in other form.*

3. *Asset contribution. I*f a member *fails* to provide his *contribution* as undertaken in the instrument of constitution by the prescribed *time limit,* management shall call upon such member, to provide the contribution within *thirty days*, with the applicable *consequences* indicated:

- *the membership of the member shall be terminated*
- *shall be held liable for damages* for loss caused by non-performance of an obligation.

4. *Company Register*. Since all business organization receives its legal personality, at the moment of registering in the *Company Register*, the formation of a business association shall be notified to the *court of registry* within *thirty days* from the date when the *instrument of constitution* is executed in a notarized document or *countersigned* by a lawyer or bar association legal counsel.

5. Pre-company. As of the date when the instrument of constitution is executed in a notarized document or countersigned by a lawyer or bar association legal counsel, the business association may *operate as the pre-company* of the business association.

6. *Exclusion of members*. One instance for ground of exclusion of a member is by court ruling based on a claim launched by the business association against such member. The proceedings may go forward if the continued membership of the person in question would *seriously jeopardize* the business association's objective.

7. *Organizational structure of business associations*. The supreme body functions as the *decision-making* organ of the members of the business association, is conducted by the management of the senior officials. *The executive tasks* are *the representation, the optimal division of labour and design of structure, the regulation of operation, ensuring the existence of pre-conditions of operation, the execution of the tasks and the organization of the processes, control activity, organizational development and making the association suitable for the changing conditions.*

According to the Civil Code *executive management* means all the decisions necessary in connection with the company's management, which according to the law or constitution of the association *does not belong to other corporate body*. The executive officer performs the management of the company on the base of the priority of the interests of the business association, performs his duties only in person, according to the agreement with the association under a personal service contract or under a contract of employment.

8. *The direction of the executive officer's liability*. The executive officer's liability is *bidirectional*: on the one hand, it exists *towards the association and members contractual*, on the other hand *towards third persons delicts.*

2.2. Specific Business Associations

1. A general partnership (közkereseti társaság or kkt.) is an association with legal personality which the members of the partnership agree to make available to the partnership the capital contribution necessary for its activities, and to undertake joint and several liability for the partnership's obligations not covered by the assets of the partnership. Creditors' claims against members shall be covered to the extent of the partner's share from the partnership's assets, which is due upon the termination of his membership. If a creditor files to have this share attached, he shall be entitled to exercise the member's right of withdrawal and, as a result, shall be entitled to demand compensation from that member's share. The termination of the membership can happen for various reasons:

- upon mutual agreement of the members;
- upon withdrawal of the member;
- upon transfer of partnership share;
- upon death or dissolution of the member;
- upon the occurrence of any grounds for exclusion or any reason giving cause to conflict of interest.

2. By virtue of the memorandum of association for the establishment of a limited partnership (betéti társaság or bt.), the members of the partnership agree to make available to the partnership the capital contribution necessary for its activities, and at least one of the partners, the general partner undertake joint and several liability together with the other general partners for the partnership's obligations not covered by the assets of the partnership, while at least one other partner, the limited partner is not liable for the obligations of the partnership, unless this law provides otherwise.

3. Private limited-liability companies (korlátolt felelősségű társaság or kft.) are business associations founded with an initial capital consisting of capital contributions of a predetermined amount, in the case of which the liability of members to the company extends only to the provision of their initial contributions, and to other contributions set out in the memorandum of association. Unless otherwise provided by law, members shall not bear liability for the company's obligations.

The capital contribution of members is provided in the form of core deposits. The capital contributions of members may differ in terms of value, however, the amount of each contribution may not be less than one hundred thousand forints (which shall consist of cash or non-cash assets). Each member shall have one core deposit, several persons have agreed to provide a core deposit collectively, their liability for providing such core deposit shall be joint and several. The core deposits together comprise the initial capital, which may not be less than three million forints. Business share means the whole of rights and obligations arising in connection with the core deposit. Business shares shall come to existence upon the company's registration, the business shares of members shall be consistent with

their respective capital contributions. Business shares may be freely transferred among the members of the company and to third persons limited, only if the member concerned has paid up his capital contribution in full. In special conditions if a member is excluded from the company by order of the court, or if membership is terminated due to the member's failure to provide the capital contribution or supplementary payment, the business share of such member must be disposed of.

Supplementary payments. If the memorandum of association contains provisions to authorize the members' meeting to order an obligation upon the members to provide supplementary capital contributions in order to cover losses, the maximum amount payable by members on that basis, as well as the f*requency of performing supplementary* capital contributions shall be specified. *The supreme body of a private limited-liability company is the members' meeting, the owners' deliberation and decision-making body.* The management of a company shall be provided for by one or more managing directors. *If a company has more than one managing directors, they shall be entitled to handle management issues independently, with the proviso that they are entitled to raise an objection against* the planned or executed actions of any other managing director.

The increase or reduction of initial capital. In many cases, the original capital is not sufficient for the activity, in that case the initial capital can be increased. the capital raising in two ways new strain deposits with the performance or equity over assets expense. The increase of capital may be made through two ways: through additional financial contributions, or capital increase from assets in excess of the initial capital.

4. Limited companies (részvénytársaság) are business associations founded with a share capital consisting of shares of a pre-determined number and nominal value, where the obligation of shareholders to the limited company extends to the provision of funds covering the nominal value or the accounting par value of shares. Shareholders shall not be held liable - unless otherwise provided for in the law- for the limited company's obligations. The structure of limited companies: general meeting, management, supervisory board, audit committee, auditor. Limited companies can operate in two types: Any limited company whose shares are listed on a stock exchange shall be recognized as a public limited company *(nyrt).* Any limited company whose shares are not listed on any stock exchange shall be recognized as a private limited company *(zrt).*

Shares are *equity securities representing membership rights* in the issuing limited company, they are registered, have a nominal value, and are tradable. According to the Civil Code five types of *share can be emitted: ordinary shares, preference shares, employee shares, interest-bearing shares; redeemable shares.*

The capital. The limited company is a company with share capital, the capital of the limited company is the *nominal value of all shares,* which cannot be less than *5 000 000 Forint in case of private and cannot be less than 20 000 000 Ft in case of public limited companies.* The share capital may be *increased*:

- *through the issue of new shares*
- *from the assets not forming part of the share capital*
- *through the issue of employee shares*
- *through the conversion of convertible bonds.*

2.3. Cooperative Societies

A cooperative society (szövetkezet) is a legal person established with a capital made up of the members' contributions; it operates under the principle of open membership and variable capital with the objective of lending assistance to its members so as to satisfy their economic and societal needs, where the obligation of its members toward the cooperative society covers the provision of capital contribution and their personal involvement as provided for in its statutes. Members shall not bear liability for the cooperative society's obligations. The activities of cooperative societies may include sales, purchases, production and services. The possible organizational structure units: general meeting, section meeting, college of delegates, administrative body, executive officer, supervisory body, auditor.

2.4. Groupings

A grouping (egyesülés) is a cooperative association with legal personality, founded by its members in order to improve the efficiency of their financial management, to coordinate their economic activities, and to represent their professional interests.

The purpose of a grouping is not to make profits for itself; its members shall bear unlimited, joint and several liability for debts exceeding the grouping's assets. A grouping may also pursue other service and joint economic activities (economic auxiliary activities) in support of its coordination duties. The common provisions relating to business associations shall apply to groupings.

2.5. Associations

Based on the organizing principle of private law (freedom of organization) Persons can associate freely to achieve their common objectives, associations may be formed to perform economic activities only if they are directly related to the achievement of the association's goals, with the limitation that associations shall use their assets in *accordance with their objective* (they shall not be entitled to distribute their assets among their members, not for-profit organization) and may not pay dividends to their members. According to the Civil Code, *associations are legal persons with registered members, created for the purposes defined in their statutes in order to achieve their common objectives on a continuous basis.*

An association shall be considered established upon the adoption of its statutes, for which the *unanimous declaration* of intent of at least 10 persons (natural or legal) is required. Legal personality may be conferred by the statutes upon a department of the association.

Association has *registered membership.* Membership in the association shall commence at the time of foundation upon the registration of the association, after the application for admission are accepted by the general meeting. The members of an association shall be entitled to partake in the association's activities, and shall have equal rights and obligations, except where the statutes provide for membership of special legal status. *Members shall exercise their membership rights in person*, unless permitted by the statutes, members can exercise their membership rights by way of proxy. Membership rights are *non-tradable, and cannot be inherited.* The member:

- *shall fulfil the obligations prescribed for members in the statutes.*
- *shall not jeopardize the objectives of the association and the activities of the association.*
- *beyond paying the membership fee shall not be responsible for the liabilities of the association with their own assets.*

The termination of membership: Members shall be able to *terminate their membership at any time, by means of written notice* addressed to the association's representative, without giving any reason. According to the provisions of the Civil Code, if membership is rendered subject to certain conditions set out in the statutes, and the member fails to meet such conditions, the association shall have the right to cancel the membership in writing subject to a *thirty-day notice* period. Exclusion: If the exclusion is based on seriously or repeatedly infringing the statutes of the association, guarantees for the conduct of a fair hearing shall be provided. *Bodies of association*: *General meeting, (the association's decision-making body) college of delegates, (assess constitution) management, supervisory board*(must be established if there are more than one hundred members).

2.6. Foundation

Foundations (alapítvány) are legal persons set up to pursue the long-term objective defined in the charter document. The founder shall define in the charter document the funds made available to the foundation and the organizational structure of the foundation. Differentiation of foundation and association:

Foundation	*Association*
conglomeration type legal person (funds made available for the objective)	*person aggregation type legal person* (personal activity is united)
independent from founder	counts on the members in the course of operation
pursue the objective defined in the charter document	*pursue the interest of its members*

Setting up a *foundation is by a one-sided written donation* in which the founder required to define the foundation's *purpose*, *organization*, and the *trust fund,* and all other issues the general rules of the contract law applies. The Civil Code allows the setting up of foundation *for private purposes*, but foundations are authorized to *perform economic activities only if they are directly connected to the achievement of the foundation's goals.* Foundations may *not be a partner with unlimited liability* in another legal entity, may *not set up another foundation,* and may *not join another foundation*.

A foundation may be *set up by natural or legal persons or several persons jointly.* Any amendment of the charter document aiming to *alter the foundation's purpose shall be considered annulled*, except if the foundation has *fulfilled its purpose*, or if achieving the foundation's objective is *no longer possible* and the foundation has enough funds for its new objective.

Joining: A foundation may accept new members upon the contribution of funds, subject to the conditions set out in the charter document.

The founder and new members may not appropriate the foundation's assets for other purposes and may not demand to recover such assets; any provision of the charter document to the contrary shall be null and void.

The beneficiary: *Financial benefits* may be provided from the foundation's assets, consistent with the foundation's objectives, to persons designated as beneficiaries in the charter document, or in the absence of such instruction, by the appropriate foundation organ: it may be a specific person or a range of beneficiaries.

Board of trustees: The board of trustees functions as the foundation's *managing body.* Members of the board of trustees are *the executive officers of the foundation.* The board is comprised of *three natural persons, at least two of which shall be residents of Hungary.* No *beneficiary* of the foundation or his *close relative may hold a seat* on the board. *Any provision of the charter document to the contrary shall be null and void. The members may be appointed or elected for fixed-term or indefinitely.*

A foundation may *not be transformed to another type of legal person.* A foundation may *merge* only with another foundation or may be *divided* into foundations only. *A foundation shall cease to exist if:*

- *the foundation has fulfilled its purpose, and a new objective has not been determined;*
- *fulfilment of the foundation's purpose is no longer possible,* and revisiting the objective or merging with another foundation cannot be done; or
- the foundation is not pursuing any activity with a view to fulfilling its goal for a period of three years.
- *The founder shall not have the right to dissolve the foundation.*

Assets of the foundation after dissolution without succession:

- shall be given to the person so designated in the charter document
- Upon the foundation's dissolution without succession, the founder may dispose of the assets he has provided for the benefit of another foundation or an association having the same or similar objective, if the charter document fails to provide for the appropriation of the assets in such cases, or if such provision cannot be executed.
- The court of registry *shall assign the assets to an organization designated by law*, if the charter document or the founder does not provide for the assets of the dissolved foundation, or if the person designated in the charter document, or the foundation, association the founder has designated refuses to accept it, or cannot acquire it.

2.7. State Involvement in Civil Relations

1. *The Civil Code declares the legal personality of The State, recognizes its general legal capacity. The State can be subject of civil relations in multiple ways:*

- *Through specific offices* (e.g.: Parliament, ministries)
- *Through organization it has founded* (these are typically the budgetary organs)
- *Through companies operating with the participation of State*
- *Finally, exceptionally, the state itself as whole can act in private law, although the latter is exceptional in nature* (e.g.: succession by the State of necessity)

2. The State accorded of absolute legal capacity.

3. The State and legal persons being part of general government shall remain liable for their obligations arising out of or in connection with civil relations even in the absence of budgetary appropriations.

4. The State does not have unrestricted autonomy in terms of its financial affairs, it cannot freely dispose of its assets. The State's assets may only be provided under the current budgetary rules: during the implementation of the budget the state's finances subsystem in the current year's obligation to pay only to the extent of the approved expenditure appropriations.

For the implementation of the central budget investments, The State, according to the above rules, moves directly to civil relations. The jurisprudence achievement of those proposition to say that The State, as the owner manage the owned property, resulting of the ownership nature its legal personality (*de iure gestionis*), however, separated from the exercise of public authority functions (*de iure imperii*), since it is not a matter of civil relation but in a public legal relationship with a person.

5. The State in civil relations is equal with the other subjects of law. The minister vested with powers to oversee State property shall represent the State in civil relations.

BENKE, JÓZSEF

FUNDAMENTALS OF LAW OF RIGHTS *IN REM*

Contents:

1. General Part

1.1. The Doctrine of Norms of the 'Law of Rights *In Rem*'

1.1.1. Origin and Characteristics of Basic Notions and Concepts

The *law of rights in rem* together with its core issue called '*rights in rem*' is a special notion of the continental systems of private law. This specific term is based on the idea of *iura in re* (parallel to the concept of 'proprietary rights') elaborated by the 12th–13th century Italian Glossators. Therefore, it is nearly untranslatable into the Anglo-Saxon legal terminology.

Hugo Grotius, the most remarkable Dutch jurist of the 17th century Natural Law, defined the notion as '*facultas homini competens sine respectu ad certam personam*'. This Latin phrase was, to a greater or lesser extent, translated into English in the famous work headed 'Jurisprudence' of *John Austin*—a noted English legal theorist of the 19th century—as '*rights residing in persons and availing against other persons generally*'. The definition is parallel to that of the so-called '*absolute rights*' (equivalent of *rights in rem*) defined e.g. by *Bernhard Windscheid* in his 19th century '*Pandekten*' as *rights 'which avail against all persons'*.

Therefore, the law of rights *in rem*—which observably is a *static* field of law as compared to the law of obligations being a rather *dynamic* phenomenon—is a specific and autonomous field of private law regulating those absolute rights, which entitle what kinds of assets and how can be acquired, retained, used, exploited, fructified, alienated, transferred, encumbered by each subjects of law (natural or legal persons). These absolute rights *in rem* entitle to such possibilities to act as e.g. to acquire, to exploit or to transfer a right. These absolute rights guaranteed by the law of rights *in rem* are otherwise called *potestative* rights, which generate and provide a legally assured power of different kinds of extent in valuable and marketable assets, which can be either things (tangible properties) or rights or alternatively claims (cf. NHCC Section 8:1 § 1 point 5). The *total proprietary status* of all subjects of law is legally determinable and characterizable through the very regulations of the law of rights *in rem*. Within this scope, law of rights *in rem* answers the questions of:

- Which assets can be subjected to the rule of a subject of law at all?
- Which assets among these subdued ones can be subjected to the power either of individuals or of groups being on the different levels of organization?
- Which kinds of proprietary statuses either of individuals or of groups can be formed due to the rules mentioned above?
- What types of relationship can emerge between the diverse proprietary statuses said before?
- What is the legal content of these proprietary statuses otherwise what kinds of rights and duties do these proprietary statuses consist of?

According to these, through private law tools, the law of rights *in rem* regulates the *distribution of wealth* among economic operators, whether they are individuals or groups. Diverse *socio-economic models* governed by its rules take their place on a scale defined by the extrema of total *individualism* and total *collectivism*. These politico–legal ideologies profoundly govern the proportion of private and public property in a specific society and its economy.

1.1.2. Principles and Regulatory Structure

With respect to the aforesaid characteristics of the law of rights *in rem*, the life conditions regulated by this field of law are, as a matter of course, issues of enormous social, economic, constitutional and political importance. Therefore, in the whole scope of the law of rights *in rem*, the *general principle of enhanced protection* dominates, according to which:

- Several rules of this field of law belong to the branch of *constitutional law*, because some of the issues regulated by it—such as the freedom of property or the principle of property protection—call for a regulation of highest rank in the hierarchy of norms, since these profoundly determine the relationships between public and private interest. The Fundamental Law of Hungary says that "every person shall have the right to property and inheritance", anyway "property shall entail social responsibility"; "property may only be expropriated in exceptional cases and in the public interest, in legally defined cases and ways, and subject to full, unconditional and immediate indemnity" (Art. XIII §§ 1–2).
- The utmost part of its norms is *mandatory*, thus dispositional norms are very exceptional, and occur only if it is expressly permitted by law (see e.g. NHCC Section 5:18 § 1 The property of a building shall accrue to the owner of the land, which it was built up on, unless there is an agreement between the parties to the contrary). This is also echoing in several principles of the law of *in rem* rights:
  - Subjects of law neither can establish other genres of *in rem* rights than those which are named by law (*Principle of Exclusiveness*),
  - nor can define the legal substance of an already named *in rem* right otherwise than it was settled by law (*Principle of Substance Limitation*).
  - The object of an *in rem* right shall always be certain and properly defined (*Principle of Specification* otherwise *Principle of Uniqueness*).
- The legal relationships based on the law of rights *in rem* are *absolute private law relationships*, therefore only the entitled party is certain, and all other persons are obliged to acknowledge, to tolerate and not to violate this party's rights (*Principle of Absoluteness*).
- Transparency shall also be applied according to these legal relationships *(Principle of Transparent Openness*). It is assured and guaranteed by public registers (e.g. Real Estate Register, Collateral Register, Ship Register, Aircraft Register) which authentically contain the relevant data
  - of former and recent entitled persons,
  - of the object of the certain right,
  - of the certain right's contents, temporal extent and establishment.

The *codified private law fundament* of the law of rights *in rem* lies in the 187 sections of the *Fifth Book* of NHCC, which is composed of four parts:

- Part One contains the *Law of Possession* [Sections 1–12),
- Part Two implies the *Law of Ownership* [Sections 13–85),
- Part Three rules the *Law of Limited Rights In Rem* [Sections 86–164),
- Part Four governs the *Real Estate Register* [Sections 165–187).

1.2. The Doctrine of *In Rem* Legal Relationships

1.2.1. The Content Thereof, and the Genres of Rights in Rem

1. The notional construction of '*in rem legal relationship*' is an abbreviated wording of 'legal relationship of the law of rights *in rem*'. Both have identical conceptual content and the same meaning.

Considering the above drafted bases of the General Part of Hungarian Private Law and with respect to the *structure of private law relationships*, there are *relative* and *absolute* private law relationships. The legal relationship is relative if *every subjects* of the relationship are *certain* (*defined*), however, since *only up to one subject is certain*, the legal relationship is a so-called *absolute* one in its structure. In absolute legal relationships, the entitled party is certain, therefore, the other subject standing on the opposite side of the relationship is theoretically an uncertain mass of people. Legal relationships arising from *obligations*—such as *contracts*, *unjust enrichment* or *torts*—are generally *relative*. Legal relationships based on the *law of rights in rem* are *usually absolute* private law relationships, where solely the entitled party is defined, and all other persons are obliged to *acknowledge* this party's rights, and to *tolerate* the exercise of these rights, and to *desist from* violating the entitled party while exercising his/her rights.

An absolute legal relationship *transforms into relative*, if a certain person of the faceless mass of people standing in the obliged side of the relationship wrongfully acts and hurts the position of the entitled party. The infringement of the obligation of acknowledgement, tolerance, and desistance *creates* an *obligation*—a *relative* legal relationship—between the *infringed* (*injured*) party and the *infringer* (*injurer*) party for the *desistance of infringement* and for the *compensation of disadvantageous consequences of the harm*.

The so-called *content* of a private law relationship incorporates the *parties' rights and duties*. It is truly simple to depict the content of the obliged side of *in rem legal relationships*, since this uncertain mass of people is obliged to *acknowledgement*, to *tolerance*, and to *desistance*. The opposite side's situation—i.e. the rights and duties of the entitled party—is much more complicated.

Since *in rem* legal relationships are various and colourful, *in rem rights* are not less manifold and diverse, too. By nature, such multifarious rights are combined with variegated duties, restrictions, and limitations based either on public or on private law norms. For the purpose of a proper overview, it is indispensable to draft the variable classifications of genres of *in rem* rights.

2. Diverse genres of *in rem* rights arising from manifold types of absolute legal relationships have some common characters as well, which are e.g.

– These are mainly so-called *exclusive rights* (otherwise *rights to exclude*) granting the exclusion of others from the enjoyment of that specific right. The notion being parallel to the concept of 'exclusive rights' is the idea of '*claim rights*' (*rights to claim*). These emerge generally from *relative* private law relationships (see detailed in the General Part above).
– Demands arising from *in rem* rights, are free of limitation, i.e. that these are enforceable regardless of the duration of time since the emergence of the specific demand, and do not lapse by the passage of time.

Diversified *in rem* rights are properly describable through the various classifications of their genres in the base of characteristic attributes. Many of these different categories have wide overlaps and common parameters.

a) In rem rights are *nominated* and *classified* by the *Civil Code* itself. This partition deserves to be the *first one to draw up*, since a *principle* of law of rights *in rem* says that persons *cannot establish other genres of in rem rights than the legally nominated ones* (*principle of exclusiveness*).

The Civil Code categorises and denominates the *in rem* rights as follows:

– *Ownership Rights* are those *in rem* rights, which allow and entitle the owner to possess, to use, to exploit and to dispose his/her/its own property. The *Right of Ownership* incorporates the following *particle rights*:
  - the *Right of Possession*,
  - the *Right of Use*,
  - the *Right of Utilization* (viz. of exploitation, and fructification),
  - the *Right of Disposition* having two subcategories such as
    - the *Right of Alienation* and
    - the *Right of Encumbrance*,
  - and nonetheless there is the *Right of Protection*.
– The other main category contains the *Limited Rights In Rem*, which can be sub-classified as follows:
  - The *Law of In Rem Security Rights over Assets* that contains the manifold types of *Pledges*, *Liens, Mortgages*, *Hypothecations* etc., among which Civil Code names the followings:
    - *Statutory Lien* (i.e. a lien based on law),
    - *Collateral Security* (*Security Deposit*),
    - *Possessory Lien* (*Pledge*),
    - *Non-Possessory Lien* (i.e. *Mortgage*),
    - *Independent Lien*,
    - *Lien on Rights* (*Hypothecation of Rights*),
    - *Lien on Claims* (*Hypothecation of Claims*),
    - *Lien on Set of Assets Identified by Detailed Circumscription* (*Lien on a Defined Part of a Person's Estate*),
    - *Multiple Pledges*.

- The diverse subgenres of the *Rights of Use*. The notion of *Rights of Use* is a *Plurale Tantum*, i.e. a noun, which *exclusively* has the *Plural* form. This notion is therefore not equal with the concept of the *Right of Use* used *in Singular*, which is a *particle right* of the *Right of Ownership* (see above). However, "*Use Right*" is a third autonomous form of right meaning a *subgenre of the Rights of Use* (see below). The different *subgenres* of the Rights of Use are then the followings:
  - *Land Use Right*,
  - *Beneficial Interest* (otherwise known as *Usufruct*),
  - and *Use Right*.
- The last category of Limited Rights *In Rem* contains the manifold types of *Land Easements* (otherwise known as *Land Servitudes*) and the *Right of Use for Public Purposes*.

The classifications below are based on *Jurisprudence*, not on the letter of law.

b) At first, with respect to the *physical character of the object* of the right, two types of *in rem* rights shall be separated as follows.

– On the one hand, there are *genuine in rem rights*, the object of which can solely be a *corporeal* asset (*thing*). [The classifications below in *c)–e)* deal exclusively with these genuine *in rem* rights.]
– On the other hand, there are *affinitive in rem rights*, the objects of which are *incorporeal* assets such as rights and claims. The 'affinity' means that these related rights are *similarly as* the genuine rights *in rem* according to the *character*, *content*, and *enforceability* of the very right. With respect to the *extent of power* upon the *incorporeal* asset, affirmative *in rem* rights can be sub-categorised as
  - *statutory ownership-like rights* generated by law (e.g. mining rights, and rights to hunt, which were *ex lege disannexed and autonomised* from the circle of *particle* rights within the old institution of land ownership),
  - and *absolutised relative rights* tied with *in rem effect*, i.e. an *in rem-like* absolute right—such as copyright, patent right, usufruct, lien or pledge—in a relative right based e.g. on an obligation. In this regard, the *utilization* (exploitation) of a relative right takes place with an absolute (*in rem*) effect. E.g. a usufructuary of a claim shall be entitled to enforce the claim, and, if the creditor's waiver is required for maturity, to exercise the creditor's right to terminate as well. Other acts of usufructuary relating to the claim shall be null and void. By the debtor's performance the creditor shall acquire the object of the claimed service, and, at the same time, the usufructuary of the claim becomes entitled to a usufruct in the performed object itself (NHCC Section 5:158 §§ 1–2).

c) The most important classification of *genuine in rem rights* forms its categories according to *the extent of power upon the thing*:

– *complete in rem right* entitles to *full power* (*plena potestas*) upon the thing,
– while *non-complete in rem rights* assure only partial power on a thing.

The *complete in rem* right is called *ownership right*. The right of ownership legally enables and protects the beneficiary while fully exploiting the thing. It can only be limited and restricted *by law* within the scope of *constitutional and legal guarantees*. The full power upon a thing *entitles to exercise and to protect* all of the so-called *particle rights* of the full right of ownership:

– either to *possess* or to *non-possess* the thing,
– either to *use* or to *non-use* the thing,
– either to *utilise* or to *non-utilise* the thing,
– either to *dispose* or to *non-dispose* of the thing (i.e. to *alienate* or *non-alienate* as well as to *encumber* or *non-encumber* it), and,
– either to *terminate* or to *non-terminate* the thing.

Non-complete in rem rights ensure and protect the beneficiary to exercise either *one* of the above enumerated *particle rights* of full ownership or *some of them in certain combinations* (e.g. the use or utilization of a thing typically presupposes its possession, too). It is also possible that the particle right(s) can be exercised in a limited way, since the right of the owner to possess, to use, or to utilise his/her/its thing may restrict the parallel right of the other entitled party. E.g. a *usufructuary* has *no* right to *dispose* (alienate, encumber) either of the *thing* itself or of his/her own *right of usufruct*, but is indeed *entitled to assign* his/her

right to possess, to *use* or to *utilise* the thing (cf. Section 5:148 § 1]. The person entitled to the mere *right of use* of a thing (i.e. the *user*) is, however, entitled neither to utilise the thing, nor to use it without any restrictions (see Section 5:159 § 1].

d) Between *in rem* rights, there is another relevant distinction: whether it is a *right in an own thing* (*ius in re sua*), or a *right in a thing owned by another* (*iura in re aliena*), otherwise an *in rem right in a foreign tangible asset*. The right in the beneficiary's *own* thing can solely and exclusively be the *proprietary* right, i.e. the *ownership* right. By comparison, a person's exclusive *ownership rights* are totally excluded from the circle of those *in rem* rights, which can burden a tangible asset *exclusively owned by another person*. The reason for this lies in the well-known axiom, according to which it is logically, physically and therefore legally impossible for multiple persons to have exclusive ownership rights in the same thing without any material or immaterial division.

The category of *in rem rights in foreign things* meets more or less the category of *limited in rem rights*, since exclusive *unlimited in rem* rights (i.e. ownership rights) of multiple persons cannot simultaneously burden the same thing. In the same tangible asset (thing), an *in rem right in an own thing* and an *in rem right in a foreign thing* simultaneously exclude each other:

- on the one hand, a thing's owner cannot have any limited rights *in rem*—i.e. rights *in rem* in a foreign thing—in his/her/its own asset,
- on the other hand, the beneficiary of a limited right *in rem*—i.e. a right *in rem* in a foreign thing—loses this right, if acquires the ownership right in that very thing.

e) At last, there are *acquired in rem rights* and *in rem rights to be acquired*—otherwise known as (*in rem*) *reversions* or *reversionary rights*. While *acquired*—complete or non-complete—*in rem* rights have already been *merged into* the beneficiary's estate, an *in rem reversionary* right (in German law: *Anwartschaft*) is in a pending legal situation, notwithstanding that the future acquisition of the very right during and at the end of this provisional position cannot be legally precluded or hindered. An expectant, or otherwise, more precisely, an *in rem reversioner* of a right is e.g. the purchaser of a thing if the seller retains the title of ownership until the price is paid in full [Section 6:216 § 1].

1.2.2. The Objects Thereof, The Estate, and The Assets

1. Since a legislative definition of the notion of '*estate*' has not been adopted in Hungarian private law, the concept has been defined by Jurisprudence. According to this, *a person's estate is the aggregate*, on the one hand, of the *total* of the person's *positive assets* (*tangible* and *intangible properties*, otherwise *things*, *rights*, *claims*), and, on the other hand, the *total* of the person's *negative assets* (*duties*, *obligations*, *debts*, *counter-claims*), the monetary values of which are determined or determinable. The term of '*positive* assets' is often identified with the notion of '*assets*' or '*advances*', while the concept of '*negative* assets' is usually mentioned as '*liabilities*'. The most commonly adopted parallel expression applied for denominating the phenomenon is '*assets—liabilities*'.

If the total of assets exceeds the total of liabilities, the *net value of the estate* is *positive*, i.e. the estate is '*active*'; if contrary, the estate is '*passive*', and the net value is negative because of the prevalence of the total of liabilities. It is to be emphasised well in advance that, according to continental and Hungarian private law thinking, itself the very tangible asset (thing) owned by a person belong only *indirectly* to the person' estate, since *only the in rem rights on the person's things belong directly to the person's estate*.

2. If we want to find a homogeneous answer to the question of what is the *general object of in rem legal relationships*, there is only one response, which is, however, so general and theoretical that it hardly has a practical significance: Every private law relationship—inclusive of the *in rem* legal relationships as well—has one common object, which is the *human behaviour*. This is held to be the *direct* object of every legal relationship (see above in the General Part of Hungarian Private Law).

The *indirect* object of *in rem* legal relationships is the *asset*, *to which the in rem right*, *through the direct object* (human behaviour), *intends*. According to the NHCC, there are *one kind of tangible (corporeal)* asset, i.e. the thing, and *two kinds of intangible (incorporeal)* assets, which are the *rights*, and the *claims* (see Section 8:1 § 1 point 5). The *reason* for the lack of a *common* and *general object* of *in rem* rights lies in the fact that there is no codified *common* and *general notion of in rem right* either. The diverse genres of *in rem* rights, which were

enumerated and diversely classified above, have their own different special objects, too. Albeit ownership rights and limited rights *in rem* both belong to the main class of *in rem* rights, these can have different objects: In the case e.g. of ownership, pledge, usufruct, collateral security, or land servitude, the Civil Code distinguishes, and it does not allow to subject every kind of assets to the *in rem* legal relationship.

3. It is therefore *untrue* that 'objects of *in rem* rights are things', since, on the one hand, there are *in rem* rights, the objects of which *can be not only things*, and, on the other hand, there are *in rem* rights, the object of which *cannot be a thing*. It seems therefore appropriate to introduce, how *Civil Code defines the indirect objects of in rem rights*.

– The indirect objects of *ownership rights* are as follows [Section 5:14):
  - *Things: tangible assets being capable of appropriation*, and
  - special objects *considered to be things by the fiction of law*:
    - *special corporeal* assets such as *money*, *securities*, *animals*,
    - special *incorporeal* assets, which are *incapable of appropriation*, such as the "*natural resources utilised as capital goods*" [such e.g. as energies (electricity, wind-power, solar energy) and internal gas], and e.g. *dematerialised securities*.
– The indirect objects of the *limited rights in rem* are as follows:
  - Not only *every kind of assets* (things, rights, claims) can be subjected to *In Rem Security Rights* (*pledges*, *liens* etc.) but even a *set of assets identified by description* (cf. NHCC Sections 5:101–105).
  - *Collateral security* may be arranged on *money* and *securities*, on *payment account balances*, and on *other assets defined by law as collateral* (cf. NHCC Section 5:95 § 1].
  - In case of the different kinds of *rights of use*:
    - *Things*, and *lucrative rights* and such *claims* are regarded as objects of *usufruct* (cf. NHCC Sections 5:146 and 5:156),
    - while objects of *use rights* are solely *things* (see Section 5:159),
    - and the object of a *land use right* can only be such *soil, which a building stands on, if the ownership in the building and in the land are separated* (see Section 5:145).
  - The object of *land easements* (servitudes) and *rights of use for public purposes* can solely be *real estates* (NHCC Sections 5:160 and 5:164).

4. So far as the previous thoughts are concerned, the *things* are the *most general* and *most common objects* of *in rem* rights. A '*thing*' is defined by the Civil Code as a "*tangible asset being capable of appropriation*" [Section 5:14 § 1]. Things, *in general*, can namely be subjected to *all kind of in rem rights* except collateral security (see above). There is no doubt that the *corporeal* otherwise *tangible assets*, i.e. *things*, are the *most colourfully different* objects of *in rem* rights. Therefore, this variability deserves to be introduced through diverse ways of classifications.

a) By argumentation *a fortiori*, there are, on the one hand, tangible assets, in which an *autonomous and independent in rem right can exist*, and, on the other hand, in which such rights *cannot exist*. The first category contains the *autonomous* or otherwise *principal things*, the second one incorporates *auxiliary things* otherwise *side-things*. A side-thing related to a principal one '*shares the legal fate*' of the latter. The reason for that lies in the fact that a side-thing *has no*, or, *does not yet have* any *physical autonomy*, and/or, consequently, any *economic*—i.e. application, use, utilization and exertion—*independence*.

For instance, a *boat* and *its oar*, and a *house* and *its built-in closing systems* are all things, i.e. these are all tangible assets being capable of appropriation, however, an independent right *in rem* cannot exist either in an *oar assigned to a boat*, or in a *door-system built into a house*. Evidently, such rights do exist independently in an oar or in the pieces of a closing system, which *do not yet related to their principal things*. In this example, this relationship shall be understood as an *in rem* right in a boat with oars and an *in rem* right in a house with installed doors automatically—i.e. by law (*ex lege*)—extends to the auxiliary things (oars and fixed closing systems). A so-called '*fructus pendens*', i.e. a fruit not separated from the object which they originate from (e.g. standing crops, apples still hanging on the tree), does have a physical entity, however, it, as such, cannot be appropriated separately, since it obtains its legal autonomy through appropriation: A *pending fruit* transforms into *separated*—an *independent* thing—through its harvest, which is to be interpreted in this connection as *appropriation* (i.e. taking in possession).

Thus, auxiliary things (side-things) are *narrow connected* to their principal things, therefore their legal attributes shall be investigated through this very *association*. These relations are called *coherence of things* (detailed notion see above at *cohaerentia corporum* in the General Part of Private Law).

The concept of coherence of things has many *sub-divisions* such as:

– *Components* (see the example of the *fixed closing system of a house* above): "Ownership extends by law to everything that is *permanently* unified or adjoined with another thing, if their *separation* or *disjunction* would cause *perdition*, *destruction* or *significant reduction of value* any of them" (S. 5:15).
– *Accessories* (see the instance of the *oars of a boat*): "Ownership shall extend, in case of doubt, to parts that are *not components* but are *usually necessary* or *beneficial* for the *proper use* or *maintenance of a thing* (see S. 5:16).
– Another category of coherence of things is that of *land and building*. Our private law preserves the ancient Roman principle of *aedificium solo cedit* in a *dispositional* manner since Civil Code says: "*Ownership of a building shall accrue to the owner of the land*, unless there is a contrary agreement between the owners" (see Section 5:18 § 1].
– There are things without physical autonomy, which are bestowed with legal independence by law. The aim of the lawgiver was precisely to exclude them from the *in rem* right existing in the principal thing: "Ownership of a *real estate property* shall extend *neither* to *treasures of earth nor* to *natural resources*" (see Section 5:17 § 2].

b) In the followings, we shall turn to the category of *legally autonomous things* being capable of appropriation. These can be manifold classified as well.

– First of all, things shall be differentiated with respect to the circumstance, how, and, to what extent the *diverse subjects of law*—i.e. the state, the local governments, and other legal persons, and natural persons as well—*are capable of acquiring the in rem rights*, esp. *ownership rights in them*. According to this classification, there are things, which:
  - are (fully) *marketable*,
  - have *limited marketability*,
  - are *non-marketable*.

  These limitations may arise from *agreements* or *laws*. If the latter, restrictions shall be based *at least on Acts*, i.e. either directly on the *Fundamental Law* or on *cardinal* or *simple acts*. The legal restrictions may have *effect* either to the *total right of ownership* or solely to its *particle rights* such as one or more of the followings: right of possession, use, utilization, disposition (alienation and encumber). For instance, the treasures of earth, the national roads, the Holy Crown of Hungary, the Building of the Hungarian Parliament and many others are so-called *Objects of Exclusive State Ownership*. Scheduled national or local monuments are non-marketable since these generally belong to *Treasury Assets*. Some of *local government properties* (e.g. local roads) are non-marketable, some of them have a limited marketability declared by local ordinances. In case of *firearms*, even the right to *possession* is restricted. The ownership in *soil* can be acquired by *natural* persons within the limitation of the *spatial extent*, in case of acquisitions by *legal* persons, limitations are defined not only by territory and extent but by *personal* restrictions as well. An example of *limitation of marketability by agreement* is the *agreement as to succession*. In this case, any disposition of the testator for alienating or encumbering the property to which the agreement as to succession pertains shall be null and void (in absence of a contrary agreement; cf. Section 7:50 § 1].
– If an *in rem* right, typically an ownership right is just existing in a corporeal asset, this is called an *owned thing*, if contrary (i.e. there is currently no *in rem* right existing in the very thing because there either cannot or does not exist any) it is named after ancient Roman terminology as *res nullius*, i.e. 'nobody's thing', or *res derelicta*, viz. 'voluntarily abandoned property'.
– According to the things' *nature*, *physical attributes* or *other tangible characters*, things can be diversified and classified as:
  - *alive* things and *dead* or *lifeless* or *inorganic* things,
  - *solid* (*simplex*) and *compound* (*complex*) things,
  - *divisible* and *indivisible* things,

- *fungible* (*replaceable*) and *infungible (irreplaceable*) things,
- *consumable* (capable of being ceased by use for intended purpose) and *inconsumable* things,
- *valuable* and *invaluable* things,
- at last but not least *movable* and *immovable* things.

Between things diversified by their nature and physical attributes, there are *characteristic overlaps* and *constant parallelisms*:

– *complex* things are usually *divisible*,
– *alive* things are ordinarily *consumable*, and are typically *movables*,
– *irreplaceable* things are mostly *inconsumable*,
– in the majority of cases, *immovables* are *valuable* and *inconsumable*.

However, it *does not exclude oppositional situations* either. Namely, it is not inconceivable at all (following the order above):

– that a *simplex* thing may be *divisible* as well (e.g. soil),
– that a *lifeless* thing may be *consumable*, too (e.g. salt, medicines), or an *alive* one at the same time *immovable* (e.g. a forest),
– that a *replaceable* thing may be *inconsumable* (e.g. money in cash),
– that an *immovable* may be likewise *consumable* (e.g. a mine) or *invaluable* (e.g. the building of the Hungarian Parliament).

The diversifications and classifications shown above have not only didactic and logical relevance but these always have a *private law consequence* as well. Without any legal relevance, the categorizations would be an empty playing on words, namely, their so-called *raison d'être* lies in this kind of implications. Let us introduce to some of them!

– The category of *movables and immovables* has many private law consequences such as in the case of:
  - *encumbering* with pledges, liens (e.g. the object of a possessory lien can only be a movable asset),
  - the *duration of adverse possession* (in case of movables, it lasts 10 years, in case of immovables, it takes 15 years),
  - the *un-owned position* (an immovable cannot be derelicted),
  - *product guarantee* and *product liability* (it exists for movables with respect to the notion of 'product'),
  - *alienation restrictions* (approval of guardian authority is required for the legal acts of minors' legal representatives if concerning the transfer of a real estate),
  - the *acquisition by transfer* (in case of immovables, a contract for transfer or other legal title is required, and, the change of owners shall also be registered in the Real Estate Register),
  - *acquisition of ownership from a non-owner* (in case of movables),
  - *consignment* and *deposit contracts* (solely for movables).
– Distinction between *divisible–indivisible* assets has private law consequences such as in case of:
  - termination of co-ownership (in case of an indivisible asset, the co-ownership cannot be terminated by the division in kind),
  - partial performance (if a service is divisible, the obligee shall accept it performed partially),
  - multiple liability in an obligation (liability shall be joint and several, if an indivisible service is to be supplied by more than one obligor),
  - limited non-performance (it is allowed only in case of the non-performance of a part of a divisible service).
– The differentiation between *replaceable and irreplaceable* things is also established by the important private law impacts such as in the event of:
  - acquisition of ownership from a non-owner (in case of money, it is allowed through a simple transfer without further ado),
  - the object of some contracts (only fungibles by loan, life annuity, and collective or irregular deposit contracts, but solely infungibles in case of a plain deposit contract).
– If category of *consumable and inconsumable* things is concerned, it has significance in case of:
  - *long-term legal relationships* such as *usufruct* or *lease contracts*, since their object can be inconsumable

corporeal assets, otherwise the relationship becomes irregular together with its special rules,
- *civil law partnership* (if partners contribute inconsumable assets, these shall be used collectively, if contrary, the members contribute consumable assets, these shall be owned jointly).

1.2.3. The Subjects Thereof

According to general rules on legal capacity [Section 2:1 § 1; 3:1 §§ 1–2), a *person having legal capacity* can become subject of *in rem* legal relationships. Thus, such persons are entitled to have *in rem rights and duties* as well; these can be:
- either *natural persons*,
- or *legal persons*
  - within the *legal persons of private law* (e.g. companies, and civil society organisations),
  - and the *legal persons of public law* having simultaneously a private law personality as well (e.g. the State or a local government).

Considering only, in a narrower sense, the ownership rights, the legal position of its subjects sharply divides the *two major paradigms of property*, i.e. *private property* and *public property* (detailed see below in Law of Property).

The above defined *general rule upon legal subjectivity* in the law of *in rem* rights can be restricted by manifold private and public law norms. It means that the *acquisition of in rem rights* by persons—viz. to become subject of an *in rem* legal relationship—are limited through much kind of norms. These *private* and *public law restrictions* shall be classified in different ways as follows:
- The reason for a legal restriction may lie in the *special legal subjectivity* of the beneficiary, too. (Namely, the legal position of the *State*, a *local government*, a *church*, an *economic operator*, a *civil society organisation*, or a *foreign* or *non-resident* person diversifies the extent of *capacity of in rem right acquisition*.)
- Another reason for a legal limitation of *in rem* right acquisition may also lie in the *speciality of the object* (soil, monuments, roads, special rights, frequencies, firearms, the invaluable worth of asset etc).
- The *regulation of the process of acquisition* may also be interpreted as a limitation factor (in the case e.g. of public procurements, competitions, competitive selection processes, private and official auctions, the stock exchange, or any other regulated market such as commodity exchanges).
- A different restrictions of *in rem* right acquisitions can be classified with respect to the *extent or way of limitation* as well, since it may affect:
  - the *availability* or *marketability* of the right (e.g. in case of soils),
  - the *contents* of the *acquired* right (e.g. the limitation of the acquisition of possession or that of ownership),
  - the *temporal scope* of the *acquired* right (in the case e.g. of agricultural leasehold contracts),
  - the *physical extent*, *territorial attributes* or *any other relevant character* of the object *to be acquired* (see e.g. the maximum allowable extent of soils by sales and leaseholds, or the acreage restrictions).

This schematic frame of restrictions of *in rem* rights acquisition based mainly on the *subjects* of rights gives basic answers to the questions of:
- *what kind of subject of law* (natural or legal person) can acquire the right,
- *what kind of object of right* can be acquired at all,
- *within what measure of time or space* can the object be acquired, and
- *how*, i.e. *within what procedural framework* can the object be acquired.

For finding the answers to the questions formed above consult the chapters below on the detailed rules of each right *in rem*.

2. Special Part

After the recapitulation of the *General Part* of the law of rights *in rem* comprehending the theory of norms and the doctrine of legal relationships as well, a *Special Part* shall come, which contains the law of possession and the special rules of specific *in rem* rights.

This chapter follows the order of the Civil Code (see above). I shall emphasise well in advance that other Hungarian textbooks of the law of rights *in rem* do not handle this field of law as having two major parts of general and special. I reviewed this practice, and I can state that there are more reasons for doing so than against it.

- Although, generally, contemporaneous textbooks are *ended up* in the theme of *Law of Possession*, this book preferably *starts* its special part with this very issue. The reason for that lies in the fact that it is the possession, which serves as a *factual* ground, and, in many cases, a *legal* basis for *exercising* rights in *things*, which are the most common and important objects of the rights *in rem*.
- The issue of the law of possession is followed by the introduction of the *rules of ownership*, which is the unique *complete in rem* right entitling the subject of law to full power upon the thing owned. Within it, the chapter of *basic notions* is succeeded by the *content*, *protection*, and *acquisition* of ownership, then comes the analysis of the *special forms* of ownership, i.e. *joint ownership* and *condominium ownership*.
- The third thematic unit deals with *non-complete rights in rem* following the structure and order of the Civil Code: The general and special part of the *Law of Lien* is followed by the diverse genres of the *Rights of Use*, and then comes the manifold types of *Land Easements* (servitudes).
- Since *Public Registers* concern or may concern almost all kinds of rights *in rem*, their regulation could be introduced equally well in the *general* part. Whereas these rules upon the registers are hardly understandable without a detailed knowledge of rules belonging to the *special* part of this field of law, it seemed more reasonable to discuss them in this part. Another reason is that the system of registers is organised specifically: its different genres (*Real Estate Register* and *Register of Collaterals*) are linked with either the physical character of the registered asset (viz. *immovables*) or the special way of engagement (viz. *collaterals*) of the thing registered.

2.1. The Law of Possession

The system of the *law of possession* is a minor field of private law, which regulates the phenomena and settles the disputes arising from cases standing in connection with the *right of possession* otherwise the right to possess. This small and self-contained branch of law incorporates rules as follows: on the one hand, rules upon *lawful* possession's *genres*, *acquisition*, *loss* and *protection*; on the other hand, rules upon *wrongful* possession.

2.1.1. Basic Notions Thereof

1. *Possession*. 'Possession' is ordinarily a mere *fact*, which, in general, *proves the power* of either an entitled or even an untitled person towards a certain movable or immovable asset for outsiders. This fact is to be interpreted as an *upshot of a single movement* as well as a *conclusion of a process of multiple momenta* aiming to achieve a factual power towards tangible assets.

At the same time, 'possession' is not only a simple fact but—in fact: principally—a *protected substantive right* as well. Possession as a substantive right entitles to have power towards a thing for keeping it under control in a way matching the public perceptions. In the vast majority of cases, with respect to the person who possesses (possessor), possession as a fact and possession as a right coincide: the object of possession is possessed by the entitled person.

2. *Object of Possession*. An object of possession can *solely* be a *thing*, be it a movable or an immovable. According to this, speaking about the possession of other assets such as claims or rights is a nonsense.

3. *Acquisition of Possession*. The acquisition of possession is the *legal process* for realizing a *new legal situation changing the status quo ante of a certain person's power towards a certain tangible asset*. This process may take place

either through a *real act*—i.e. a factual change of power upon a thing (details see above at 'legal facts' in the general part of private law)—, or through a *legal act*—which is a special transaction called the '*transfer of possession*'.

The acquisition may succeed *with* or *without a legal title* as a legal base for it. Legal titles are various: some of them belong to the *law of rights in rem*—such as an ownership right, a usufruct, a right of use or e.g. possessory lien—, some of them are among the legal titles of the *law of obligations*—for instance sales contracts, contracts of gift, lease contracts or contracts of deposit.

4. *Possessor.* Possessor is who *realizes* otherwise *establishes* a *new legal situation of possession in his/her own favour* or *in favour of another person*, in other words, a possessor *acquires and maintains the power towards a certain thing on his/her behalf or on behalf of others*. According to Section 5:1 of the Civil Code, there are *two main paradigms of possession*.

- Possessor is a person having factual power towards a thing *as his own* (e.g. the owner), or keeping it in power *under a temporary right* (e.g. a lessee, a tenant, a usufructuary, or other beneficiaries). Therefore, if the thing stays *at the same time under a multitudinous possession of various possessors having a legal title to possess*, there are two diverse legal situations:
  - the one is the *co-possession*, in which the thing is mastered by two or more *partial possessors having the same kinds of rights* within the *same or different measures* (e.g. the one has 10%, the other has 30%, the third one has 60% of the same right to possess the certain thing);
  - the other is the *divided possession*, in which the thing is mastered by two or more *possessors having diverse kinds of rights* within the *same measure*:
    - *sub-possessor* is the one who *maintains the actual power* towards a thing under a *temporary right originating from another's possession*
    - *principal-possessor* is the one *whom the sub-possession actually stems from*.
      According to this, next to an *owner* as *principal*-possessor, there can be more kinds of *sub*-possessors like a *usufructuary*, a *lessee*, or a *depositary*. If the *usufructuary gives the thing in lease*, he/she will be a *principal*-possessor *with respect to the lessee* who is *sub*-possessor but the usufructuary *remains sub-possessor as to the owner*. Beside a lessee as principal-possessor, a sub-lessee is sub-possessor, or, adjacent to all of them, a depositary can be sub-possessor; here is the lessee a sub-possessor as to the usufructuary or the owner who gave the thing in lease. Thus, a depositary can act either as a *sub-sub-possessor* (for instance: owner → usufructuary → depositary), or as a *sub-sub-sub-possessor* (viz. owner → usufructuary → lessee → depositary), or even as a *sub-sub-sub-sub-possessor* (in case of owner → usufructuary → lessee → sub-lessee → depositary).
- According to the other main regime of possession, possessor is also the one from whom possession of a thing is *temporarily conveyed without legal basis to the actual control of another person*: from an *entitled principal-* or *sub-possessor* to an *unjustified possessor* such as e.g. to a thief. This is the situation of *simultaneous existence* of *lawful* and *wrongful possession* (below).

5. *Lawful (Just) Possession.* A possession is lawful since it is established *under a legal title* and *without any exclusive title*. In case of an already *established lawful possession*, there is no legal relevance of the possessor's knowledge about being or not being entitled to the possession.

6. *Wrongful Possession.* A possession is unlawful, unjustified or wrongful (synonyms) since it is established *without any legal title* or *contrary to an exclusive title*. However, in case of an *established wrongful possession*, there is an utmost high legal relevance of the possessor's knowledge about being or not being entitled to the possession if appearance ("I am entitled to possess") and reality ("I do not have any justification to possess") differs. There are, namely, two kinds of wrongful possessors:

- a *bona fide wrongful possessor* is who *does not have and must not have* knowledge about the fact that the apparent situation differs from the real one;
- a *mala fide wrongful possessor* is who *has or ought to have* knowledge about the fact that the apparent situation differs from the real one.

By nature, the *private law position* of a *wrongful possessor of good faith* and a *wrongful possessor of bad faith* is deeply different (see below).

7. '*Own-Force*'. 'Own-force' is a created notion in English legal terminology, i.e. a loan translation of

the German '*Eigenmacht*', which is to be explained as *self-authorization for interference*. This is an interesting concept since being a '*legal notion extra legem*' which exists *beyond* the frames of law. Its non-legal basis is the *fist law* establishing the *rule of force* aiming the *self-enforcement of self-defined demands*.

With respect to the *goal* of the own-force, it has *two variations*:

– *self-defence* aims the *repulse of an unlawful offence* against the possession;
– *self-help* targets the *termination of an already occurred injury* against the possession.

As to the *tolerance of the State* towards own-force, there are two types as well, i.e. *legally permitted* and *legally prohibited* own-force. The latter has two versions:

– *unlawful deprivation* of possession, and
– *unlawful interference* of possession (which restrains its maintenance).

8. *Protection of Possession*. Protection of possession aims either to *reacquire lost possession* or to *terminate the restraint against maintaining possession* either by legally permitted *real acts*, i.e. *lawful own-force*, or by a *legal act for enforcement*, i.e. *lawsuit for protection of possession*.

Protection of possession is a rather special institution since it distinguishes persons *worthy of protection* from persons *not worthy* of protection *irrespective* of the fact that the one to be protected was *lawful or wrongful possessor* but *with reference to* the fact that the one to be protected *acquired possession by using lawful or wrongful own-force*. Scil. "the possessor is entitled to protection of possession *against anybody*, *with exception of the one from whom the possession was acquired by unlawful own-force*" [Section 5:5 § 2 of NHCC).

According to two major Authorities of continental private law thinking, protection of possession has *two main motivations*:

– *limiting the own-force* through the State power within the reasonable boundaries (*F. C. von Savigny*),
– *granting the owner an eased and accelerated ownership protection* through possession protection on the empirical basis that possessors usually are owners (*R. von Jhering*).

2.1.2. Acquisition and Loss of Possession

1. Most of the time, possession and ownership are accompanied by each other. In modern legal systems, ownerless and abandoned i.e. unpossessed tangible assets can hardly exist. Therefore, acquisition and loss of possession usually are in a mutually correlative relationship. Thus, losses of possession are immediately followed by acquisitions of possession, and *vice versa*. However, there are two minor exceptions as well:

– *dereliction*, i.e. a definitive give-up of exercise of power towards a thing,
– *joint possession*: in this case, acquisition and loss of possession can also be connected to each other partially.

This concept is evidenced by the fact that the Civil Code knows *two major ways of loss of possession* (cf. Section 5:4 § 1]. According to the cited law:

– possessor shall lose possession if *definitively* abandons physical power towards the thing; but possession shall *not* cease if the possessor is *temporarily* unable to maintain the physical power, because, in such cases, it is the mere will to possess, which solely maintains the legal situation of possession (*animo retinetur possessio*);
– the possessor also loses the possession if it is *acquired by others* (*succession*).

2. There are two major different ways to acquire possession:

– on the one hand, so-called *original acquisitions* mean acquiring physical power towards a thing through *real acts* (cf. Section 5:2), while,
– on the other hand, *derivative acquisitions* are more complex modes to acquire possession since these are executed not only via *real acts* but through *inter vivos* or *mortis causa transactions* as well.
  - *transfer of possession* (see NHCC Section 5:3) is the *inter vivos* kind of derivative acquisitions,
  - *testamentary dispositions* are their *mortis causa* ways. In case of death (or successive dissolution) of the possessor, the possession shall pass to the heir (or successor) after the succession has been opened (or upon succession). The heir's (or successor's) legal status shall be determined by the testator's (or predecessor's) legal title of possession (see Section 5:4 § 3].

3. *Transfer of possession* is a bilateral agreement, which is governed by the provisions on *contracting* and

validity of contracts (cf. Civil Code Sections 6:63–6:115), and by which *the physical power towards a thing is conveyed from transferor to transferee*. It follows that an *invalid* (void, null) or *legally inexistent* transfer of possession cannot lead to a *legal* change in the legal situations of transferor and transferee. If a *factual* change of physical power towards the thing *was still being executed*, i.e. without any valid legal title, the transferee becomes in the legal situation of *wrongful possession*. Transfer of possession as a *legal* act, however, can be transacted both *with* and *without* the *real* act of *physical handover–takeover*.

The following transfers do not necessitate a real act:

– In some cases, a handover from hand to hand is physically impossible: if an immovable is transferred, it is always unfeasible, but there are also movable-transfers, such an execution of which is also hardly imaginable. If such way of handover is excluded, transfer of possession takes its place *through the agreement* of transferor and transferee relating to *the termination of the former possessor's power* towards the thing, the possession of which is to be delivered (*traditio longa manu*).
– Since Civil Code knows institutionally no *detention*, and it holds that both principal- and sub-possessors are two different kinds of possessors, a sub-possessor is not in the legal standing of a mere detentor. Thus, transfer of possession can also be carried out *without any change* in the *physical* positions but through a mere agreement on the *change of legal title* of possession (*mutatio causae*; cf. Section 5:3 §§ 2–4):
  - a *sub-possessor becomes possessor* (*traditio brevi manu*), e.g. if a tenant or depositee acquires the ownership of the leased house or deposited movable thing; and *vice versa*:
  - a *possessor becomes sub-possessor* (*constitutum possessorium*) by transferring possession of a thing but continuing to hold it (*detinere*); e.g. when a seller of an immovable remains therein as a tenant.
– If the thing is held by third parties, possession shall be transferred *through the mere conveyance of the claim for the thing* to the party acquiring possession, if so agreed by the possessor and the acquirer of possession [Section 5:3 § 4]. Namely, if a *lienor* or a *pledgee* possesses the real security, and the debt of the lienee or pledger *is paid by an extraneous person*, this one *becomes the successor of the lienor or pledgee within the proportion of this payment terminating the secured debt*. Such succession entitles the payer to the possession of the thing given over as real security. In such cases, transfer of possession takes place without any physical handover but *through the transfer of the demand of surrendering the thing* (*cessio vindicationis*).

2.1.3. Protection of Possession

1. To exploit the benefits of a tangible asset—i.e. to use and to utilise it— usually and practically necessitates the possession, namely holding it under physical power. It is an empirically proven fact that *possessors generally are lawful possessors* who have a legal title of a *full* or a *limited right in rem* or a legal title of a *right in personam* etc. to hold the thing under power.

It follows, according to *Jhering* (see above), that the main reason for the legal defence of possession is, as a side effect, to offer these lawful possessors as well a simple and fast legal protection for re-instating the former lawful position (*in integrum restitutio*).

2. The institution of *protection of possession* is used for the *defence of possessors*, the variegated notion of which was defined above (see there). The law [Section 5:5) provides protection for the following possessors.

– The *'pure'* or *'simple' possessor* who stands in a legal situation, where is no principal- and sub-possession involved in, is entitled to protection *against anybody*, with exception *of the one* whom the possession has been acquired *by unlawful own-force* from.
– *Principal-possessors* and *sub-possessors* are also entitled to protection *against anybody*, with exception *of the one* whom he has acquired the possession *by unlawful own-force* from. A *principal-possessor* is also *against sub-possessors* (lessee, usufructuary etc.), and *vice versa*, within the legal title. This means that protection can be issued only if the law ruling the legal relationship establishing sub-possession (e.g. lease, usufruct) grants this right.
– In case of *joint possession*, there is a two-way protection of possession:
  - *Against extraneous* (third) persons, protection shall *individually accrue to each* possessor, and each

possessor shall be entitled to demand the thing to be rendered available *for joint* possession; the *limit* has been drawn by the abovementioned main rule saying that possessors are entitled to protection *against anybody*, with exception *of the one* whom the possession has been acquired *by unlawful own-force* from.

- *Against each other*, joint possessors are also entitled to protection of possession according to their title and proportion.

3. The Civil Code names the matters of facts establishing a legal title for protection in sum as *prohibited* or otherwise *unlawful own-force*, which can be divided into two classes:

– in case of *unlawful deprivation*, possession is lost totally and plausibly definitively;
– in cases of *unlawful interference of possession*, when possession
  - is lost plausibly only temporarily,
  - or it is lost only partially,
  - or it has not been lost yet but has already been hindered.

4. There are *three means* of protection of possession [Sections 5:6–8):

– *lawful own-force*, which is a tool beyond the law as such,
– *extra-judicial* procedure (*possessory* process) and
– *judicial* procedure (*petitionary* process).

a) *Own-force.* Prohibited unlawful own-force actions shall not be repelled by other unlawful own-force actions. Therefore, the *cause* or legal basis of possession's protection is an *unlawful* own-force action but the *mean* of the protection beyond State authorities can only be a *lawful* own-force action. Which own-force actions are affirmed to be lawful, since protection of possession aims either to *reacquire lost possession* or to *terminate the restraint against maintaining possession*?

– A possessor, who was *restrained in maintaining* his/her possession, is entitled to act in *own-force* to repel any *unlawful own-force action to the extent necessary for the protection* (*rule of proportionality*).
– With respect also to the *rule of proportionality*, acting in own-force *for re-acquiring a lost possession* is allowed only if the time lost through the use of other tools of protection would frustrate the success of protection.

b) *Extra-judicial possessory process.* The so-called possessory procedures are extra-judicial, which means that these are not lead in front of a court but in front of a public authority, i.e. the notary. This procedure is a special process of public authority, which has specific rules according to remedies etc.

– The possessor is entitled to file a request *within one year* at the notary either for *re-instating the former state of possession* or for *terminating the restraint of maintenance of possession*. If requested, the notary may also decide in the questions of *interim profits, damages, and costs*. The resolution adopted with respect to *protection of possession* shall be enforced *within three days* with no regard of taking a petitory process. Anyway, an *action can still suspend the enforcement* if the decision *covers* the issues of profits, damages and costs, and if the action was brought in this respect, too. The court *may order the suspension* of enforcement of the resolution about the main issue of possession, if the *resolution seems to be altered.*
– The *request is granted unless* it is evident that the person who has requested protection is *not entitled* or *had been obliged to tolerate the restraint*. In case of a successful request, the notary orders *re-instatement of the former state of possession* or *binds the trespasser to stop restraining the maintenance of possession*.
– There is *no legal remedy* against the decision of the notary *within the system of administration*, thus the resolution *cannot be appealed* by way of an *administrative procedure*. But the party who finds the resolution prejudicial can *bring an action within fifteen days* of receipt of the decision *against the other party for overturning the complained decision*. The claim shall be submitted to the notary who brought the resolution (see Section 566 § 2 of the new Code of Civil Procedure, i.e. Act CXXX of 2016).

c) *Judicial petitionary process.* The *judicial* remedy for protecting possession is a *petitionary* action which can be brought in court either *after the decision of notary as its remedy* or *instead of the administrative process of the notary*. This is a specific *civil procedure*, in which, on the one hand, *plaintiff* (claimant) is the possessor aggrieved by prohibited own-force, and, on the other hand, *defendant* is the one who acted in unlawful own-force. The *bill of complaint* holds the petition which aims either to *restore the former state of possession* or to *terminate the restraint*. The court decides on the ground of *eligibility for holding the possession*, which means

that the court examines whether the plaintiff or the defendant has a *stronger legal title to possess*. A stronger legal title is the one which *establishes lawful possession with respect only to the other party*. The *burden of proof* (*onus probandi*) is set by law that *the entitlement of the party disturbed in peaceful possession shall be presumed*. Therefore, the *defendant* is bound to prove that he/she has a better ground or a stronger legal title to possess the very asset as the one which the peaceful possessor had. The court delivers the judgment with an *immediate effect*, i.e. the decision is *enforceable notwithstanding any appeal* [Section 344 § 5 and Section 362 § 1 point b of the new Code of Civil Procedure).

2.1.4. Wrongful Possession

1. According to common sense and by nature, in case of a wrongful possession, the *entitled party is at least partially out of possession*. Such a legal situation subsists ordinarily during a period of time, which makes inevitable to settle, the legal fate, on the one hand, of *interim decreases* and *increases of worth* of the possessed asset (meantime damages, deteriorations, depreciations, profits, benefits, gains, fruits etc.), and, on the other hand, of the *costs* and *expenditures* staying in the background of such changes and fluctuations in the value. The reason for that lies in the *main function of private law*, which is—among others—to *prevent*, *hinder*, and *terminate unjustifiable enrichments*.

2. In case of wrongful possession, there are theoretically *three different kinds of subjects* on the two sides of the legal relationship:

- on the one side of the legal relationship stands the *lawful possessor*,
- on the other a *wrongful possessor*, which is
  - either a wrongful possessor of *good faith* who, applying *due diligence*, *does not have and must not have* any knowledge about the fact that the *apparent* situation—to be *lawful* possessor—differs from the *actual* position—to be a *wrongful* possessor;
  - or a wrongful possessor of *bad faith* who, applying *due diligence*, *has or ought to have* knowledge about the fact that the *apparent* situation of *having* a legal title to possess differs from the *actual* one, i.e. that the possession *has not got* any legal basis.

Apparently, the legal position of these three different kinds of subjects shall be totally diverse with respect to the *obligations of bearing risks of loss* and *of bearing costs*, and nonetheless according to the *right of exploitation* and *profit-taking*. However, there are duties and rights which are *independent of the faith* of the wrongful possessor. These duties and rights are regulated in the *common rules* of lawful and wrongful possessions [Sections 5:9–12).

- As a rule, wrongful possessors are *bound to surrender* the thing to the lawful possessor, but a wrongful possessor *may refuse to surrender* the thing until his/her lawful demands claimed in connection with the possession are satisfied. The *surrender may not be refused* if the thing has been acquired *violently* or *treacherous*, especially by committing *criminal offence*.
- With exception of *minor expenses required for the maintenance*, the wrongful possessor is *entitled to demand compensation* regarding his/her *necessary expenses* related to the thing. The wrongful possessor is entitled to *remove the equipment and accessories created by him/her without damaging* the thing (*right of removal*).
- If the *lawful possessor fails to remove* the thing *on demand* within a *reasonable period of time*, and the relocation of the thing would involve *unreasonable difficulties* or *require an advance on the costs*, the *wrongful possessor* is entitled to *sell or use* the thing. *Highly perishable* things *shall be sold or utilised*, if possible; these *incomes*—i.e. the purchase price or the consideration of the used thing—accrue to the lawful possessor.

3. As a matter of course, the legal position of a *bona fide wrongful possessor* is more *preferred* than such legal standing of a *mala fide wrongful* possessor. The preferred nature of the legal situation has *two directions*: the one is that *sanctions are softer*, the other is that *rights are wider* [Sections 5:10–11).

The quality and measure of *useful* expenses exceed that of *necessary* expenses:

- A *wrongful possessor of good faith* may also demand compensation for those *useful* expenses, which are *not covered* by the possessed thing's *interim benefits* accrued in the meanwhile to his/her assets.

– A wrongful possessor of *bad faith* may demand compensation according to the principles of *unjust enrichment*. According to this, compensation is eligible only for those useful expenses and only within that measure, by which and from which the lawful possessor was enriched.

Surrendering *extant benefits*, i.e. such interim advantages of a wrongfully possessed thing that still exist at the time of recovery:

– if a wrongful possessor of *good faith* has acquired the possession *for a consideration*, he/she is *not bound* to surrender the extant advantages;
– a wrongful possessor of *bad faith* and of *whatever faith* if acquiring *gratuitously*, is *required* to surrender the extant benefits.

Liability for damages caused to the thing and *responsibility for the compensation of non-extant*—i.e. *consumed* and *not collected—interim benefits* from wrongfully possessed things *before the reclaim* of the thing:

– *Until possession is reclaimed*, the *bona fide* wrongful possessor is *not liable* for providing *compensation* for non-extant benefits and is *not liable for damages*. Moreover, if *recovery is claimed*, such a possessor is *neither liable for damages caused while exercising presumed right nor responsible to provide compensation* for the benefits that *has been or should have been collected under presumed right* until bringing the action for reclaim.
– The *mala fide* wrongful possessor *shall reimburse* the value of consumed and not collected benefits, and, under the provisions of non-contractual liability, is *liable for all damages* that would not have occurred if the thing had been possessed by the entitled party.

2.2. The Law of Ownership Rights

2.2.1. Basic Notions Thereof

1. *Ownership*. The *ownership is a form of realization of power towards a thing*, which enables the one holding the power to enjoy the right of the *fullest possible exploitation* of the thing in question. Although such rights grant the widest possible rank of enjoyment of a thing, it is *neither unrestricted nor unrestrictable*.

So far as the *constitutional issues* are concerned, *private ownership* is one of the major institutions *to limit State Power* and—as a *pillar of private autonomy—to guarantee the practice of individual freedom* as well. As such, ownership is a *fundamental right* entailing *social responsibility* for *public good* [Fundamental Law of Hungary (FLH) Art. XIII § 1] in these days' societies and Systems of State.

Ownership is the basis of social security Hungary *striving to provide* to *all of its citizens* (FLH Art. XIX § 1]. The source of this society-wide security is the constitutional obligation, according to which every person shall *contribute to satisfying community needs to the best of his or her capabilities and in proportion to his or her participation in the economy* (cf. FLH Art. XXX § 1].

2. *Ownership Relations*. The ownership relations—as *plurale tantum*—describe the status and changes of relationships between *private and public ownership*.

3. *The System of Property Ownership*. Inside a certain society, the system of property ownership means the overall relations of ownership, and, as such, the base of the State's socio-economic organization.

4. *The legal relationship of ownership*. The partially *beyond-law-concept* of *ownership relations* (as *plur. tant.*) should be distinguished from the legal notion legal relationship of ownership, which is an *absolute private law relationship* according to the very *object of ownership*. The *subjects* of legal relationships of ownership can be classified in many ways, such as:

– classification with respect to the subjects' *public law standings*:
  - *private ownership* is the ownership that is enjoyed by a person who does not have and cannot exercise *sovereign rights*;
  - *public ownership* is the ownership that is enjoyable solely by a person having and exercising *sovereign rights*; the major part of *public goods* is the *national wealth*, to which belong:
    - on the one hand, the *state assets*, which are
      - the *treasury assets*, viz. a bound form of *public ownership* exercised by the holder of sovereignty, and
      - the *business assets*, viz. a *private law ownership* exercised by the holder of sovereignty;

    - on the other hand, the *assets of local authorities*, which are
        - the *capital* and other *non-marketable* assets, and
        - the *business property* of municipalities.
- *within private ownership*, there are *two major forms* in respect of the subjects' *legal personality*:
    - *individual property*, i.e. the ownership of a certain *natural person*,
    - *partnership property*, i.e. the ownership of *legal persons aggregating goods*.
- *within individual property*, there are *three forms* with respect to the *singularity or plurality of entitled parties* having ownership right in a *single* thing:
    - *personal property*,
    - *joint property, and*
    - a peculiar *combination* of the afore mentioned ones, i.e. the *multi-household building*, which has a *special legal personality for its own*.

5. *Ownership*. The legal notion of *ownership* is used *two-way*:
- as the *law of ownership rights*, which *governs the totality of social relationships* according to *private* properties and *lays the private law foundations* of *public* properties;
- as the notion of *ownership right*, which is the *major element* of the *legal relationship of ownership*, and, which *legitimates* and *protects* the entitled person's *possibility of action* for the owned thing's *full enjoyment*.

6. *The object of ownership*. The object of ownership is the *indirect* object of the legal relationship of ownership. It *differs* from the range of objects of *in rem legal relationships* since these can be diverse kinds of assets such as things, claims, and rights. The *range of ownership objects* are *defined by law*. The centre of the regulation lies in the Civil Code [Sections 5:14–20). According to this:
- *in general*, the objects of ownership rights may be *all things of a tangible nature* which are *capable of appropriation*;
- although *in a special way*, some *peculiar tangibles* may also be the objects of ownership rights, such as:
    - money,
    - securities,
    - natural resources that can be utilised as capital goods,
    - animals;
- *additionally*, otherwise *secondarily*, ownership extends to some other *separate* or *affiliated* tangibles in a specific way, such as:
    - *in every case*, the ownership of the *principal* thing extends to its *components*, which are *permanently enjoined* with the thing in such a way that disjunction would cause their *distraction* or *depreciation*,
    - *in cases of doubt*, the ownership of the *principal* thing extends to its *accessories*, which are parts that are *not components* but are *necessary* or *useful* for a *proper use* of the principal thing;
    - *unless there is an agreement to the contrary*, the ownership of a *building* accrues to the owner of the *land*;
    - *to the extent of a potential use*, the ownership of the *land* extends:
        - to the *airspace* above the land,
        - and to the *land mass* underneath it;
    - *by no means* can the ownership of the *land* extend:
        - to the *treasures of the earth*,
        - and to the *natural resources*.

2.2.2. The Content of Ownership

The content of *ownership* is not equal with the content of the *legal relationship of ownership*. The latter is an *absolute* private law relationship, the content of which is that the *entitled* party holds the *ownership right itself*, and other persons are *obliged* to *acknowledge*, to *tolerate* and *not to violate* this party's right. The ownership grants the *widest although not illimitable extent* of power towards a thing for its *utter enjoyment* and *fullest exploitation* with some certain possible restrictions provided by law. According to this, the content of

ownership implies the rights of the owner with its specific restrictions based either on public law or on private law. Some of these restrictions can be taken also as the duties and obligations of the owner. The *advantages* of a thing (*commoda*) *enjoyed* by the owner requires the owner also to *bear the burdens* in connection with the ownership (*incommoda*). This is an *ancient principle of natural law*, which had already been formulated by some excellent jurists of Imperial Rome (D. 50,17,10; *Sabinus*, *Paulus*), too: „*secundum naturam est commoda cuiusque rei eum sequi, quem sequentur incommoda*", which says: "It is according to nature that the advantages of anything should attach to the one, to whom the disadvantages attach."

Our Civil Code says that the owner is entitled to a *full and exclusive power granted by law* in the *object of ownership within the framework of law* and *without prejudice to the rights of others* [Section 5:13 § 1]. Some *typical elements* of this "*full and exclusive power granted by law*" are enumerated exemplificative by the Civil Code. According to this, the right of ownership incorporates the following *particle rights*, which can be restricted and limited by private and public law norms as well:

- the *right of possession*, and the *right for protection of possession*, too;
- the *right of use*, and the right to *consume* and *expend* the thing;
- the *right of utilization*, and, together with it, the right to *use it up*;
- the *right of taking benefits* from the thing, i.e. to *fructify* it, and to *acquire the thing's natural* and *civil fruits* by their *separation* but *not* by *gathering* them;
- the *right of disposition*, which has other subcategories such as
  - the *right of alienation*,
  - the *right of encumbrance*,
  - and the *right to convey the exercise of each particle rights*;
- in addition to the possession's protection, the *right of ownership protection*;
- the *right to destroy* the owned thing;
- the *right to refrain from* and *to definitively give up* the *exercise of such rights*.

2.2.2.1. The Right to Possess, Use, Utilise and Fructify, and the Restrictions Thereof

1. The owner of a thing is entitled to *possess* the thing, i.e. to *keep it under his/her power granted by law* according to the *rules of possession* (see above). It follows that the owner is also entitled to the right of possession's protection:

- if the owner *indirectly* exercises the right of possession, he/she has the right of protection after the *general rules* of possession's protection;
- but if the owner *temporarily conveys the exercise of the possession right* to another by *any private law title*, the protection of possession is granted to him/her solely as to a *principal-possessor* (see above).

2. It is in accordance with *natural law* that if an owner is entitled to *use*, to *utilise* and to *take the benefits* of the owned thing (*commoda*), *in return*, the owner is bound *to bear the burdens* and *expenses* (*incommoda*) as well as the *risk of damages*, for which *no compensation can be demanded from anyone else* (*casum sentit dominus*; see in Section 5:22).

The *burdens of the owned thing* consist of the followings:

- the *costs* of *investments* and *expenditures*, which either can *add* or *uphold* the *objective* and/or the *subjective* value of the owned thing;
- the *private* and *public law restrictions* and *limits* of the *particle ownership rights*,
- the *dues* such as taxes, duties, customs, tariffs, fees etc.

The *duty of bearing the risk of occurred*—but not threatening or imminent—*damages* concerns solely those damages, for which no compensation can be demanded from anyone else. Therefore, *real factual damages* (*damnum emergens*) can either be *borne by the owner* or be *compensated by others* such as:

- the one who *wrongfully causes damage* (*delictual liability*),
- the one who is *liable for not wrongful damages*,
- the *insurer*,
- the party who *acquires a thing as a service* in the base of a *void contract*,
- the party who *acquires a thing as a contractual service* of a *valid contract*,

- the *obligee who is in delay* while refusing to accept a good performance,
- the *buyer* who *acquires possession* of the sold *real estate before the registration of ownership* in RER,
- the *lessee*.

3. The *use* of a thing means the *proper or improper usage* of an *own* or *another's thing* and the *thing's interim benefits without any entitlement of acquiring* these *benefits*—i.e. natural and civil fruits, outputs, increments, proceeds, profits—arisen *during or because of* the use. An *improper usage* is also qualified as 'use' but it is sanctioned if realised with respect to another's thing [Sections 6:167 § 2 and 6:227 § 2].

To *expend* or to *use up* a thing means that a thing *expires while properly used*:

- it is *utilization*, if it goes *with extra benefits*, and,
- it is *consumption*, if it has *no extra benefits* but solely those advantages which emerged by the mere use of the thing for the user's aims.

A *factual use* does not necessarily equal with the notion of *use* based on a legal title. While the latter *always has a valid entitlement*, the *former is a mere fact regardless of having a legal title to do so or not*. With respect to the thing's nature and function, the use of a thing, in general, necessitates the *factual power* towards it, i.e. that the user shall be either in the legal situation of a *possessor* or—at least—of a *sub-possessor*.

4. The *right to acquire the benefits* of the thing, which can be based either on an *in rem title* (e.g. usufruct) or an *in personam title* (e.g. lease agreement), belongs to the *right of utilization* but not to the right to use. In case of *licensing contracts* (lease, leasehold, lending), the *contractual right to use* sometimes contains a *restrained right of utilization*, too. This limited right of utilization means that the *sub-possessor* (lessee, borrower) is entitled to *utilise* the object of contract with the *permission* of the *principal-possessor* (lessor, lender). If the sub-possessor gives the object *further to a third* for use or utilization *without* permission, he/she falls under *strict liability*.

5. *Public law restrictions* of the *particle* rights of ownership are multitudinous. The mere right of possession can be limited either by *laws* which *restrain the possession of some dangerous things* (weapons, chemicals, drugs, pharmaceuticals etc.), or by laws which *bind the possessor for being officially controlled* and *registered*. Public law restrictions of the *right of use* are e.g. the rules of the road, traffic regulations, or the prior authorization of automobiles' operation. The *right of utilization and fructification* can also be restricted by public law, in case e.g. of the strict rules of land cultivation or the sectoral legislation of agriculture or forestry. There are also public law restrictions, which concern *all particle rights* at the same time, because these legally deprive the *whole of the right of ownership* or of *exploitation*. Such restraint is e.g.:

- the *expropriation*,
- the *obligation to disposal*, or
- the *use for public purposes*.

These *massive interferences into private autonomy* shall also have a serious guarantee as well, i.e. the *immediate*, *full and unconditional compensation*.

6. The variegated *private law restrictions* of the *particle* rights of ownership are defined mainly by the Civil Code. These restraints stem from the *law of rights in rem* as well as from the *law of obligations*, among the general and special rules of *contracts* entitling for *enjoyment of one or more particle rights of ownership*.

This chapter does not deal with the latter. Just for instance, an important restriction of ownership rights is among the rules of the *leasehold of arable lands*. The lessee is entitled to gather the land's proceeds within the "*requirements of prudent management*", and is *obliged to cultivate* the land according to its *designated purpose* and shall *preserve the fertility of the land* [Section 6:350). The reason of this rule is that soils and arable lands merit a *specific protection regime*.

The rule of the so-called *General Private Law Limitation of Use* says that while using a thing, the owner shall *refrain* from engaging in any conduct that would *unnecessarily disturb others* (especially the *neighbours*) or *peril the exercise of others'* (especially the *neighbours'*) *rights* [Section 5:23).

Furthermore, there are special private law limitations, which aim either to *facilitate the exercise of other persons' ownership rights* or to *protect other owners*. Such limitations are:

- the *mutual rights of neighbourhood*,
- the *right to use in emergency*,
- the rules of *wrongful building beyond the own land's boundaries*.

7. The regulation of the *rights of neighbourhood* takes its place in the Civil Code and in a very short special law [Sections 1–6 of the Act CLXXIV of 2013). According to these, the rights of neighbourhood are to be named as:

- the *right for a ground support*, to which the owner of the neighbouring building is entitled (5:24);
- the *right of access to the neighbouring land*: the owner *shall permit access* to his/her land *for compensation* if it is *necessary* for
  - doing works of public interest,
  - harnessing animals,
  - gathering fruits of branches reaching over the land,
  - removing branches and roots,
  - (re-)construction, demolition, maintenance [Section 5 :25);
- the *right to withhold trespassing animals*;
- the right to catch the swarms of bees flew out;
- the *right to gather the fruits*, which fell onto the *neighbour's land* from an *own* tree;
- the *mutual right of the neighbours* the *acquire plants* and to *use constructions* standing on the *boundary-line* of neighbouring lands.

8. *Emergency*—in a private law sense—means a *direct threat* to the *life*, *physical integrity* or *property* of another person that *cannot be prevented in any other way*. In case of such an emergency, the owner shall tolerate his/her property to be *accessed* and *used* or *damaged* to the *extent necessary for abolishing* this kind of danger. The owner damaged by an emergency intervention is entitled to:

- *compensation* according to the rules of *non-contractual* liability from persons who *caused unjustifiably great damage* while abolishing the emergency,
- and *indemnification* from the persons *who were in emergency*.

If such emergency threatens *only the property* of another, the obligation binds the owner *so long as* the *imminent* damage's extent, as it is *foreseeable*, *substantially exceeds* the extent of damage likely to be caused to the owner by the emergency intervention.

Our law maintains the ancient rule of *lex Rhodia de iactu mercium* in a special way. Namely, Section 26 § 3 says that if such emergency threatening *several persons* is necessarily prevented by the *release* (i.e. relinquishment, abandonment) of *some things at the same risk*, the damage from this shall be borne *jointly by the affected ones in proportion to their interests at risk*.

9. *Wrongful building beyond boundaries*. If the owner builds a house *without any legal title* beyond the boundaries of his/her own land (*wrongfulness*), the Civil Code distinguishes the situations of doing so in *good faith* and in *bad faith*:

- a *bona fide builder* does not know, and, although acting in due diligence, ought not to know either that he/she has built beyond these boundaries,
- a *mala fide builder* knows, or, by acting in due diligence, should know that he/she has built beyond the boundaries of the land.

In case of a wrongful building beyond the boundaries *in good faith*, the *neighbour* is entitled to demand the *builder*:

- *pay indemnification* for the damages from the use of the built-up part of land and from the depreciation of the touched land's value;
- *purchase the built-up part* of the land (only if it is *divisible*!); or
- *purchase the entire* neighbouring land if the wrongful building has made
  - the *remaining part unusable*,
  - or the *exercise of a right or profession* related to land *impossible* or *considerably more expensive*.

In case of a wrongful building *in bad faith*—or if the neighbour *protested* against these operations *in time*, i.e. when restoration would not have caused *unreasonable harm* to the builder—, the *neighbour*, *in addition to* the aforementioned demands of a *bona fide* builder, is entitled to demand

- the *builder demolish* the building *at his/her own expense* with the builder's *right to removal of demolition material*,

– or *transfer the ownership* of his/her *land and building* in return for a *proper reimbursement* of the value of these transferred immovables.

2.2.2.2. The Right of Disposition and Its Restrictions

1. It is undoubtedly the right of disposition which makes the ownership a *full power* towards a thing (*plena potestas*). This very *particle* right distinguishes the *full power of owners* and the *minor power* of the entitled ones of *limited in rem rights*.

According to the Civil Code (see Section 5:30), this full power of the owner entitles him/her to:

– *convey* the *particle rights* or *solely the exercise* of these rights to another, i.e.
  - the *possession* of the thing,
  - the *use* of the thing,
  - the *utilization* and *fructification* of the thing;
– *encumber* or—in any other licit way—*burden* the thing;
– *alienate the ownership right* in the thing;
– *destroy* the owned thing;
– *refrain from* and *give up* the *exercise of such rights*.

2. The most important and powerful *private law restriction* of the right of disposition is the *Restraint on Alienation and/or Encumbrance* [Sections 5:31–34). A restraint on alienation and/or encumbrance can be *legally based on*:

– the *owner's disposal for ensuring a right in the object* of ownership (e.g. a right to maintenance); in case of *real estates*, not only the *ensuring restraint* shall be registered but the *ensured right* as well (since ensuring restraints cease if ensured rights are extinguished);
– *law*,
– and *court decision*.

The *legal consequence* of such restraint is that the *entitled party's consent* is *required* for any disposition *contrary to* the restraint, and a disposition contrary to the restraint is *ineffective* with respect to the person *whose right it is intended to protect*. The restraint *does not limit* any acquisition of right *for consideration* by persons acting in *good faith*.

2.2.3. The Protection of Ownership

1. In view of the *institution of private property* has an enormous *social* and *economic significance*, the right of ownership is *protected* through *many branches of law*, including:

– *public law* with many tools such as the ownership protection of
  - *constitutional law* (protection in the range of fundamental laws, restraint with respect to social responsibility, expropriation with serious guarantees),
  - *criminal law* (crimes against property and economic crimes), and
  - *administrative criminal law* as well;
– the *private law* tools of ownership protection are as follows:
  - from the tools of *protection of possession*,
    - the owner is *directly* protected by the right of *lawful own-force*,
    - and *indirectly*—i.e. through the fact that the owner possesses the owned thing—protected by *other* possession protection tools;
  - the *lawsuit for protecting ownership* (*rei vindicatio*),
  - the *lawsuit for protecting the privacy of ownership* (*negatoria in rem actio*),
  - the *lawsuit of replevin within enforcement*,
  - and the *actions in connection with the Real Estate Register*.

2. The right of ownership stems from an *absolute* private law relationship, the *harm* of which produces a new, *relative* legal situation, which entitles the owner to use the tools of ownership protection through

the so-called *ownership claim*, the legal basis of which is the changed, relativised legal situation. The socio-economic significance of the ownership is in balance with its guaranteeing tools, i.e. the institutions of ownership protection, since *ownership claims never lapse*, so their *prescription is excluded* by law [Section 5:35). This means that *ownership claim exists so long as ownership or its harm persists*. If the owner *no longer has* the object of ownership, the *in rem* claim *transforms into* a *relative* (*in personam*) claim which *lapses* within the *period of limitation* defined by law.

3. The owner, according to the rules of possession protection, may *restrain* or *prevent* every *wrongful intrusion* and other *unjust interference impeding, restraining*, or *making impossible* the exercise of ownership rights.

4. In a *lawsuit for protecting ownership* (*rei vindicatio*), the owner claims the *termination of wrongful intrusions* or *interferences*, or the *surrender the thing* from the wrongful possessor. For succeeding in the case, the *plaintiff shall prove* that he/she is the *owner* of the thing in question, and so his/her right to possess is based on his ownership rights.

In case of *lawsuits for immovables*, the *plaintiff* refers to his/her *registered ownership*, and the *defendant* can therefore refer only to the fact that the *registration* of the plaintiff's right *infringes* his/her rights, for example because defendant had acquired the ownership before the plaintiff acquired it. If the plaintiff has *no registered* ownership, the lawsuit can be brought only for registration although this action is not a *rei vindicatio* but an *action for registering ownership*.

In case of *lawsuits for movables*, the legal standing of the plaintiff is much more complicated, because the ownership right is established mainly without any official registration. Therefore, for succeeding, the plaintiff shall prove

- either that he/she acquired the subject-matter of the litigation through an *original* acquisition (such as usucapion, administrative decision, official auction, occupation, trove);
- or that he/she acquired the property by a *derivative* acquisition (such as transfer, fructification, processing, succession, acquisition of games and fishes etc.), and, if so, he/she is bound to prove the acquisitions of his/her *legal predecessors* until *one of them* acquired the thing through an *original* acquisition, because it can *break the link*. This *burden of proof* (*onus probandi*) is so heavy that such evidence is called the diabolical proof.
- Contrary to these, the *defendant* shall prove only that he/she has acquired *entitlement to possess directly from the owner* (because the defendant is e.g. a usufructuary or a lessor), or he/she has such right indirectly from a sub-possessor (lessor) of the owner as principal-possessor (because the defendant is e.g. a sub-lessor), or he/she is entitled to possess *by law*. If *sub-possessor unlawfully conveyed* the possession to a third, the *owner* is entitled *in the name of the sub-possessor* to demand to return it to the sub-possessor; if sub-possessor *refuses to accept* it, the owner is entitled on his own behalf to demand to surrender the thing.

5. The *owner* may bring a *lawsuit for protecting the privacy of ownership* (*negatoria in rem actio*) on the legal basis of his/her ownership right for having the wrongful and unlawful intrusions and interferences to be stopped. The burden of proof is similar in the case of the *rei vindicatio* with the proviso that, in this action, the plaintiff can target only so-called negative conducts by the defendant:

- on the one hand, the *cessation* of intrusion or interference,
- on the other hand, for the future, the *prohibition* of such conducts.

6. In the *lawsuit of replevin within enforcement*, the plaintiff brings the action to recover the asset from seizure, if he/she demands the seized assets on the legal basis of his/her ownership right (or any other right which can block the sale of the asset in judicial, administrative, or tax enforcement proceedings). Seized assets *may not be claimed* by any person who is *held liable* for the debt *subject to enforcement* jointly with the judgment debtor. In the case of a *real estates* encumbered with *usufruct*, the *usufructuary may not request* to have the property released from seizure. If the seized thing is in joint ownership, *either co-owner* may *individually* bring the action (New Code of Civil Procedure; Section 538).

If the court decided *in favour of the plaintiff*, the claimed thing shall be *released from seizure*, or, if the claimed asset *has already been sold* (and if the amount covering the price is available at the deposit account of the bailiff), the court shall order *disbursement of that sum*. If the court's decision is *in favour of the usufructuary*, the encumbered thing shall be released from seizure solely *with respect to the usufructuary*, with the proviso that *it may be sold only by the usufruct will have been ceased* (see the New Code of Civil Procedure,

Section 544).

7. There are *three* different kinds of *actions concerning Real Estate Register*:

- *Action for registration*: the owner of a real estate, if he/she has *acquired from a non-registered* owner, may claim for having his/her ownership registered in the real estate register (Civil Code Section 5:37).
- *Action for deletion*: an *entry* or *record* in the real estate register is to be deleted if the *transaction* being the legal basis of the entry or record is *void*, or if the entry or record *subsequently becomes inappropriate* [Section 5:183). According to Section 62 of Act CXLI of 1997 on Real Estate Registration, a lawsuit may be brought before the court
  - for having a registered *entry cancelled* and the *original status re-instated* on the grounds of *invalidity* by the person *whose right of record* has been *injured by the entry*;
  - solely for having an *entry cancelled* by the *interested* party if able to prove that the right of record has been lapsed or terminated, or the registered fact has changed.
- *Action for correction*: if an erroneous entry *cannot be cancelled* during the *proceedings of authority* supervising the real estate, or if the injury caused by the error *cannot be remedied*, an action may be brought *before court* by the person *aggrieved due to erroneous entry* for having an *entry corrected*.

2.2.4. The Different Modes of Ownership Acquisition

1. Since *ownership acquisition* has *multitudinous matters of fact*, it also has many different 'modes' (*modus adquirendi rerum dominii*) to be *classified* in various ways:

- whether ownership is established in an *already existing* thing or a *newly formed or created* one;
- whether ownership is acquired *relating to possession* or *regardless* of it;
- as per the acquisition is "*original*" or "*derivative*".

2. The *decisive and authoritative* classification is, according to the concepts of *modern Continental private laws*, the diversification in the base of whether the mode of acquisition is "*original*" or "*derivative*". For good reasons, Hungarian Civil Codes (*Act IV of 1959*; and *Act V of 2013* in effect) *has never applied* this theoretical categorization of the modes of ownership acquisition.

The *origin* of this classification goes back into the *Middle Ages*. In all likelihood, its first appearance took place in the works of *Bartolus de Saxoferrato* who was the greatest *post-glossator* (*commentator*) of the 14th century. The diversification could be useful primarily for *didactical* purposes, because the many ways of acquisitions was easier to learn while classified. After this period, in the 17th century Law of Nature—at first maybe in the *œuvre* of *Hugo Grotius*—, the categories were applied in *international law* for classifying the different ways of *acquiring territories*. The 18th–19th century *Pandectistics*, i.e. the most meaningful school of German private law Jurisprudence, used the terminology for categorizing different ways of *private law* acquisitions of property (ownership). I shall add that *Philosophy* and *Epistemology* have also used the terms since the time of *Immanuel Kant* (18th century)—in the base of *Aristotle*—for differentiating the *two major ways of cognition* called "*aquisitio*" (sic!).

An *original mode of acquisition does not presuppose a previous or former ownership* in the implied thing, *although there could exist one,* but this is not an aspect to be respected. According to this, the realization of the matters of fact of an original acquisition produces a *novel ownership* which *has never existed* before. Whether there existed an ownership previously in the thing, or not, *a new ownership is never linked to any other rights in rem*. Therefore, *encumbering rights*—such as *servitude*, *usufruct*, *lien*, or *pledge*—of other entitled persons *cannot survive* the establishment of a *new ownership* in the encumbered thing through an *original* way of acquisition. There are *three different groups* of original acquisitions:

- the one is, if ownership arises in a thing *never owned before*;
- the other is, if the thing *is already owned* by someone but the acquirer *creates novel ownership without the contribution of the previous* owner who is, therefore, *no legal predecessor* of the new owner of the thing;
- the third one is, if the new ownership right is *created by a fact* that is *independent* even of the person who acquires the new right—such facts are e.g. *natural events* or the *act of third parties* (*extraneous*).

The *derivative mode of acquisition* is otherwise called *legal succession* since the new owner acquires his/her

ownership either *from another person* or *with respect to the ownership right of another person*—who becomes after the acquisition a legal predecessor. Derivative acquisitions *never create new ownership rights*, the *ownership right of the new owner is derived from that of his/her legal predecessor*. These acquisitions, therefore, on the one hand, *do not touch previously established encumbrances* in the acquired thing, and, on the other hand, the *successor*—with some exceptions—*does not become owner* if the *predecessor had no ownership right* in the thing acquired. Its basis goes back into the law of Ancient Rome. Namely, an ancient Roman legal principle called "*nemo plus iuris*" says in *Ulpian's* Commentary to the Edict that "no one can transfer to another more rights than he/she has himself/herself" (*nemo plus iuris ad alium transferre potest quam ipse habe<re>t*; D. 50,17,54).

3. The *most important and most frequent type* of derivative modes of acquisition is the *transfer*. In this case, a successful derivative acquisition necessitates *two coherent criteria* (conditions "*sine qua non*") which are two *transactions*:

- a valid *disposal transaction* (*Verfügungsgeschäft*), which is a *mode of acquisition* (*modus adquirendi*), i.e. a transfer agreement, which is the conveyance of possession of the thing to be acquired;
- a valid *commitment transaction* (*Verpflichtungsgeschäft*), which establishes a *legal title* for the acquisition (*iusta causa adquirendi*) based on a *contract* such as e.g. the contract of sale or gift.

The title of acquisition *per se* establishes only an *in personam* claim for the thing transferred. The *execution* of the *commitment* transaction is the *disposal* transaction, by which an *in rem* claim emerges. According to this, there are three kinds of *property conveyance systems* in Continental Europe:

- in a *causal*, otherwise *conventional model*, which reigns e.g. in *France*, a successful acquisition of ownership necessitates *only a valid commitment transaction*, no disposal transaction needed for the transfer;
- according to the *abstract model* prevailing in *German* law, a *sole valid disposal transaction* is sufficient for the transfer making the positions changed;
- in contrast to these, the *traditional model*, which is based on the *ancient Roman* system of ownership acquisition, governs the ownership transfer in *Switzerland*, *Austria* and *Hungary*; it necessitates *both commitment and disposal transaction* for the success of property transfer.

4. University *textbooks*, *as a rule*, distinguish between *movables'* and *immovables'* acquisitions *within* the two systems of *original* and *derivative* acquisition. This method superfluously *duplicates* the classification. Therefore, we do not accept this way to be followed.

Ordinarily, the Civil Code rules of ownership acquisitions are tailored to the movable assets, unless a specific mode of acquisition, *by its nature*, applies *exclusively to immovables* (e.g. expropriation, accretion, building on another's land), or, on the contrary, *solely to movables* (e.g. the occupation of lordless assets, i.e. nobody's movables). Thus, it seems to be sufficient to introduce first the rules applying to movables and then the exceptions being effective for immovables.

5. It is also to be emphasised that even the *textbooks* on the law of rights *in rem* are *not consistent with each other* in the *classification of each mode* of acquisitions into the categories of *original* and *derivative* acquisitions—e.g. the acquisition of products, proceedings and progenies (fructification), acquisition of games and fishes, or building on another's land are not in the same category of acquisition in each and every textbooks.

This is a disturbing and confuse phenomenon, the reason of which lies in the fact that different textbooks define the major categories of originality and derivativeness in diverse ways. By logic, it follows then that diverse categories can incorporate only diverse species of acquisition modes. The outcome of the lack of *communis opinio* is that the whole issue of this categorization loses its *raison d'être* since it results in incoherency. Thus, it appears necessary to find the *fundament* of the definition of *originality* and derivativeness, which is *historically authentic* and *temporarily near* to our age. The basis for it is offered by *German Pandectistics* (see Point 2 above).

Furthermore, since the notion of *derivative* and *original* acquisition *do not contain* the aspect, whether the thing was acquired *through its formation* (*creation*) or the acquisition took place in an *already existing* thing, taking these facts into account while making a correct definition shall be avoided. *Originality* consists in the *novelty of the ownership* but *not* in the *recentness of the object of ownership* (see Point 2 above). Namely, there are examples when a *new ownership* is established in an *already existing* thing (e.g. usucapion), and, on the contrary, when an earlier *inexistent* thing is acquired *derivatively* (e.g. accretion, building in another's land,

fructification). In case of *derivativeness*, the significant factor is whether the thing is acquired *from the legal predecessor* or *with respect to the rights of the legal predecessor* (cf. the content of original acquisition in Point 2 above). The classes of original and derivative acquisition can only be read '*between the lines*' of the Civil Code, which—in a moderate way—*does not* mention them *in its chapters' titles*. However, in the base of the aforementioned factors, we *do classify* here the modes of acquisition into these categories by using the *authentic content* of each notions introduced above.

6. It shall also be accentuated that *good or bad faith of the acquirer* has a great significance concerning almost all of the modes of acquisition, although there are acquisitions, in the case of which the issue of acquirer's good or bad faith *shall be avoided* (e.g. usucapion), and there are acquisitions as well, in which *bona* or *mala fides can never happen to arise* (e.g. accretion).

I shall also stress that, for some cases—like when a person acquiring a right relying on the real estate register in good faith—, the Civil Code defines itself the content of the notion of good faith for the reasons of guaranteeing e.g. legal certainty. In this connection, the lawgiver has defined:

- the *content* of good faith as matters of fact;
- whether the acquirer *may refer to his/her good faith or not*;
- what is the *relevant moment*, *in which* the *former* existence of good faith is to be examined, and *when* shall these issues *be examined*; namely: the *time of investigation* and the *time for which the existence of bona fides is examined* may differ.

2.2.4.1. The Original Modes Thereof

1. On the base of the abovementioned *historically authentic notion* of *original modes* of acquisition of *movables and immovables* are as follows:

- *Means of Administrative Decision and Official Auction*,
- *Expropriation* (only for *Immovables*),
- *Adverse Possession* (i.e. *Usucapion*),
- *Appropriation of Derelict Property* (i.e. *Occupation*; only for *Movables*),
- *Finding* (i.e. *Trove*; only for *Movables*),
- *Treasure Trove* (only for *Movables*).

2. *Acquisition by Administrative Decision and Official Auction* [Section 5:41). If someone has acquired a thing *in good faith* by administrative decision or official auction shall gain ownership *irrespective of the previous owner*. The latter phrase tells us that this acquisition is *doubtlessly original*: the *encumbering rights of third* persons *established under* the authority of the *previous* owner lapse *if* the new acquirer was in *good faith* according to these right's existence. For an acquisition of a *movable* by administrative decision, it is necessary to *transfer* the thing's *possession*. In case of *immovables* (real estate), the title of acquisition is needed *to be registered in the real estate register*.

Simili modo, in case of an *official auction* the buyer acquires the ownership if the auctioneer *transfers the auctioned movable's possession* to him/her. If the object of auction was an *immovable* (real estate), the ownership title is acquired if it became *registered in the real estate register*.

What is the *codified definition of good faith* [Section 5:172) in the case of a *bona fide person* who acquires a right *relying on the data of the real estate register*? This special notion of good faith is to be applied in *every case* of acquisition of *immovables'* ownership.

- If a *court* or an *authority* examines the good faith of an acquirer *referring to it*, the *existence of good faith* shall be examined *with respect to that time* when the application for acquisition's registration was submitted in the real estate register.
- The acquirer *cannot be considered acting in good faith*, if, *in time of acquisition*, he/she *knew* or *should have known* that a *registered relevant data* was *incorrect*, or that the *rights of a registered right-holder* were *restricted*.
- An acquirer *may not allege* his/her good faith *against a person* who bases his/her title of acquisition upon a right or fact *to be henceforth registered* or *recorded*, which right or fact *had already been* registered or recorded as a *provisional apostil at the time of examination* of good faith's existence, if the right's registry or the fact's recording was *later on in fact carried out*.

3. *Expropriation*. As the *most radical restriction* of ownership, the expropriation necessitates even *constitutional* guarantees. Therefore, the institution's regulation *is located*, on the one hand, in the *Civil Code* [Section 5:43) and the *special law* upon expropriation (*Act CXXIII of 2007*), and, on the other hand, in the *Fundamental Law of Hungary* (Art. XIII § 2]. Ownership of real estates can only be expropriated *for public use*, *under exceptional circumstances*, and against *immediate*, *full*, and *unconditional compensation*—says the text of the Civil Code similarly as that of Fundamental Law.

4. *Adverse Possession* (*Usucap[t]ion*; Section 5:44–49). The lawgiver *tears* the legal conditions of adverse possession *away from the requirement of good faith* of the adverse possessor. The Civil Code orders that a person acquires ownership of a *thing* or a *share of a divisible thing* through adverse possession, who:

- has had *continuous possession* for a *fixed time—with the proviso* that the *new adverse possessor* is entitled to add his/her *predecessor's usucapion time* to his/her *own* time of adverse possession—;
- the duration of adverse possession for a successful usucapion is:
  - *15 years* in case of *real estates*,
  - *10 years* in case of *movables*;
- the adverse possessor shall possess the thing *as his/her own*; this means, by the way, that the circumstance of *good faith is not* qualified as a *conditio sine qua non*.
- *No person shall acquire ownership through adverse possession* who has taken possession of a thing
  - by *committing a crime*,
  - or in *another violent* way,
  - or in a *treacherous* way.

The adverse possession as an *original mode* of acquisition is *openly expressed* by the Civil Code, since it says that:

- In case of *movables'* usucapion, the rights of third parties in the thing shall cease if:
  - such rights *had arisen before* the adverse possessor *got into possession*,
  - and in connection with these rights of a third the duration of adverse possession has expired,
  - *except when* the adverse possessor acted in *bad faith with respect to these very rights*.
- In case of usucapion of *real estates* and *special registered movables* such as ships or aircrafts, even a *registered restraint on alienation* or such *encumbrance does not preclude* the acquisition of title through adverse possession—by nature, if other conditions are met.

If an owner, for an *excusable reason*, *is not in the position* of exercising the ownership rights, adverse possession *shall not take place for 1 year from termination of impediment*, even if the time of usucapion has elapsed or there is less than 1 year of it left. This institution is called the *suspension* of adverse possession's duration. After the end of such suspension, the adverse possession's duration *goes on continuously*, and the time of adverse possession already elapsed *shall be counted in* the duration of usucapion.

In contrary to suspension, if *discontinuance* of adverse possession eventuates, the duration elapsed until the emergence of discontinuance *may not be taken into consideration*, and the period of adverse possession, after the causal basis of its discontinuance has already terminated, starts again, if:

- the owner *brings an action* to have the thing *surrendered*;
- the owner *exercises* his/her *ownership rights* in the very thing;
- or the adverse possessor *loses the thing's possession against will*, and *fails to re-acquire it within 1 year*, or, again, *within 1 year*, *does not bring an action* against the thing's new possessor to *surrender* it.

The notion of "*cadastral usucapion*" lacks from English legal terminology. It is an *artificial* legal concept created by the composition of independent English legal terms. This *special genre of adverse possession* is an *old institution* of *Austro-Hungarian* private law (1853–1959) following the Austrian Civil Code's (ABGB) idea of "*Tabularersitzung*" (§ 1467 in effect until 1917). According to this, the title to a *real estate* can be acquired by adverse possession only *after 5 years*:

- if the possessor acquired possession *from the owner*,
- if possession is acquired *by means of a written contract*, which *would give right to registration* of title in real estate register *if the contract met* formal requirements prescribed by law,
- and, if the possessor *has already paid the consideration*.

5. *Acquisition of Derelict Property* (*Occupation*; Section 5:52). The ownership of a derelict *movable* can be acquired by any person who *takes its possession with the intention to acquire ownership*. The historical predecessor of the institution was the antique Roman *occupatio*. The *origin* of this mode of acquisition goes back to *prehistoric* times because this kind of acquisition of power upon goods was inevitable for mankind's survival even in ancient times.

A movable is considered *derelict* if it was *never owned* before by any person, or, was *abandoned by its owner with the intent to relinquish ownership*. If a movable thing was *abandoned without* the intention of ownership relinquishment (*res amissa*), the taking into possession thereof, although with the possessor's intention to acquire ownership, cannot result in successful acquisition. This case may belong either to adverse possession or, more precisely, to finding.

I shall stress that the group of movables being acquirable by occupation has become much narrower than it was in the Antiquity, or in the Middle Ages, because the number of things belonging to *State ownership* has strongly escalated, and the *registration of titles* to movables as well as to immovables has extremely expanded. According to this, nowadays, *wild fauna*—including terrestrial and aquatic animals—and *flora*—e.g. the trees of forests—are no more derelict assets being capable of occupation; these are, namely, under the ownership either of the State or of water or forest owner. The exploitation of these assets takes place, therefore, upon *in rem* rights of utilization. These days, there are no occupiable *immovables*, and the number of *movables* being acquirable through occupation has become very few, such as, for instance, wild fruits, herbs, and consumable plants and smaller animals of meadows and forests (e.g. snails and some insects).

6. *Finding* (see otherwise as '*Trove*'; cf. Sections 5:54–63). A person who *finds* a *lost thing* that is *presumably owned by somebody else* (*res amissa*) and *takes possession* thereof, acquires ownership in the found thing by *having intention to have it*, if:

- the finder has done *everything* what was *expectable* from him/her for returning the thing to its owner who lost it, and
- the *owner* (or any other person authorised to collect it) *has not* come forward to take it in possession within *1 year* of the day which it was found on (or, in case of *live animals*, within *3 months*)

If the *owner* (or the one who lost it or any other person who is authorised to collect it) *does not gives a notice* within the mentioned period, and the *finder does not acquire* the ownership thereof, the *ownership* or the *purchase price* received for the found thing's sale shall *accrue to the State*. Within *8 days* from the day of finding, the finder is obliged to *hand the thing over* either to: the person who *lost* it, or to its *owner*, or to any other person *authorised to collect* it, or to the *notary* by reference to the place of finding.

If the person who has title to collect the thing *can be identified*, the notary *gives the thing over* to this one without delay. If the entitled person *cannot be identified*, the notary shall *retain* the thing for *3 months* from the date of receipt; if the *owner fails to give a notice* during this period of time, the thing shall be *released to the finder*. The *finder is entitled to use* the thing without causing any damage to it but has *no right of disposition* (i.e. may not alienate or encumber it and may not allow others to use it). *By the acquisition* of ownership by the finder, *every in rem rights of third parties cease*. If the thing is *perishable* or *cannot be maintained*, the notary *provides for its sale* without delay. If the owner comes forward *after the sale*, the *sum* received as purchase price *shall be paid* to him/her. The owner *fails to come forward* within 1 year from the finding, *loses the ownership*, or the *right to the sum* received in connection with the sale. If found thing is of *substantial value* and the *finder does not acquire ownership* thereof, the finder is entitled to a *fee of reasonable amount* if he/she has done *everything expectable* to have the thing returned to its owner. The finder is entitled to *withhold* (*retain*) the thing until his claims for the *reimbursement of interim costs*, and for the *fee* is satisfied.

7. *Treasure Trove* [Section 5:64). *Treasure* is a *valuable* thing which has been *hidden by unknown persons* or the *ownership of which has otherwise been forgotten*. The *finder of treasure* is obliged to *offer it to the State*. If the State *does not need* it, the thing becomes the property of the finder. If the State *does claim* the treasure, the finder becomes entitled to a *fee proportionate to the value* of the thing. If the found thing is classified as *protected cultural goods*, its ownership *belongs* to the *State*.

2.2.4.2. The Derivative Modes Thereof

1. *Transfer* [Sections 5:38–40). With certain exceptions, ownership can be acquired by transfer *only from* a transferor who is the *owner* of the thing (*nemo plus iuris*):

- For the acquisition of ownership of *movables*, a *contract* for transfer or other legal title—i.e. the *commitment transaction* (see above)—is required, and, in that context, the *possession* of the thing shall also be *conveyed* by a *transfer agreement*—i.e. the *disposal transaction* (see above as well).
- For the acquisition of *title to a real estate*, a *contract* for transfer or other legal title is required, and, in that context, the *change of owners* shall be *registered in the real estate register*.

There are some certain exceptions of the *Principle of nemo plus iuris*, in which the ownership acquisition is allowed *from a person other than the owner*:

- Where ownership is acquired (i) *in good faith*, (ii) *in the course of trade*, and (iii) *for consideration*, the transferee acquires ownership by way of transfer even if the transferor was not the thing's owner; similarly, if the purchase takes place from a seller who enters into the contract *in his own name within the framework of legitimate business activities*. In these cases, if the acquirer (transferee) acted *in good faith* in connection with the rights of *third parties* arising *before* the time of transfer, these rights cease by the time of transfer.
- If someone acquires *money* by way of transfer, becomes owner even if the transferor was not one.
- If a person *lawfully* gets *securities* by way of transfer, acquires ownership regardless of the transferor's title.

2. *Acquisition of Fruits* [Section 5:50). Any person who has an *in rem* or an *in personam* right (e.g. usufructuary, or a lessee of a leasehold contract) in respect of a thing of another person, which *entitles* to *take possession* of *products*, *produce* or *progeny* (together as: *fruits*):

- This entitled one *acquires ownership* in the fruits *by their simple separation*, if these had been previously not acquired by him/her. (*Lawful possessors* also acquire the ownership in the fruits *by separation*.)
- But if the entitled person *does not possess* the fructifying thing from which the fruits originate, becomes owner *by taking the possession* thereof.

If the *right*, which entitles for acquiring the ownership of the fruits, *ceases before* the fruits' acquisition, the *entitled person* of these ceased rights may *demand for compensation* by the *owner* or by the *new holder* (i) *up to the value of the fruits* (ii) *within the enrichment* of the owner (or of the new holder), and (iii) *in proportion to* the *invested effort*, and (iv) *up to the extent of* the emerged *expenses* that cannot be *recovered from elsewhere*.

3. *Acquisition of Ownership of Game and Fish* [Section 5:53). *Game animals* and *fishes* living in rivers and natural lakes and other *useful aquatic animals* belong to the properties of the *State*. The ownership of game animals that were *killed* or *captured* or *fallen* on a hunting ground, acquires the person who is *entitled to hunt the specific animal* and *owns the hunting ground* in question. In absence of such hunting right, the game becomes the property of the person who is *entitled to hunt the game in question* and *owns the land where the game migrated from*. The ownership of *fishes* and other *utilizable aquatic animals* is acquired by the person *entitled to exercise the right to fish*.

4. *Acquisition of Ownership of Processed and Converted Things* [Section 5:65). A person who (i) *manufactures a new thing* (ii) *for him-/herself* (iii) *in good faith* (iv) by *processing* or *converting* (v) a thing *owned by another*, (vi) *under the choice by the owner* of the manufactured *thing*:

- either *reimburses the value* of the manufactured thing, and, in this case, the *rights of third ones cease* (a character showing a symptom of *originality*!).
- or *surrenders the ownership of the new thing in return for reimbursement of the value of the invested work*; with exception of the situation, in which the *value of the work significantly exceeds* the *value of* the manufactured *thing*—the manufactured thing's owner, in this case, may demand only the compensation for its value.

If the person that manufactured the *original thing*—which is called in trade *raw material* or *commodity*—has acted *in bad faith*, the right to choose accrues to the owner of this thing: If the owner chooses to *acquire the ownership of the new thing*, he/she is obliged to *pay compensation*, with respect to the act in *bad faith*, *only up to* the extent of his/her *actual enrichment*; and, if so, rights of third persons in the manufactured thing survive, and they proportionally exceed to the new thing as well (a symptom of *derivativeness*).

If the ownership of the manufactured—*converted*, *processed*, as well as *merged* or *combined* (see below at Section 5:66)—thing is *claimed by neither* of the parties, it *shall be sold*, and the gained *price shall be divided* among the entitled parties in respect of their *share of ownership* (see Section 5:67).

5. *Acquisition of Ownership of Merged and Combined Things* [Section 5:66). If the things of two or multiple persons are *merged or combined* in a way that their *separation* may only be accomplished by *inflicting substantial damage* or *unreasonably high cost*, or if these things *cannot be accomplished at all*, the ownership of the *composite* or the *compound* (that is *final product*) is acquired *jointly by the involved persons*. The *proportion of their share* of ownership *acts upon* the value of the merged or combined things *at the time of* their transformation.

If the thing(s) transformed by merging or combining is (are) *acquired by joint owners*, the *rights of third parties* on the things touched by merger or combination *accrue to the ownership shares* replacing those things. However, the rights of third ones *cease*, if the *new* thing is acquired by a person *other than* the one who *had a right* in the *original* thing merged or combined.

If either of the merged or combined things, with respect to its *value*, or *quality*, or *economic function*, or *for any other reason*, should be considered as a *principal component* of the new thing, the *owner of the main component* has the *right to opt* either to *retain the ownership* of the new thing *and compensate* the other owners, or to *surrender* the new thing to them *for compensation*. The person *cannot have* the right to opt who *caused* the merger or combination by his/her own *act in bad faith* (this person can demand only for compensation up to the amount of the actual enrichment of the others). If the ownership of the *merged* or *combined* thing is *claimed by neither* of the parties, it *shall be sold*, and the gained *price shall be divided* among the entitled ones with respect to their *share of ownership* [Section 5:67; see above).

6. *Annexation* [Section 5:68). If a person in good faith builds an annex attached to the building owned by another by using own materials, and thereby considerably increases the value of that building, joint ownership of builder and owner emerges in the new building, unless they had an agreement to the contrary. The *ownership shares* are *determined* after the *value* of the *whole* property and the *annexed part*. The mentioned values shall be taken into account *at the time when annexation was finished*. (The provisions on *mala fide builders* shall also apply to *mala fide annexation*.)

7. *In-Building* [Section 5:69). If a person *uses another's material* for building *on a land* (or *into a building*), and these materials become *permanently attached components* (see above) of the land (or of the building), the in-built materials are acquired by the *landowner* (or the *owner of the building*), unless they made an agreement to the contrary.

8. *Building on Another's Land* [Sections 5:70–71). If a person builds a structure *in good faith on another's land without any entitlement*, the ownership of the *building* is acquired by the *landowner* who is bound to *reimburse the builder the enrichments* gained by this act. The *builder* can be *compelled by court* to *buy the land* at the request of the landowner. The *builder* acquires the ownership of the *land*, if the *value* of the *building considerably exceeds* that of the *land*. If the *builder acted in bad faith*, or, if the *landowner protested* against the building at a time when the *in integrum restitutio* would not have caused *unreasonably great damage* to the builder, the provisions on *wrongful building beyond boundaries* (see above) are to be applied. By law, the builder is considered acting *mala fide*, if he/she *knew or should have known before the beginning* of building works under the case's circumstances that the building in question *infringes on the owner's rights*.

9. *Accretion* (5:51). The *landowner acquires* the ownership of *everything that has become a part of the land subsequently*, *except* if it belongs *under any title* to another person. An accretion can be *natural* or *artificial*:

- *artificial* accretions are buildings and other constructions, planted crops, forests, various plantations;
- *natural* accretions are, however, e.g. natural vegetations, forests, islands in a watercourse, dried or abandoned water-basins, and alluvia (or—most theoretically—a new mountain or land emerged by volcanic eruption).

These rules *cannot be applied* e.g. upon *users of lands* building new components on land, or upon *river plots being accrued through* small river isles (*eyots*) or through *alluvia*, or the *dried river-basin* since these belong to *State* properties.

10. *The Inheritance and the Dissolution of a Legal Person with Succession*. The *assets* of a natural person testator, *as whole*, *entirely devolve* upon the heir(s) *after* the testator's *death* (*universal succession ipso iure*; see detailed in the *Law of Succession* below). By inheritance, the *in toto transfer of negative assets* of a person goes in a special

way since the *Principle of Liability of Heirs for the Estate's Debts* says that: The heirs are responsible to the creditors of the debts of the estate *with the objects and proceeds* of the estate. If the estate's objects or benefits are *not in the heir's possession at the time of claim enforcement* against estate, heirs are liable *with their other assets within the value of their acquired part from the estate* [Section 7:96 § 1].

About *dissolution of legal persons with succession*—e.g. in the case of *business organizations'* transformations—, enquiries can be made via *Law of Persons* or *Company Law* (see there, above).

2.2.5. The Joint Ownership and the Condominium

2.2.5.1. Joint Ownership and Legal Relationships of Joint Owners

1. *About the Notion*. Joint ownership is a *specific form of ownership*, in which the *same thing* is owned by *two or more joint owners of the specific intangible shares* in the jointly owned thing, and the shares are, *in doubt*, *equal*. Joint owners can be natural as well as legal persons. Joint ownership takes place through *intangible shares* in the jointly owned thing produces also a *peculiar legal situation* between the joint owners, which can be summarised as follows:

- *intangibly shared ownership* means that the *exercise of theoretically partial* (i.e. joint) ownership rights takes place with respect to the *whole* thing in a *theoretical dividedness following the actual share* of the joint owner in question; thus partial ownership rights *cannot be exercised* if the thing *is separated in kind*—actually, if a thing *is divided in kind* and *is owned by multiple persons* in this *physically shared way*, it just *terminates joint ownership* because *intangible* shares are ceased by a division *in kind* (see Section 5:84 § 1];
- it follows that the ownership right of joint owners is *homogeneous*, which means that it *extends to the whole thing owned jointly* and its *every benefits and disadvantages* but *up to the proportion* of the *actual intangible share* of the joint owner;
- joint owners together compose a *specific community of rights and duties*, therefore, by nature, their legal relationships have two diverse directions:
  - Their *internal legal relationships* tend to order the relationships, rights, duties, obligations *among and towards each other* and *between community and its member*.
  - Their *external legal relationships* are composed of the relationships according to rights and duties and obligations *between the community of joint owners and* third, i.e. *extraneous persons*; it follows then that *the act of a single member* (joint owner) of the community *is considered*, with some exceptions, *the act of the community*.
- Consequently, *typical objects* of joint ownership are *immovables*—lands, other real estates, houses, flats etc. —, therefore, the *specific* rules of *real property law* and of *land trade law* have also to be kept in mind with respect to *creation*, *amendment* and *termination* of legal relationships, and in accordance with the *rights*, *duties* and *obligations*, as well as in respect of *ownership protection*.

2. *The Internal Legal Relationships of Joint Owners*. Rights, duties, and obligations of joint owners, and nonetheless their relationship to the jointly owned thing, are ordered by law in accordance with their internal legal relationships. Among these, Civil Code regulates the following matters:

- the process of *decision making in the matters of common concern* by adopting resolutions;
- *possession*, *use*, and *utilization* of the object of joint ownership;
- *bearing costs*, *expenses*, *obligations* and *risks* of the object of joint ownership;
- *termination* of joint ownership, which may also touch the legal position of *extraneous* persons.

Joint owners have the *right to vote in the matters of common concern* in the *proportion of their ownership share*. They make their decisions basically by *simple majority*, unless law prescribes *unanimity* in matters such as:

- bearing expenses greater than *ordinary management* or *housekeeping*;
- *transferring* the *whole* ownership of the jointly owned thing;
- *encumbering* the *entire* thing owned jointly;
- making any other *commitment* relating to the *entire* thing.

Majority decisions *can be contested in court* by the minority, if the decision:

- *infringes* the standard of *reasonable management*,

- results in a *significant injury to the lawful interests* of the opposing minority,
- or, if there is *disagreement* among the joint owners whether a proposed work is *inevitably necessary* for the *preservation and maintenance* of the jointly owned thing's conditions.

Joint owners have the rights to *possess* and to *use theoretically the entire* thing *in the proportion of their intangible share*. These rights may not be exercised *to the detriment of rights* and *lawful interests* of other joint owners. It follows then that joint owners can make *specific agreements* for *temporal* and/or *spatial sharing* of the thing's possession and use. This special agreement may be concluded also *by conduct*—e.g. if *none* of the joint owners *raises any objection* against a new way of exercising the right of possession or use by another co-owner with respect to its new spatial and/or temporal extent.

However, it sometimes occurs that the *proportionality of the exercise of such rights* factually *differs* from the *intangible share* of the joint owner. In this case, the joint owner who exploits more rights than he/she would have according to his/her ownership share, shall pay a *fee for the surplus use*. Unless it is otherwise indicated by the mentioned *agreement* of joint owners or the *relevant circumstances* of the case, *contractual services are for consideration* (cf. Section 6:61). It follows that a surplus possession or use can only be *free of charge* otherwise *gratuitous*, if the parties *expressed concluded* it in their agreement or if it follows the relevant circumstances (e.g. the parties are *close relatives*).

On the one hand, all the *benefits* (*commoda*) from the joint property are claimed, and, on the other hand, the bearing of all *costs* and *obligations*, and nonetheless the *liability* for all damages (together as '*incommoda*') with respect to the joint property are borne *in the proportion of the joint owners' shares of ownership*. It is also true in accordance with the *protection of the thing's conditions*; viz. Joint owners are entitled to carry out works that are essential for preserving and maintaining the thing's conditions. The costs of such investments are borne by all joint owners according to the actual share of ownership. If possible, joint owners shall be notified before the emergence of such costs.

At the request of either of the joint owners, the *court* may rule on the matters relating to *possession*, *use*, or *utilization*:

- if parties *could not make any decision according to these*, i.e. if they did not manage to conclude an agreement in this context;
- *and* with respect to the *ownership shares*, and the *joint owners' rights and lawful interests*,
- *and* according to the *requirements of reasonable management*.

Every joint owner may demand the *termination* of joint ownership; any *waiver* of this right shall be *null and void*. The Civil Code contains regulation only for such cases, if the joint owners do not manage to agree properly in the way of termination as between them, thus, if a disagreement occurs. The *mandatory rules of terminating joint ownership bind only the courts* applying them: *Parties may make any agreement for the termination*, unless it is not contrary to law. Court shall examine, at request, if termination would fall on an *inopportune date*, which is either *subjectively* unsuitable for the parties or *objectively* inappropriate; if so, termination of joint ownership *may not be ordered* by court.

There are *four different modes of termination* of joint ownership, which are: *Termination in Kind*; *Termination for Consideration Paid by a Joint Owner*; *Termination by Jointly Selling the Thing and Dividing the Price*; *Termination by Transformation into Condominium*. This enumeration means somehow a *mandatory sequence*, and the *conditions of conversion* from one mode of termination to another are defined by *mandatory rules* of Civil Code [Section 5:84). I shall stress that the court *cannot apply any mode* of termination, *against which all of the joint owners protest*. The relevant laws say that:

- Objects of joint ownership shall be divided *primarily in kind*.
- The objects of joint ownership, or a part thereof, if it is *justified* with respect to the *joint owners' circumstances*, *may be given into the ownership of one or more of the joint owners* in return for the *payment of an appropriate consideration*:
  - *with the consent* of the joint owner *acquiring* ownership;
  - or *without consent*, if the joint owner who acquires ownership by the termination r*esides in the jointly owned real estate*, and this way of termination *does not harm* his/her *reasonable interests*:
    - the *adequate consideration* (or, if the thing is sold by auction, the minimum purchase price) shall be *determined by court ruling*;

    - the court *either orders* the joint owner living in the real estate to be terminated *to vacate* it, or, if this order infringes the equitable interests of this party, the court shall *grant the right of use* for him/her *in proportion of the actual ownership share*; this right of use may, by nature, depreciate the co-owned thing, the effects of such value-decreasing shall be borne by the joint owner who remains in the residence.
- the objects of joint ownership *shall be sold*, and the *price received shall be appropriately divided* among the joint owners if:
    - joint ownership *cannot otherwise be terminated*, or
    - *division in kind* would *cause a significant decrease in value*, or
    - *division in kind* would *hinder the thing's proper use*.
- Joint ownership of a *real estate* may also be terminated by *converting it into condominium*, if its conditions are satisfied. (If conversion into condominium is ordered *by court decision*, the *bylaws of condominium* shall be substituted *by the court ruling*.)

3. *The External Legal Relationships of Joint Owners*. According to the joint owners' rights, duties, obligations, and with respect to the common thing, the following issues requires regulation in the external legal relationships of joint owners:

– the right of disposition in accordance with ownership,
– and the protection of joint property.

Although alienating and encumbering a jointly owned thing *as whole*, as we saw, needs a *unanimous* decision of the joint owners, each of them may *freely dispose of the own share* of ownership, i.e. the right of free alienation, leasing, and encumbrance. This *liberty of disposition* has, however, some *boundaries* as well: The *formative rights*—otherwise known as *mightinesses*—of third persons that are certain *prerogatives* such as the *right of pre-emption*, the *right of first refusal for lease*, and the *right of first refusal for tenancy*. The beneficiaries of such rights can be e.g.:

– *by law*, some *extraneous* persons may have such prerogatives *against the joint owners* or *against third persons having no prerogatives* (e.g. in case of certain monuments, the State, or, in the case of arable land, a resident or neighbouring farmer);
– *against third persons*, *joint owners registered* in the real estate register has such formative rights, and, if the *seller has knowledge* about the *existence of joint owners not being registered* in the real estate register, these *unregistered owners* also have such rights;
– joint owners *cannot have* such mightinesses *against each other*;
– the right of pre-emption *based on other laws precedes* the pre-emption rights of joint owners afforded under *Civil Code*.

With respect to the *ownership share offered for selling*, joint owners may exercise their right of pre-emption and their other formative rights mentioned above *in proportion to their ownership shares*. According to their prerogatives, they have the right to be first on offer for buying the share of another joint owner who aims to sell or lease his/her own share to third parties. If the joint owner selling the own share fails to make an offer first to the other joint owners, the offer of the third party for sale or hire or lease becomes the object of the right of pre-emption etc.: If such offer of an *extraneous* person is *in toto*—i.e. the offer for the price or lease charge etc. together with every other clauses—*acceptable* for a joint owner having an interest to buy or lease the share of another co-owner, the *contract* in question *becomes to be concluded between the joint owners*—i.e. between the *prerogative's beneficiary* and the *seller—with the content offered by the third person*. If *either of the joint owners accepts* the offer for the ownership share in question, the right of pre-emption etc. accrues *exclusively* to him/her. If there is *more than one* such joint owner *acting on his/her own*, the *owner has the right to select one*.

Any of the joint owners may act *independently to protect the joint property as whole*. According to this, the tools of protection of property introduced above may be used by any of them with respect to the entire joint property regardless of the ownership share of the joint owner acting towards property protection.

In accordance with possession issues, joint owners are, in most cases, *joint possessors* at the same time. Therefore, in these cases, joint ownership may be qualified *simultaneously* as joint possession, too. If so, *protection of possession* accrues to each *co-possessor*—i.e. *joint owner—individually*, and each of them is *entitled to*

demand the thing to be rendered available for joint possession; joint possessors are also entitled to protection *against each other* according to *their title* [Section 5:5 § 4sq)—viz. with respect either to his/her ownership share or to his/her use rights based on the agreement for sharing the right to use.

2.2.5.2. The Condominium

1. According to the Civil Code [Section 5:85), a condominium is composed of, under the condominium's bylaws, *at least two independent units for residential (or non-residential) purposes in a technically separated building* passing into the *private* ownership of condominium owners, whereas *building areas not being* the object of *private* ownership go into the condominium owners' *joint ownership*. The share of ownership in the jointly owned parts follows the proportion of the owners' share in the individual properties. The *actual share of common elements* of condominium and the *individually owned* (non-)residential *units* form together an *independent property*. The titles to *individual* and to *common share* of condominium property may be *neither transferred nor encumbered separately* from one another.

2. The provisions concerning *joint ownership duly apply to condominium* properties as well. *Special regulations* thereof are codified in the *Condominium Act* (Act CXXXIII of 2003), according to which:

- only *in its name*, and only *by the administration of matters* concerning the building's *maintenance*—i.e. operation, conservation, renewal—as well as its *jointly owned parts*, a condominium is entitled to
  - *have rights and obligations*,
  - *sue and be sued autonomously*,
  - *exercise ownership rights in jointly owned* areas of the condominium,
  - *bear the costs and risks* of the *jointly owned* parts.
- The condominium's *capacity to bring an action* is exercised by its *common representative*.
- The *principal body* of a condominium is its *general assembly* composed of the condominium owners, which *all of them* may *participate* in.
- The *common matters* of condominium are *administered* by the *common representative* or the *administrative committee* (the latter is a parallel institution of the previous one if composed of multiple persons).
- If a condominium includes *more than 25 flats*, an *audit committee* shall be elected for management control.
- The *legal supervision* of the operation of the condominium and its bodies' *operation* is conducted by the *notary of the municipality*, which the condominium is established in.
- Owners of the condominium are liable for the obligations of the entire condominium in the proportion of their share of ownership; this liability is a simple—i.e. not directly enforceable—guarantee.
- *Supporting frames*, and *areas of the building* serving *security purposes* and *common purposes* of condominium owners belong to the *jointly owned* parts, *even if* it is situated in an *individual* unit.
- A condominium may be established either for an *already finished* building or for a building *under construction* or *to be construed*:
  - a condominium in an *already standing* building can be established through such *intention* of the real estate's *joint owners* expressed in the *bylaws* of the condominium;
  - a condominium in a building *under construction* or *to be construed* can be established through such *intention* of the *land parcel's joint owners* expressed in the *bylaws* of the condominium; this is called *preliminary establishment* that shall be *recorded* on the *title deed of the parcel* in the real estate register, and the *registration of the condominium* can be claimed only after the completion of the construction.
- The major issues laid down in the *rules for the organization and operation* are as follows:
  - the *bodies* of the condominium, its *power*, and its *rights* and *duties*,
  - the rules of *bearing the common costs*.
- Any owner of the condominium is entitled to *possess*, *use*, *utilise*, and *dispose* the *individually owned unit* without any infringement of *rights and lawful interests* of the other owners.

- Every owner is entitled to *possess* and *use* the objects of *joint ownership* with no harm of *rights and lawful interests* of others.
- Any *owner of the condominium is bound to*:
  - *maintain* his/her *independent* residential or non-residential unit;
  - *make possible* and *tolerate* that the condominium's representative *enter* the *independent* residential or non-residential unit in accordance with issues concerning the *control*, *fault resolution*, and *maintenance* of the *jointly owned properties* in an *opportune time*, and *without any unnecessary harm of the tenant*;
  - *inform the common representative* about:
    - any *planned building (re-)construction* in the own unit,
    - any *changing in ownership rights* in the own unit,
    - the own *relevant personal data* and that of the tenant, and about the number of people residing in the individually owned unit.

2.3. The Law of Limited Rights *In Rem*

Limited *in rem* rights have *manifold genres*. To depict their *common characteristics* properly, it seems useful to briefly repeat the various *classifications* of the complex system of *in rem rights' species* that have actuality in respect of a *better understanding* of the relevant attributes of *limited* rights *in rem* (see more detailed above, in the chapter of *in rem* rights' genres).

The *Civil Code categorises and denominates in rem* rights as follows: *on the one hand*, there are the *ownership* together with *particle ownership rights* (such as the right of possession, use, utilization, disposition, protection), and, *on the other hand*, there are the colourful categories and species of *limited rights in rem* having *two main sub-categories*, *the one* of which contains the manifold types of *pledges*, *liens*, *mortgages* etc. (statutory lien, collateral security, possessory lien, mortgages, independent lien, lien on rights, lien on claims, lien on set of assets identified by description, multiple pledge) called altogether the *Law of In Rem Security Rights over Assets*, and *the other* of which incorporates the diverse genres of the *rights of use* (land use right, beneficial interest otherwise known as usufruct, use right, land easements viz. servitudes, right of use for public purposes).

The most important classification of *genuine in rem rights* forms its categories according to the *extent of power upon the thing*: *complete in rem* right entitles to *full power* (*plena potestas*) upon the thing, while *non-complete in rem* rights assure only *partial power* on a thing. *Complete in rem* right is called *ownership right*, which legally enables and protects the beneficiary while fully exploiting the thing. *Non-complete* otherwise *limited in rem* rights ensure the beneficiary to exercise either *one of the particle ownership rights* or *some of them in certain combinations*. The beneficiary's limited rights *can be restricted* by *parallel ownership right*. A *usufructuary* has e.g. no right to dispose either of the thing itself or of his/her own right of usufruct but is indeed entitled to assign his/her right to possess, to use or to utilise the thing (see below; cf. Section 5:148 § 1].

Between *in rem rights*, there is another relevant distinction: whether it is a right *in an own thing*, or a right *in a thing owned by another*. The right in the beneficiary's *own* thing can be *solely* and *exclusively* an *ownership* right. The category of *in rem* rights *in foreign things* meets the class of *limited rights in rem*.

2.3.1. The Law of In Rem Security Rights over Assets

2.3.1.1. The Legal Nature Thereof

1. The *one* group of *limited in rem rights* contains the *Rights of Use* that entitle the beneficiary *to exploit*—i.e. to *use* and/or *utilise*—the advantageous attributes of a *thing's physical consistency* either *with* the *partial* or *total exclusion* of exercise of parallel ownership rights, or *without* any exclusion of this kind.

2. On the contrary, *pledges*, *liens*, *mortgages*, *charges*, *hypothecations* etc. do not encumber *things* or other *assets* such as *rights*, *claims*, *certain parts of a person's estate* through establishing a title for exploitation of the *consistency* thereof, but these security rights entitle *to exploit the value of the encumbered asset with in rem effect*, i.e. through *total exclusion of enjoyment of rights* of *owners* or *beneficiaries* either *for securing a claim* (*collateral security*

rights) or *without* such legal purpose (*independent security rights*).

It shall be stressed well in advance that this field of Law of Rights *In Rem can hardly be translated into English legal terminology* because Hungarian (and other Continental) notions and English terms of this field *are profoundly different*. There are *merely parallel legal concepts*, the *conceptual elements* of which are also *not identical*. Therefore, *in lack of an equal term*, the definition of Hungarian legal institutions by using the English language can merely be issued by the *method of circumscription* (*periphrasis*).

This is immediately evidenced by the *heading* of this very chapter circumscribing a *deficient notion* of English law that would *resume* and *summarise* mortgages, liens, pledges, charges, collateral securities, hypothecations of *every kind* under a *single* legal term. The concept of "*In Rem Security Rights over Assets*" is not synthesised in English law but it seems *somewhat capable of describing the legal content* of a *recapitulatory notion* of such colourfully variegated institutions as enumerated above.

A *legally obliged party*—be it an *obligor*, or a *borrower* in a general sense, or another kind of *debtor*—is *liable* for the obligation, duty, debt etc. not only with the object of an *in rem* security right if there is any but *with* his/her *whole estate*. However, the debtor's estate *as whole* can be used *as the cover of claims of every creditor* offering *no privileged status in the ranking of satisfaction* for any of them. It is only an *in rem security right* that grants an *exclusive position* for the creditor who enjoys such right towards every other claimant, which offers, *regardless of others*, a possibility to *totally withdraw (deprive) the value by enforcement* of the right's *object* with respect to the *extent of security right*. The *reservation of value with in rem effect* means that the object (asset) of the security right can only be used for the satisfaction of the beneficiary of that very security right. There are *many ways* of this kind of *special satisfaction* of claims secured by such rights (see them detailed below), the common character of which is that its beneficiary has *priority in satisfaction* as compared with other claimants. The issues below have *no further significance* with respect to the *in rem effect* of such security rights:

- whether the owner or other beneficiary of the object of an *in rem* security right, i.e. for instance a *lienee*, is in fact a debtor of the *lienor*;
- whether the *obliged* party of the security *has other creditors* to whom he/she owes another debt, because security offers *priority in satisfaction*;
- whether there is *another joint debtor* of the claim secured by an *in rem* security right, which joint debtor is *not encumbered* by such security rights, because the beneficiary of the security right may withdraw (deprive) the object for his/her own satisfaction by enforcement *before* touching his/her other debtors.

3. *In rem* security rights have *two different major periods of existence*, and, within the *first* one, *two minor parts of life*, all of which are clearly separated by Civil Code, too:

- the *first* major part having a *static* character is called the *period of formation*, in which the value of the object of security right *becomes to be engaged* for the purposes of such rights but it *cannot yet be withdrawn (deprived) for satisfaction*; within this period of existence, the *engagement has two minor parts of life*, in both of which parties are in a *special legal position* as compared with the second period of satisfaction (see that below):
  - the first one is called *the period of 'coming into existence'*, in which the *in rem* security right created with an *in personam* effect *becomes ready for establishment* in the second phase of an *in rem* effect;
  - the second one is called *the period of 'establishment'*, from which the *engagement* of the security right's *object has in rem effect*, i.e. it has a legal effect *towards everyone* (*erga omnes*), and so it *becomes ready for satisfaction* albeit this phase takes place is the *second major period*;
- *in rem* security rights over assets can potentially have also a *dynamic* phase called the *period of satisfaction*, in which *the value of in rem engaged object can be totally withdrawn (deprived)*, whether it *serves as cover* for satisfaction of claims or it *does not*. This period is *merely probable* since:
  - in the case of an *independent lien*, it is not sure, whether the beneficiary of the lien exercises the right of satisfaction;
  - in the case of *collateral security rights*, the beneficiary of the security right *may claim* or *can get satisfaction* from elsewhere, i.e. if the *debt of the lienee or pledger is paid by an extraneous person*, or it is paid *voluntarily by the lienee or pledger from their non-encumbered parts of estate*. Paying the consideration

is legally followed by the *termination of secured debt*, the consequence of which is that the *terminated debt's collateral security rights also cease*.

2.3.1.2. Collateral and Independent Types Thereof

The Civil Code [Section 5:86) creates a short definition of the *collateral type* of *in rem* security rights over assets as follows: "If the *in personam obligor fails to perform the claim secured in rem*, the *lienor* becomes to be *entitled to seek satisfaction prior to other claims against the property engaged as the claim's in rem security*. The *right to satisfaction* cannot be affected by any rights acquired *after* the engagement as *in rem* security." The *collateral* type of *in rem* security rights shall be considered as the *major type of all genres thereof*.

Concerning the economic purposes of the institution, there is *another type* of liens called "*independent lien*" [Section 5:100). The *General Rules* upon *In Rem* Security Rights over Assets *are designed for* the *collateral* type thereof that is a legal institution *created solely for securing claims*. *Independent* lien is *not collateral* since *it exists independently of any claims to be secured*. Therefore, the statements of the following chapters are undoubtedly correct *only* about *collateral* types of *in rem* security rights. According to this, merely these lines below contain some observations about the independent lien.

A lien may be established on a *real estate property* on behalf of a *financial institution* by engaging the lien's object to be encumbered only *to the amount of a specific sum* but *not to secure a claim*. An independent lien may be *transferred* to another financial institution *in whole* or *in part*, or *in instalments*. For the *purpose of satisfying the lienor*, a *cancellation of lien* is needed: *Both lienor and lienee* may cancel the independent lien *in writing*; the *notice period* is *6 months*. Under the same ranking, an *independent* lien *can be converted* into a *collateral* lien securing a claim, and *vice versa*, if *so agreed* by the parties *in writing* and by its *registration* in the real estate register.

2.3.1.3. The Process of Formation Thereof

As we could see, the *first*—'static'—period of existence of *in rem* security rights is the *period of formation*. The value of the object of security right becomes *engaged* for the purposes of lien, mortgage, pledge etc. but it *cannot be enforced yet* since the *right to satisfaction is still not open*. There are *two minor interior parts* within this period during which parties stand in a *special legal position* as compared to their legal standing within the period of satisfaction.

In the *period of 'coming into existence'*, the *in rem* security right *is created* with an *in personam* effect between the parties, therefore, it *becomes ready for establishment* that will erect its *in rem* effect. 'Coming into existence' necessitates *two conditions*:

- the first one is the *parties' agreement on the establishment of the actual in rem security right*,
- the second one is that *the party engaging the object of security right has the right of disposition over the encumbered property*. This entitlement is *inevitable* for the following step of *establishment* (see the below). According to Section 5:121 of the Civil Code, if a lien is *established* by the *previous beneficiary of the right of disposition* over the property encumbered to secure a lien registered in the collateral register, it precedes the lien that was established prior to the mentioned lien, albeit it subsequently came into existence due to the lack of right of disposition.

The *period of 'establishment'* creates for the engagement of the security right's object an *in rem effect*, i.e. it has a legal effect *towards everyone* (*erga omnes*), therefore, and so it *becomes ready for satisfaction*. An *in rem* security right shall be considered established if:

- the *parties have already made an agreement upon the security right's conditions*, and, with respect to that content of agreement while *having the right of disposition*:
- either, in the case of a *mortgage type* of security right, the *security right is registered in the actual register*,
- or, in the case of a *possessory lien* type of security right, i.e. the *pledge*, the *possession of the encumbered property is transferred to the pledgee*.

In the case of *real estates*, mortgages are to be registered in the *real estate register*, but in the case of *movables*, *rights* and *claims* mortgages shall be registered in the *collateral register* or other *registries of special movables* (aircrafts, ships etc). Registration in the real estate register or in other registries can be based

either on the *parties' agreement* upon the security right, or upon the *lienee's allowance*. In the case of *collateral register*, either *uniquely identified* or *per circumscription defined objects* can be registered in, and, in that case, registration can take place even if the object of security right, at the time of registration, *still does not exist* or the lienee *has no right of disposition* at that time.

In the case of a *pledge* (*possessory lien*), the transfer of possession takes place in the *above enumerated* ways of *possession transfer* except *constitutum possessorium*. There are *further ways* of transfer, too: it may also be satisfied if possession is *maintained jointly by pledger and pledgee*, or if the thing concerned is *safeguarded on their behalf by a third person*. In case of *cessio vindicationis* (see above), when the *object is held by a sub-possessor* (third person), and the transfer of possession take place by *conveying the claim for the thing*, there is a *further requirement* needed for the *establishment* of pledge: the *sub-possessor shall be notified* concerning the pledge.

2.3.1.4. Contracts on Establishing An *In Rem* Security Right

1. Such agreement contains an *arrangement* between the parties *on encumbering a determined or determinable asset* and *to secure a certain claim* (in the case of an independent lien, the latter condition is lacking). The *formal validity* of these agreements necessitates its execution *in writing*. The *determination of the object* may take place *by genre*, *quantity*, or *circumscription*. *Still not existing assets* may also be identified as object of an *in rem* security right, and nonetheless such assets, in the case of which the party engaging assets for encumbrance *has yet no right of disposition*. The *already existing* or *yet not existing secured claim* shall be determined in a way by which it *can be doubtless identified*, and for that:

- indicating the *legal relationship(s)*, which the *claim's title is based on*;
- determining the *amount* of the claim;
- applying *any other* tool *suitable* for the identification.

Under an agreement upon an *in rem* security right, the *party who encumbers his/her property* through such security right undertakes the obligation:

- in case of *pledges*, to *transfer the possession of* or the *control over* the pledged property to the creditor;
- in case of *mortgages*, to *grant an approval for the registration* of mortgage;
- in case of *hypothecated claims*, by following the *lienor's choice*, either to *inform the obligor of a hypothecated claim in writing on having the lien established*, or to *make a statement thereof and deliver it to the lienor*.

2. An agreement of such kind may also be qualified as a *consumer contract*, if:

- the *lienee* is a *natural person*, and
- the *object* of the security right *is not used primarily for professional* or *business purposes of the lienee*, and
- the *secured claim does not stem from* the *lienee's profession* or *business operations*.

In case of a *consumer* contract on establishing an *in rem* security right, the *provisions of* such a *non-consumer* contract shall apply with *some exceptions* such as:

- the *object* of security right may be:
  - either an *individually determined* asset *owned by the lienee*,
  - or an *asset to be acquired by lienee* from a loa*n provided by the lienor*;
- the *determination of the secured claim* shall include:
  - either the *sum without its additional charges*,
  - or the *amount limit up to which the lienor is entitled to seek satisfaction from the encumbered property.*

2.3.1.5. Parties' Rights and Obligations before Satisfaction

There are *three important issues* to be mentioned: a) the *protection of the value of the object*, i.e. that of the *encumbered property*; b) the *right of possession*, *use* and *utilization* of the *tangible object*, i.e. that of the *pledged* or *mortgaged* property; c) the *rights and obligations* of the *debtor* of a *hypothecated claim*.

Ad a) In case of *pledged property*, if any *loss in value* of the pledged property *jeopardises the claim's satisfaction*, and the *pledger fails to restore the condition* of the object of pledge contrary to the *creditor's such request* within the *prescribed time*, or *fails to provide adequate replacement* or *additional guarantee to cover that loss*, the *pledgee* becomes *entitled to sell* the pledged property *on the behalf of object's owner* for *preventing further depreciation*. If

the *pledger* or the *debtor of the secured claim offers adequate other assets* in replacement and this *does not endanger* the *satisfaction*, the pledgee is *obliged to return* the pledged property. The pledger is entitled to use any *insurance settlement*, *compensation* or other *value received in exchange for the pledged property to restore* it, if this *does not imperil* the secured claim's *satisfaction*. The rules upon *mortgaged objects' protection* are similarly as that of pledged property. There are, however, some minor differences according to the diverse purpose and nature of the institution. If the *mortgagor* or a *third person* is *endangering* the *condition of the mortgaged property*, the *mortgagee* is entitled to *exercise the rights the exposed party* for eliminating the *imminent dangers* (cf. Section 6:523). If a *depreciation of the mortgaged object perils the claim's satisfaction*, the *mortgagee's* rights are similarly as that of the pledgee (see above). The *mortgagor* is entitled—similarly as the pledger—to *allocate any value received in exchange* for the mortgaged property to *restore* it.

Ad b) The *rights of possession*, *use* and *utilization* upon *pledged* properties *deeply differ* from that of *mortgaged* objects. The *reason* for that lies in the major difference between the institutions that the *pledger gives the possession* of the pledged property to the pledgee, while the *mortgagor can hold it* for making *profits* from the object to *increase liquidity*. Since the *pledgee gets* the pledged property in his/her *own possession* while *obliged to maintain the good condition* thereof, the *pledger* or the *debtor of the secured claim* is entitled to *control* the *condition* and *use* of the pledged property. On the contrary, the *mortgagor* is entitled to *keep* the mortgaged property in his/her *possession*, *use* it and *utilise* it *for its intended purpose*. The *mortgagor*, as the *pledgee*, is obliged to *maintain* mortgaged property's *good condition*. If mortgaged property is *defined by circumscription*, the mortgagor *registered in the collateral register* is entitled to *process*, *convert*, *merge*, *combine* and *alienate* it within the requirements of *prudential management*.

Ad c) The *debtor of a hypothecated claim* is *liable to perform to the lienee* insofar as an *instruction* is given that *indicates the relevant personal data of the lienor*. After that the debtor *may perform as instructed*. Performance instructions *may be sent* by the lienor only *after* the *effective date of the right to satisfaction*.

2.3.1.6. The Claims Guaranteed Thereby

The *purpose* of *collateral* security rights is to *strengthen credibility* by *offering a serious in rem cover* for the creditor's claims emerging from a *credit* or *any other obligation*. The Hungarian system is *quite flexible* since it allows *almost every kind of claims* to be guaranteed by the many different genres of *in rem* security rights. However, *no in rem* security right can be established on claims that *cannot be enforced in court*. Still, *in rem* security rights may be established:

- on *one* or *more* claims;
- on *existing* or *future* claims;
- on *conditional* or *unconditional* claims;
- on *pecuniary* or *non-pecuniary* claims; in the case of the latter, the security right may guarantee
  - the claim *for damages resulting from the failure of satisfaction*,
  - as well as *other receivables*;
- on *pecuniary* claims of a *determined amount* or that of a *determinable amount*.

There is a significant relationship between the *scope of liability with the object of encumbrance* and *the extent of the claim guaranteed by encumbrance*: The scope of liability assumed through encumbered property *is adjusted to the sise of the claim*, for the guarantee of which the property was encumbered. *Above* the value of the claim *as capital*, the notion of '*sise of the claim*' incorporates the following *associated costs*:

- the *interests* on the claim,
- the *costs of the claim's enforcement*,
- the *costs of the actual in rem security right's enforcement*,
- and the *reasonable costs spent on the encumbered property*.
- The parties *may set a limit up to which the lienor may seek satisfaction* from the encumbered property. If so, the security right guarantees *the claim and the here enumerated associated costs up to that limit*.

If an *in rem* security right is *collateral* (not independent), the secured claim's *assignment* or *transfer of any other kind* is followed by the *transfer of the security right to the new obligee* of the claim. The *transferor of the claim* shall either *surrender the pledged property*, or *provide the permit for registration* of the transfer of the lien. If the

secured claim is only *partially transferred*, the *previous* and the *new* lienor, pledgee, mortgagee etc. *receives the same rank* for the lien, pledge, mortgage etc. *in proportion to their respective claim*. By nature, with exception of independent lien, the *collateral character* of other *in rem* security rights is verified also by the fact that these encumbering rights *may be transferred* or *encumbered only together with the claim secured thereby*. If a claim *secured by* an *in rem* security right *is encumbered* by another *in rem* security right, a '*subordinated lien*' is established, which *covers* the securing *in rem* right as well as the claim guaranteed thereby.

2.3.1.7. The Objects Thereof

Hungarian Law of *In Rem* Security Rights is flexible with respect also to the fact that *every marketable asset, the value of which is determinable in money*, *can be the object* of an *in rem* security right. The *diverse legal characters of different assets* encumbered by such rights implicate also *different genres of encumbering in rem security rights*. According to this, assets may be the object of *in rem* security rights—*after the colon* see the *genre of in rem security right*, which the actual type of asset can be encumbered with—, be these:

- *things*, be these
  - either *movables*: *pledge*, *mortgage*,
  - or especially *money* or *securities*: only *security deposit*; briefly about the institution of security deposit (cf. Sections 5:95, 5:123, 5:138):
    - it is *stronger in ranking* as any other *in rem* security rights,
    - it offers a so-called *right to direct satisfaction*, which means that the creditor is entitled to *acquire ownership* of encumbered property *up to the amount* of the secured claim *by way of unilateral statement* addressed to the debtor;
  - or *immovables*: *no pledge* but *mortgage*,
  - or *intangible shares of joint ownership*: *mortgage*;
- *rights*, be these *autonomous rights* or *parts of divisible rights* of multiple obligees or beneficiaries: *lien*;
- *claims*, be these either *whole claims*, or *parts of divisible claims*: *lien*; or some special claims such as *payment account balances*, *funds available through deposit account contracts*, other *balances available on account*: only *security deposit*;
- a *certain part of a person's estate*, the elements of which shall *be determined by circumscription*: *lien*.

The objects of *in rem* security rights are often such things and rights that are *complex* and *productive* or *fructiferous*. It follows then that these objects may have *components*, accessories and *interim profits*, the legal fate of which shall be regulated by private law. According to this, in the case of encumbered things *in rem* security rights extend to the encumbered thing as well as:

- to *its every component*;
- *in doubt*, to *every accessory* of the encumbered thing;
- to its *products*, *produces*, *progenies*, and *other benefits*;
- on the contrary, *in rem* security rights *do not encumber* the *components* and *accessories* and *benefits* of the encumbered *real estate*, *if*:
  - these were *separated* from the real estate *by prudential management*,
  - then were *alienated* and *removed* from the real estate
  - *before the period of satisfaction*.

During the existence of encumbrance by *in rem* security rights, it occurs not infrequently that the *object* of the actual security right *becomes to be substituted* by *other things* or by *other valuable assets*. In these cases, the objects become to be replaced by other assets, therefore, *in rem* security rights *totally* or *partially extend* to these substitutive assets such as:

- in the case of *destruction or depreciation* of encumbered property:
  - the received *insurance settlement*,
  - the received *compensation*,
  - the received *reimbursement*,
  - or *other value received in exchange for the pledged property to restore*,

- as well as *any claim thereof*;

– in the case of *expropriation* of encumbered property, the *received compensation*, as well as the *claim thereof*;
– in the case of *selling* the encumbered property *to avoid any imminent damages*: the *received price*;
– in the case of *selling*, *within prudential management*, an encumbered property *registered* in the *collateral register*: the *income* from the sale;
– in the case of *processing*, *conversion*, *merger*, or *combination* of the encumbered property with other assets by the *lienee*: the *new thing created* by these acts;
– in the case of *depreciation* of encumbered property, if a *new* or *supplementing* object is given by the *lienee* or by the *debtor of the secured claim*: the *newly encumbered property*;
– in the case of *payment* or other *assets' transfer* as the *performance* of either a *hypothecated claim* or *its guarantees*: the *received payment or other asset*.

Frequently occurs also, that an *in rem* security right is established *on more than one object to secure the same claim*. This institution is called the *multiple* pledge, lien etc., which creates a *universal security right*. Universality is *excluded* if all encumbered properties are owned by the same person. If the lien or pledge is universal, all objects serve as security for the entire claim. *Lienor* or *pledgee* is entitled to *determine the order of enforcement* of the encumbrance but the *right to satisfaction extends only* to as many encumbered properties as necessary to provide satisfaction.

2.3.1.8. The Rankings Thereof According to Registration

It occurs many times that a security right is established *on more than one object to secure the same claim*— not less frequent is the case, if the *same property is encumbered by more than one in rem security right*. In this case, the *lienors can be satisfied in the order of establishment* of *in rem* security rights. The *order of security rights on the same property* is called '*rank*' or '*ranking*'. Ranking can be determined either *by law* or *by agreement*. The ranking of liens *may be modified with the consent of all parties concerned*. If *registered*, *any change* in ranking shall be considered *effective*. The *disposition over the rankings* may not cause any *injury to third party rights registered at the time of such modification*. Parallel to the Anglo-Saxon legal institution of *floating charge*, in case of *changes in the encumbered properties* registered in the collateral register, if the *object* of the lien is *more than one asset identified by circumscription*, the changes in things, rights or claims *shall not affect the rank* of the lien. The reason for that lies in *nature of floating charge*, according to which the *lien pertains all time to all those assets* (things, rights, claims) identified by the *detailed circumscription* over which the lienor has the *right of disposition*. It is a *special case*, if a *lien guarantees the acquisition of the property being subject to that very lien*. If a lien established to secure a claim either for the *purchase price* of an *encumbered movable*, or for the *re-payment of a loan provided for the acquisition of the encumbered movable*, it shall *precede* the liens established by the buyer or the debtor *previously*, if, *before the transfer* of the encumbered property,

– the lien is *registered in the collateral register*, and
– the *lienor notifies* of the establishment of lien in writing the *previous lienors*, whose lien covers the newly encumbered property.

To the benefit of another person or without indicating any beneficiary, the *owner* of an asset to be encumbered is entitled to have this *intention* to encumber recorded or registered in the appropriate register by *specifying an amount limit* of lien the owner wishes to establish. If a lien *becomes indeed registered*, it shall be ranked *consistent with* the ranking of the recording or registration of the *intention* to encumber.

2.3.1.9. The Enforcement Thereof: Exercising the Right to Satisfaction

1. *General Provisions on Exercising the Right to Satisfaction*. The *time*, when the *secured creditor becomes to be entitled for exercising his/her right to satisfaction by the enforcement of the actual in rem security right*, is called *the opening* of the right to satisfaction. This is a *significant point dividing the two major periods of existence* of *in rem* security rights: i.e. that of *Formation* and *Satisfaction*. Accordingly, the *legal position* of parties *undergoes a meaningful changing*, the nature of which shall be summarised in this chapter.

The pledgee's, lienor's, mortgagee's, etc. right to satisfaction *opens*, when the *claim* secured by the *in rem* security right *falls due*, and *default occurs*. In the case of an *independent lien*, the right to satisfaction *opens* if lien is *cancelled* following the period of notice (see above).

The *exercise* of the right to satisfaction may take place in the following ways:

- either *by way of judicial enforcement* (against *customers* and in the case of a *lien on payment account balances* can be enforced *only* by this way);
- or, *at the discretion of the secured creditor* who is *entitled to switch* to a different way of enforcement, *by means other than judicial enforcement*, i.e. through:
  - the *sale of the encumbered property* by the secured creditor;
  - the *acquisition of the encumbered property* by the secured creditor;
  - the *enforcement of a hypothecated right or claim*.

If the *creditor* whose claim is guaranteed by an *in rem* security right, *while exercising the right to satisfaction*, *infringes obligations or duties* prescribed in the Civil Code, any person who has a legal interest therein may bring an action before the court *to suspend the exercise of the right to satisfaction*, or *to order* the creditor to exercise this right *with respect to the conditions determined by court*.

2. *The Sale of the Encumbered Property by the Secured Creditor*. The *secured creditor*, at least *10 days before the planned transfer*, shall send a *notification*—among others about the planned mode of sale and the place and date of the (public) sale—*in writing* concerning the *intention* to sell the encumbered pledged property:

- to the *debtor of the in rem security right* (i.e. pledger, lienee, mortgagor etc.),
- to the *debtor of the secured claim*,
- to the persons who *have guaranteed the performance of the secured claim's debtor* (guarantor etc.)
- to the *creditors of other in rem security rights encumbering the same object*.

No prior notification is needed if the encumbered property is *perishable*, or it is a thing or a right *traded on stock exchange*.

By nature, the exercise of the right to satisfaction *by selling* the encumbered property *necessitates the acquisition of possession*, although the law declares that the *failure to take possession cannot hinder* the execution of the encumbered property's sale. Therefore, by the opening of such right to satisfaction, the secured creditor acquires the right to take possession of the encumbered property *for the purpose of sale*. *Without voluntarily transfer* of possession, the creditor has the right to *request the surrender* of the encumbered property, and the debtor is obliged to surrender it within a *certain period of time* determined *by law* such as:

- for *movables*: at least *10 days*,
- for *real estates*: at least *20 days*,
- for the *full vacation* of a *residential property*: at least *3 months*.

The *Principle of Reasonable Commercial Practices* says that the secured creditor, *while selling* the encumbered property, *shall act* in accordance with the *requirements* of the mentioned Principle, and with respect also to the *interest* of the pledger, lienee, mortgagor etc., and to that of the debtor of the secured claim as well. *Unless proven to the contrary*, it shall be *presumed* that the sale was conducted under the Principle, if:

- the object was sold *in stock exchange* at a *valid stock market price*;
- the sale took place *under the actual market's normal terms usually employed*.

The *rules for the sale* determine the following circumstances:

- The secured creditor is *entitled to transfer the ownership* of the encumbered property *instead and on behalf of its owner*.
- The encumbered property may be sold:
  - either *as it is*, i.e. in its *original status*, or in the status of *being processed or converted* if that was *commercially justifiable*;
  - either *in private* or *public*;
  - either *together* or *separately* if the security right was established on *more than one encumbered property*.

With no delay, after a *successful sale*, the secured creditor who executed the sale shall *distribute the net incomes*—i.e. the *received price* together with the *collected proceeds minus the costs of the sale—among the other secured creditors* concerning their *rankings* and *extent of claims*, and to *pay the remaining* amount to the *debtor* of the *in rem* security right.

3. *Acquisition of the Encumbered Property by the Secured Creditor. After* the *opening* of the right to satisfaction, the secured creditor *may offer* to the debtor of security right that he/she *accepts the ownership* of the encumbered property *in satisfaction of the secured claim in whole or in part*.

Among others, the *offer shall specify* the parties, the object, the secured claim, and the percentage of cover reached by the acquired ownership. The creditor is similarly obliged for a *prior notification* as in the case of sale of encumbered property (see above). The persons to be notified *may object to the offer if it is considered to jeopardise satisfaction* of their secured claim.

If the *offer is accepted in writing* by the debtor *within 20 days* from the date of receipt thereof, and *no objection is made* within the same period of time, creditor and debtor *enters into a sales contract*. With respect to the contract, the debtor is obliged to the *transfer of possession*, or to make out an *allowance for the registration* of ownership. *By transfer of ownership*, the *secured claim ceases* (in part or in whole).

The *Prohibition of 'Lex Commissoria'* is a living institution also in the Hungarian private law. According to this, any *agreement* concluded for *transferring ownership* of the encumbered property *to the secured creditor at the time of the satisfaction right's opening* shall be *null and void*.

4. *The Enforcement of Hypothecated Intangible Assets*. If the object of a mortgage is a *claim* or a *right* or a *debt instrument*, the *mortgagee may give an instruction for performance to the debtor* of the claim etc. (*mortgagor*), and, after the claim has fallen due, is *entitled to enforce the claim* against the debtor *in place of the original creditor* of the secured claim.

5. *Basic Rules of Civil Procedures*. The *Priority of Satisfaction* is guaranteed not only by *Substantive Private Law* but also by the *Law of Civil Procedures*. Two acts incorporate the major guarantees thereof: a) the *Act LIII of 1994* on *Judicial Enforcement* (hereinafter AJE), and b) the *Act XLIX of 1991* on *Bankruptcy and Liquidation Proceedings* (from now on: ABLP). I shall stress that the *major way* of enforcement of *in rem* security rights is that of *Judicial Enforcement*. In this subchapter, since our textbook concerns *substantive* law, only the *cornerstones* of the regulation shall be mentioned.

Ad a) If the debtor of the *in rem* security right is undergoing judicial enforcement *covering the encumbered asset as well*, *from the time of seizure* of asset, the secured creditor *shall not be entitled to* exercise the right to satisfaction *outside the judicial enforcement* procedure, and shall be able to seek satisfaction *solely by way of judicial enforcement* [Section 4/A of AJE).

The opening of the right to satisfaction *is declared by the court of origin for authorizing enforcement upon request*. After declaration, if *legal grounds* and *amount* of the secured claim *are not contested*, the *court permits* the secured creditor's *direct involvement in the enforcement procedure*. The opening can be declared *on the ground of the encumbered asset's seizure* in enforcement procedure *unless* secured creditor and debtor are *relatives* of each other [Section 114/A of AJE).

According to Section 165 of AJE, if the *proceeds of enforcement are insufficient to cover all claims*, the *priority order* of satisfaction shall be the following based on the legal title of claims: 1. *child support*; 2. other form of *statutory maintenance* (alimonies); 3. *employee's wages* and other emoluments construed as such; 4. *civil claims caused by a criminal offense*; 5. *sums payable to the State* established by judgment against debtor in criminal, penal enforcement or misdemeanour proceedings; 6. *tax and social security claims* and other outstanding public dues; 7. *other claims* etc.

The amount received from the sale of an encumbered property *shall be used primarily for the satisfaction of the claim secured by an in rem security right* [Section 169 of AJE). With respect to the *priority order* above, this rule shall be interpreted as the *ranking of in rem secured claims is preceded by 6 other kinds of items* (!).

Ad b) The secured creditor *is entitled to exercise* the right to satisfaction by the enforcement of *in rem* security right *only within the framework* of bankruptcy or liquidation proceedings [Section 4/A of ABLP):

- in case of *bankruptcy* proceedings, from the time the *notice of bankruptcy or moratorium is published*;
- in case of *liquidation* proceedings: *before* ordering liquidation, from the time of *receipt* of the court ruling on *permitting moratorium*, or *after* ordering liquidation, from the time the *liquidation order is published*.

The *economic operator's debts shall be satisfied from its assets* that are *subject to liquidation in the following order* [Section 57 of ABLP):

- *liquidation costs* in the following *priority order*:
  - *wages* and other *non-salary compensations* payable by the debtor,

- *costs of rational termination* of the debtor's business operations,
- *verified costs of sale of assets* and that of *claims' enforcement*,
- *assistance received* from the wage guarantee account of the *National Employment Fund*, charged to the debtor;
- *court costs* and the *costs of regulatory proceedings* concerning *liquidation*,
- *costs of safeguarding* of the debtor's *documents*,
- *liquidator's fee*;

– *after paying all of the above enumerated liquidation costs*, the *part* of a claim secured by *in rem* security right shall be satisfied, which *were not satisfied according to Section 49/D* of ABLP, which says that the *liquidator shall deduct* the following items, i.e. *only the sum remaining after these deductions shall be used to satisfy the claim itself* as principal, interest and other charges (!), if the security right was filed *prior to the opening* of liquidation proceedings:
  - the *justified* costs of works ordered *by administrative decision* required for *fixing up the encumbered property* if it *endangers lives and properties*,
  - the *costs of seeking restitution by lawsuits*, and *of safeguarding* and *sale*,
  - *taxes* due *after* the time of the opening of liquidation proceedings,
  - if claim is encumbered, the *costs of the claim's recovery* etc.

2.3.1.10. The Termination Thereof

1. *General Grounds for Termination*. According to the many *economic purposes* and accordingly *manifold legal contents* of the *various genres* of *in rem* security rights, there are *numerous grounds for the termination* thereof, the one part of which terminates *every kind* of security rights (*general ground*), the other part of which ceases only *certain genres* thereof (*special grounds*).

The general grounds for the termination of *liens*, *mortgages*, *pledges*, *security deposits*, *hypothecations*, *charges* etc. are as follows:

– the secured creditor *waives the actual security right* and *returns* the pledged property to the pledger or if the mortgage is *cancelled from the register*;
– the encumbered *property is destroyed*, or the encumbered *right* or *claim ceases without its replacement*;
– the *secured claim ceases*; but security right *remains in force for guaranteeing the recovery claim* accruing either to the *debtor of the secured claim* or to the *debtor of security right*, or to any *extraneous person* who *has satisfied the claim*;
– any *legal relationship being capable of resulting in a secured claim no longer exists*;
– the *secured claim lapses* (cf. below by pledge);
– the secured creditor *sells the encumbered property* as exercising satisfaction,
– the secured creditor *acquires ownership of the encumbered property while exercising the right to* satisfaction;
– the *same person becomes debtor and creditor* of the *same in rem* security right; however, the *collateral* security rights remain in force to *guarantee the claim*;
– the *only* claim secured by the actual *in rem* security right *was transferred with the proviso of expressed exclusion of the security right's simultaneous transfer*;
– in the cases of *unencumbered acquisitions* such as:
  - the *acquisition of ownership* of encumbered asset *in good faith in the course of trade for consideration*: the transferee acquires unencumbered ownership, right or claim registered in the collateral register;
  - the encumbered asset is *sold for protecting the in rem security collateral*, i.e. the *financial cover of the value of the actual encumbered asset*: the buyer acquires unencumbered ownership, right or claim.

2. *Some Special Grounds for Termination*. The special grounds for termination cease *only one or a few* genres of *in rem* security rights. It is *excluded* that such grounds *generally* terminate every kind of security rights. Let us introduce the case of *pledge* (possessory lien). The *pledge ceases* if:

– the *pledgee loses possession* of the pledged property, *except* when brings an action *in rem* or a possessory action without delay;

– the *lapse of the secured claim does not result in* termination of pledge;

3. *Obligations of Secured Creditors When In Rem Security Right Terminates*. If the secured claim *no longer exists* or if it *has lapsed*, *and no other legal relationship exists which may result in a secured claim in the future*, the secured creditor is obliged to:

– *return the encumbered asset* to its owner or its other beneficiary;
– *make out the allowance of cancelling* the registered *in rem* security right from the actual register;
– *notify in writing* any persons having any *legal interest* in the *in rem* security right or the secured claim.

2.3.2. The Law of Rights of Use

Well in advance, I shall repeatedly stress that there are *three* legally different notions having similar grammatical appearance. The notion of "*Rights of Use*" having only plural form shapes, adjacent to *in rem security rights over assets*, a *major class of limited rights in rem* incorporating rights that entitle the beneficiary *to exploit* the advantageous attributes of a *thing's physical consistency*. It is, however, not equal with the concept of "*Right of Use*" used in singular, which is a *particle right* of the "*Right of Ownership*". The third concept is called "*Use Right*" that is also an autonomous type of right, and a *subgenre* of "*Rights of Use*".

The most important classification of *genuine in rem rights* forms its categories according to the *extent of power upon the thing*: in addition to the *complete in rem* right entitling to *full power* upon the thing, *non-complete in rem* rights assure only *partial power*. *Complete in rem* right is called *ownership right*, which legally enables and protects the beneficiary while fully exploiting the thing. *Non-complete* otherwise *limited in rem* rights ensure the beneficiary to exercise either *one of the particle ownership rights* or *some of them in certain combinations*. The beneficiary's limited rights *can be restricted* by the *parallel ownership right*.

Between *in rem rights*, there is another relevant distinction: whether it is a right *in an own thing*, or a right *in a thing owned by another*. The right in the beneficiary's *own* thing can be *solely* and *exclusively* an *ownership* right. The category of *in rem* rights *in foreign things* meets the class of *limited rights in rem*.

The group the *Rights of Use* entitles the beneficiaries *to exploit*—i.e. to *use* and/or *utilise*—the advantageous attributes of a *thing's physical consistency* either *with partial* or *total exclusion* of exercise of parallel ownership rights, or *without* any exclusion of this kind.

2.3.2.1. Diverse Types of Beneficial Interests (Usufructs)

1. *Legal Nature and Significance Thereof. Beneficial Interest*—otherwise known after its Roman Law notion as *Usufruct*—is the *most meaningful Right of Use*, and, nonetheless, alongside of *in rem* security rights over assets, the *most significant limited right in rem* with respect to the *economic* and *social* importance thereof. This significance is clearly showed by the cornerstones of the private law regulation thereof drawing the legal nature of the institute:

– It is no wonder then that this right of use may exist in *every kind of marketable assets*, the *value* of which is *determinable in money*, i.e. either a *thing*, be it a *non-fruitful* (*regular type* of usufruct) or *fructuous* (*irregular type* thereof) tangible, or even a *right* or a *claim* (*special type* of usufruct).
– The significance of beneficial interest is mirrored also in the fact that, with respect to the *right of possession*, *use*, and *utilization*, it *grants more power to the beneficiary as ownership does*. This means that such rights are *exclusive rights*, according to which the *beneficiary may exclude the owner's parallel exercise of right* of possession, use, and utilization since *beneficial interest is the stronger one*, albeit it *grants no right of disposition* because this particle right of ownership remains in the power of the owner. In accordance with this, the beneficiary may *transfer neither the object nor the beneficial interest*, although *is entitled to assign the exercise* of the particle rights of beneficial interest (detailed see below).
– The other important *character of strength* is that beneficial interest *remains* even if *ownership* of its *object is transferred*: the *encumbrance survives* the transfer.

The *legal title* of a beneficial interest may be based either *on law* or *on agreement*. According to the *order of ranking*, the *stronger* right is that *based on law* (cf. especially in the *Law of Succession*: Section 7:51 § 2; Section 7:58 § 1 Point a); Section 7:69—detailed see below).

2. *Regular Beneficial Interest in Things* [Sections 5:146–5:155). *Every kind* of beneficial interests—be it

regular, *irregular*, or *special*—enters into effect when a *contract* or *other title is executed*, and the *possession* of the object, i.e. thing, *is transferred*; furthermore, beneficial interest *shall be registered* in the real estate register, if it encumbers a *real estate* or a *registered right*.

A beneficial interest in real estate *based on the law shall also be registered*, but, in the absence thereof, it is enforceable against those who acquired *in bad faith* or *gratuitous*. Beneficial interest *extends only* to those *interim proceedings* of the object, which *have arisen according to prudential management*.

So far as the *subject* of the right is concerned, beneficial interest is granted to *natural persons* for a limited period of time, which *cannot exceed* its beneficiary's *lifetime*; if beneficial interest is granted to a *legal person*, its duration may not exceed *50 years*, even it was established for an unspecified period of time.

The *rights* and *obligations* of the *beneficiary* are the followings:

- The beneficiary is entitled to *possess*, *use*, *utilise*, and *to collect the proceeds* of a thing owned by another.
- The beneficiary *does not have the right to dispose*, and without such right neither the transfer of *object* nor that of the *beneficial interest* may be executed.
- However, the beneficiary *has the right to assign the exercise of the particle rights* of beneficial interest (viz. possession, use, utilization) both *gratuitous* and *for a consideration* as well. The *latter* is possible only if the *owner does not demand to exercise* the mentioned particle rights *under same conditions*.
- The beneficiary is *entitled to change the economic function* of the object *without the owner's consent*, or may *convert* it or *considerably alter* it, if a contrarious act *would be in contradiction* to the *requirements of prudential management*.
- The beneficiary is *obliged* to *act in line with the rules of prudential management* while exercising the right, and is obliged as well:
- to *finance the costs* of the object's *maintenance except extraordinary* costs;
  The beneficiary is *entitled to execute extraordinary repairs or renovations* if the *owner fails* to produce them *to request*. According to the rules of *unjustified enrichment*, the *compensation of such costs* that produced an *increase of value* of the object can be demanded from the owner *when* beneficial interest is *terminated*.
- to *bear every burden of use*;
- to *notify the owner* of:
  - *imminent dangers* as well as
  - *incurred damages* including
  - any *attempt by third ones to hinder* the right's exercise;
- to *tolerate any necessary acts of the owner* to *prevent* dangers and damages;
- to *return the object* if the *beneficial interest terminated*.
- The beneficiary is *liable for damages to the thing* (*non-contractual liability*), but *not liable* for reimbursing the *regular depreciation* resulting from the *use* of the object *for its intended purpose*.

As far as the *rights* and *duties* of the *owner* are concerned, he/she is *entitled to*:

- *exercise the particle ownership rights of possession, use, and utilization so far as the beneficiary does not want to exercise them*;
- *inspect periodically* the exercise of the right;
- *demand adequate guarantees*, if the beneficiary *acts against* the owner's *unsuccessful protest* as follows:
  - *improperly uses* the object,
  - *causes damages* in the object,
  - *unlawfully alters* the object's function,
  - *imperils the object's return* after the right's termination.

  If the *beneficiary fails to provide an adequate guarantee*, upon the owner's request, the *court orders suspension of the right's exercise* until a lawful guarantee is provided. *Every right* enumerated here is enjoyed by the owner *also towards* the person to whom the *exercise* of beneficial right *has been assigned* by the beneficiary.
- *not to restore the object if it is destroyed*:
  - if the owner *does not restore* the thing, the beneficial interest *ceases*;

- if the owner *restores* the thing, the beneficial interest *becomes re-established*, and the owner is *entitled to request a limitation of rights in proportion to the emerged costs*;
- if the *object is replaced by another thing or claim*, the beneficial interest *extends thereto*.

The beneficial interest is terminated if:

– the *term fixed by law* or *agreement expires*,
– the beneficiary's *dies* or *dissolves without succession*,
– the beneficiary *acquires ownership of the object*,
– the beneficiary *sends a legal statement of waiver to the owner* (in case of real estates *for removing the right from the actual register*).

3. *Irregular Beneficial Interest* [Section 5:151). The beneficial interest is called *irregular* if the *object is fruitful* and the *right extends* also to the enjoyment of the fruits and other profits thereof. According to this, the beneficiary of an irregular right, to an extent justified by *prudential management*, is *entitled to dispose* of *inherently expendable objects*, *business equipment*, *livestock*, *stocks of goods* and *money* existing *at the time of establishment*. When the beneficial right is *terminated*, the beneficiary is obliged to *replace* the mentioned things, or to *reimburse the value thereof*, if replacement is not possible.

4. *Special Beneficial Interest in Rights and Claims* [Sections 5:156–5:158). Concerning the *special beneficial interest in profitable rights and claims*, the provisions pertaining to the beneficial interest *in things shall properly apply*. Some special rules shall be enumerated as follows:

– the *beneficiary's consent is required* for *cancelling* the encumbered *right or claim*;
– the beneficiary of the beneficial interest in a claim is *entitled to enforce the claim*, and, if the creditor's waiver is required for maturity, to exercise the creditor's right to waive;
– the *beneficiary is liable for the enforcement* of the receivables in respect of the creditor according to the principles of *non-contractual* liability
– *other acts of the beneficiary relating to the claim are null and void*;
– at the time of *performance by the claim's debtor*, the *beneficiary of the claim acquires the object of service*, while the *beneficiary of the beneficial interest in the claim acquires beneficial interest in the service's object*.

2.3.2.2. Land Easements (Predial Servitudes)

1. *The Definition Thereof*. The Civil Code in its Section 5:160 § 1 *defines the notion* of land easement, which alone *cannot be subject to transfer*, as follows: Upon land easement, the *possessor* of a real estate called *dominant tenement* is *entitled to use* another person's real estate called *servient tenement* to *a specific extent needed for a proper exercise* of the following rights of the dominant tenement to:

– *pass* (e.g. if a piece of land is *not connected to public road*, *neighbours* shall *tolerate* the possessor of dominant tenement *to pass through* their land);
– *install water lines or drainage*,
– *construe a basement*,
– *fix aerial lines*,
– *make an abutment*,
– or for *other useful purposes* for the benefit of the dominant tenement,
– or to *demand the possessor of servient tenement* to *refrain from rightful conducts*.

2. *The Establishment Thereof*. Land easements can be established either *by law* (see below the right of use for public interest) or *by agreement* or by *unilateral legal statement* or *by other legal facts* (e.g. *by a special adverse possession*):

– If *by agreement*, easement enters into effect when a *contract* or *other title is executed*, and the *possession* of the object, i.e. thing, *is transferred*; furthermore, it *shall be registered* in the real estate register.
– Easement may also be created *by the owner of a real estate to his/her own benefit by a unilateral statement*.
– The *possessor* of a real estate (*dominant*) obtains land easement *by adverse possession*, if the *possessor* of the other real estate (*servient*) *has not protested against its use for 15 years*. The exercise of a right *allowed as favour* or *for a certain period of time cannot result* in a successful adverse possession.

3. *The Exercise Thereof*. Exercising easement *shall not result in unnecessary harm* to the *rights of others*, *especially*

to the servient tenement. If exercise *involves the use of any accessories or components* of the encumbered real estate, the *costs of maintenance shall be borne by both parties in proportion of the factual use* thereof.

4. *The Extinguishment Thereof*. Land easements can be extinguished *by court*, and *by* a so-called *'negative' adverse possession*, and *by legal act* as well:

- the *court terminates*, *restricts* or *suspends* easement if it is *no longer required* for a *proper use* of the real property by the possessor of *dominant* tenement;
- *'negative' adverse possession* results in the *termination* of a right, *not* in the *establishment* thereof; according to this, it means that easement *becomes terminated* if the *possessor of dominant* tenement, *without any hindrance*, *has not exercised* the easement *for 15 years*, and if he/she *has endured the hindrance of exercising it* for the said period of time
- easement may also be terminated *by the waiver of the dominant* tenement's *owner* (*not* the *possessor* thereof!) *addressed to the servient* tenement's *owner* (also *not* the *possessor* thereof!) *in writing*, and the *removal of easement from the real estate register* is also necessitated.

2.3.2.3. Other Rights of Use

1. *Use Right for Private Purposes* [Section 5:159). Persons entitled to the use right for private purposes may *use a thing* and *collect its proceeds up to an extent not exceeding the own needs* and *the needs of the own family living in the same household*. The *exercise* of this right *cannot be assigned* to others.

2. *Land Use Right* [Section 5:145). Land use right is a *special* and *specific legal construction* since it surfaces only if *ownership of land and building construed thereon are separated*.

The speciality and specificity thereof is issued by the fact that land and building *generally share the same legal fate* because of the *old legal principle* according to which "*ownership of a building accrues to the owner of the land*" (see NHCC Section 5:18 § 1]. This is the Principle of "*aedificium solo cedit*", which originally appeared in a constitution of *Diocletian & Maximian* in *290 AD* as "*aedificia quae alieno loco imponuntur solo cedant*" (see in C. 8,10,5).

There are many occasions in which the *ownership of land and building thereon are divided*: some of them are based *on law*, some *on agreement*. The source of establishment is *the regulation of law* in the cases as follows:

- in the case of a *condominium*, the law says in NHCC's Section 5:85 that if the land on which the building stands *does not belong to the joint ownership*, the condominium owners are entitled by law to have land use right;
- so far as Section 5:145 § 1 is concerned, if the *ownership of land and building thereon belongs to different persons*, the *owner of the building*, *until it is standing*, shall have the right to use the land *for a proper use of the building*; in this case, the owner of the building entitled to use the land
  - is entitled to enjoy the land's benefits in proportion of his/her land use right necessitated for the enjoyment of the building's ownership within the measure of its intended purpose,
  - and, therefore ('*cuius commoda eius incommoda*', see above many times), is obliged to *bear the costs of the land's maintenance* also within the afore mentioned measure.

There are *two* more possibilities *for dividing the legal positions* either *by unilateral legal statement* or *agreement*

- *at the discretion of the owner of the real estate*, the building and the land on which it stands *may also be registered as separate entries* in the real estate register.
- ownership of building accrues to the owner of the land, *unless there is a contrary agreement between building-owner and landowner*;
  - if the landowner and the owner of the building made an *agreement for regulating their rights and obligations* relating to *the construction of the building* and *the use of the land*, the agreement *is effective with respect to third parties* if *it was recorded* in the real estate register;
  - the mentioned parties may enter into an agreement for establishing a *right to consent for the landowner* if the owner of the building aims to *sell or encumber the building*; if the sale or encumbrance does not risk the fulfilment of the obligations of the building's owner, he/she may demand the landowner to give consent.

3. *Right of Use for Public Purposes* [Section 5:164). For *public interest*, and, to the *benefit of persons determined by law*, and for a *proportional compensation*, *land easement* and *other rights of use* may be imposed upon a real estate *by the decision of an authority*. *Damages* resulting from such *authoritative establishment* of right of use *shall be compensated* according to the provisions on *indemnification for expropriation*.

2.4. The Law of Public Registers of Rights *In Rem*

Among other Principles of *Law of Rights In Rem*, the *Principle of Transparent Openness* guarantees social and economic *transparency* applied according to *In Rem Legal Relationships*. The Principle is practically assured and executed by the *public registers*: The *Real Estate Register*, the *Collateral Register*, the *Ship Register*, the *Aircraft Register* etc., which *authentically contain the relevant data* e.g. of *former* and *recent entitled persons*, of the *object* of the actual *right*, and of the *certain right's genre*, *type*, *contents*, *temporal extent* and *establishment*.

2.4.1. The Real Estate Register: Basic Notions and Principles

2.4.1.1. The Legal Regulation, Definition, and Basic Notions Thereof

1. *Legal Regulation*. The most important legal sources of Real Estate Register and Registration are a Part of the Civil Code, an Act and a Ministerial Decree:
- the *Fourth Part of the Civil Code's Fifth Book*;
- *Act CXLI of 1997 on Real Estate Registration* (henceforth: *ARER*);
- and the *Decree of the Minister of Agriculture and Rural Development No. 109 (29 December 1999)* on the *execution of ARER* (hereinafter: *DARER*).

2. *Definition by Law*. The *Civil Code* [Section 5:165) defines the notion of Real Estate Register (hereinafter: RER) as follows: "The real estate register is an *authentic public register containing rights in real estate properties*, *legally significant facts*, *and legally determined data of real estates and registered persons*".

3. *The Content of RER*. According to ARER [Section 2), the RER contains:
- on the one hand, *separately for each municipality*, the *data* and *information* specified by this Act *for every real estate property in the country*, and the *rights in real estate properties and facts of significance for legal purposes*;
- and, on the other hand RER also contains the *personal identification data and address of each person registered* therein, which are prescribed by this Act as necessary for registration purposes;
- additional rights and facts, *other than the ones defined by ARER*, may be entered in real estate records *only if it is prescribed by law*.

4. *Independent Immovables*. The ARER [Section 12) determines, which kind of immovables are qualified by law as *independent*, these are as follows: *land parcels*, *buildings*, *cellars*, *underground garages* and *other construction works*, *condominium units* (flats) and non-residential areas, such *units in co-operative buildings* etc.

5. *Rights to Be Registered in RER*. *Rights* are to be *registered* but *facts* are to be *recorded* into the RER. The ARER [Section 16) orders the following *property-related rights*, and *beneficiaries* thereof to be registered:
- *ownership rights*,
- in case of state-owned real estates, the *organization exercising the State's ownership rights and asset management rights*,
- *permanent right of use for members of housing co-operatives*, *land use right* in the base of agreement or court decision, *usufruct*, *use right*, *easement rights*, *easement and utilization rights in public interest* as prescribed by law,
- *right of first refusal*, *right of re-purchase*, *option to buy*, *right to sell*,
- *right of support*, *life annuity*,
- *mortgages*, and
- *the right to carry-out a judicial enforcement*.

6. *Facts to Be Recorded in RER*. According to Civil Code [Section 5:179 § 1], *recording* means the registrative indication of *legally defined significant facts concerning registered rights*. According to ARER [Section 17), *solely the following property-related facts* may be recorded in the RER:

- an indication if the *right-holder of record* is a *minor* or an *incapacitated*;
- an indication if the right-holder of record is *undergoing liquidation*, *dissolution*, or *debt consolidation procedures*;
- *commencement* of proceedings of: *expropriation*, *parcel reconfiguration*, *land survey*, *mapping*, or of *land classification* procedures;
- *remedies* lodged *against a resolution of the real estate supervisory authority;*
- *legal status of the immovable*, *construction* and *demolition* of the building, the qualification of being *national* or *historical monument*;
- *suspension of RER-proceedings*;
- the extent and nature of *permanent environmental damage*;
- *restriction of ownership title* and *construction-related restrictions* based on a *court* decision, and *restrictions relating to the right of disposition* in the base of *contract* or *testamentary disposition*, or *court decision*;
- scheduling of an *auction* or *public offering*;
- *attachment*, *sequestration*, and the *freezing of assets*;
- *sale with retention of title*;
- the approval or amendment of the *bylaws of condominiums*;
- *submission* of a contract for *landownership transfer* and many others.

7. *Recording of Legal Actions*. The ARER orders (Sec. 64) that the *court*, *upon request*, issues a *provisionally enforceable* ruling to the *real estate supervisory authority for registration of the fact of bringing actions* as follows:

- actions for *cancellation* or *correction*;
- actions *concerning the ownership of a real estate*;
- actions for the *termination of joint ownership*;
- actions *concerning property rights in matrimonial property regime*;
- actions for the *enforcement of the right to satisfaction* with respect to an *in rem security right over real estate*;
- actions for *correction concerning boundaries and sise* of a real estate.

8. *Sections of RER*. According to ARER [Section 18), a certain real estate registration database shall consist of the following sections:

- the *title deed* that can be displayed in a readable form,
- the *database of deleted entries*,
- the *state real estate mapping databank*,
- the *document archives*,
- and the *analogue and digital archived cartographic data*.

9. *The Legal Status of the Immovable*. According to DARER [Section 39/A), among others, the following *legal statuses of real estate properties may be recorded* in the RER: *condominium*, *co-operative house*, *mining site*, *monument* or *monumental area*, *archaeological site*, *farmstead*, *estate centre*, *protected* or *natural area* etc.

10. *Agricultural Sectors and Rezoned Areas*. As *agricultural sectors*, the RER knows *i.a.* the following types as facts to be recorded in (cf. DARER Sections 40–50): *arable land*, *grassland*, *vineyard*, *garden*, *orchard*, *reed-field*, *forest*, *wooded area*, *fish pond*, and the so-called *rezoned areas taken out of cultivation*—such as e.g. the *built-up* and the *undeveloped area* of the *urban zone* not larger than 1 hectare of extent.

2.4.1.2. The Legal Nature Thereof

1. *Prime Applicability of RER-data*. In the proceedings of RER-authorities, the *data shown in the RER* and the *boundaries indicated in the map* shall be construed as *authoritative*. The *burden of proof* lies with that party who *claims* that a RER-data is *incorrect* or *untrue*. If the *sise* of a real estate *indicated in RER differs from* the *sise* to be determined in the base of the *boundaries marked in the map*, the *latter* shall be applied.

2. *Legal Position of Persons Acquiring Non-Registered Rights*. A person acquiring a right *not entered* in the RER *may not enforce* the non-registered right against a *registered party acting in good faith*. A right that is *not registered* in the RER may not be enforced against a party who acquired also a non-registered right *in good faith and for consideration*.

3. *The Protective Effect of the RER*. The person who *holds a right under substantive law* may bring *action for*

cancellation, within 6 months from the date of delivery of the resolution on the originally invalid entry, on the ground of an *unlawful entry* or an *entry that became subsequently incorrect*, against third parties who *acquired right in good faith for consideration* while *relying on the completeness and probity* of that entry. If *no delivery* took place, the action for cancellation may be brought *within a period of 3 years from the effective date of the entry. The passing of these time limits results the termination of right*.

2.4.1.3. The Basic Principles Thereof

1. *The Principle of Publicity and Open Access*. According to the Principle of Publicity and Open Access, the *RER is open to public*. Therefore, *anyone* has the right for an *unlimited access to the data of title deeds and that of maps* in the RER with exception *of personal data under special protection*. Thus, open access data may be free *inspected*, and, about these data, *notes may be made*, and *certified copies* and *certificates may be requested*. The *documents*, which the data of *entries*, *records* and *pending registrations are based on*, can also be researched *if the applicant can verify* that

- the parties with respect to whom the document contains rights and obligations *gave their consent* to the access to the documents, or
- the *access is necessary* for the purpose of *enforcing legitimate rights* or for the *performance of an obligation based on law* or *administrative decision*.

2. *The Principle of Documentation*. *Rights* and *facts of legal significance* may be *registered* and *recorded*, and *data may be updated* in the RER *solely in the base* of:

- *documents prescribed by law*, such as
  - *private documents countersigned by lawyer*,
  - *authentic notarial instruments*;
- *binding resolutions of authorities*;
- and *court decisions*.

3. *The Principle of Registration*. The *creation*, *amendment* and *termination* of *rights* and *entitlements* defined by law shall be considered *effective when registered* on the title deed in RER. Solely such rights may be registered in RER, the registration of which is permitted by law. *Ownership acquisition* based on *transfer arises through* the *registration of the entry* based on the *deed of subrogation* (transfer of right). Similarly, *asset management rights*, *mortgages*, and the *rights of use*—such as land use rights, beneficial interests, use rights, land easements etc.—based on contracts arise through the *registration of the entry* based on a *deed on creating rights*. If the *recording of significant facts* defined by law, and if the *registration of rights granted by law*, *fail*, it has *no impact on the legal effect* thereof. In case of *failure to register rights* defined by law, and *to record significant facts defined by law*, the right-holder *cannot enforce them* against a third person of *good faith*.

The *legal effects of registration* of rights and entitlements defined by law, and that of the *recording* of significant facts defined by law are as follows:

- the *restraint of any future acquisition of rights*,
- the *transformation of future acquisitions from unconditional to conditional*,
- the right's *acquisition*, *change* therein, *termination* and *enforceability* thereof take effect *directly* and *retroactively*, i.e. going back to *the date of submission of the application for registration*.

The *bases* and *conditions* of *registration* and *deletion* are the followings: the *verification of grounds* for subrogation; the *allowance* of the already *registered holder* of right (the provisions concerning the *conclusion and validity of contracts* shall also apply to the *allowance of registration and deletion* of rights); *court ruling*; *administrative decision*.

The ground for *rectification of RER-entries* is that if the entry *does not coincide with the content of document* in the base of which the entry was registered or recorded. The entry may be rectified either *by deletion* or *by correction* the incorrect entry or record:

- *deletion* can *solely* be based on the *invalidity* or *subsequent inappropriateness* of the transaction which served as the ground of the entry or record;
- *correction* takes place in case of any *errors in names*, *numbers* or *calculations*, any *other typing errors* and *erroneous descriptions* in entries or records the *RER-authority makes the correction within its own initiative*.

4. *The Principle of Ranking*. Ranking means the *mandatory sequence of registered rights*. The determination of ranking follows the *effective dates of the entry's registration*, therefore:

- registered rights entering into effect *at the same time* have the *same ranking*;
- the sequence of applications' registration *received at the same time*, and the *ranking* of registered and recorded entries *are determined by*
  - the *date of the document* underlying registration, or
  - the date when the *document was drawn up*, or
  - the date when *document was countersigned* if countersigning is required.

5. *The Principle of Authenticity*. The Principle of Authenticity has two issues:

- the first one is that the RER *authentically proves the existence* of *registered rights* and *recorded facts*;
- the second one following the first issue says that if a right or a fact has been registered or recorded or if an application has been provisionally registered in the RER, *no-one can refer to the lack of knowledge* concerning the right or fact in question, viz. *ignorance does not constitute any excuse*.

6. *The Principle of Completeness*. In the base of rights registered and facts recorded in the RER, it *is to be presumed*, *until the contrary has been proven*, that such registered rights and recorded facts *exist*, and *pertain to the holder thereof*. Similarly, *unless proven to the contrary*, rights or facts *deleted* from RER shall *be presumed not to exist*. These are the *general consequences* of this Principle. However, there is a *special issue*, too, which is the very important rule upon the *protection of ownership acquired in good faith and for consideration*. According to this, the *content of the RER shall be considered being true in favour of a party acquiring in good faith and for consideration even if the content differs from the actual substantive legal status*. This protection *cannot be demanded* towards a party who *has brought an action* against the protected one *for having an entry deleted*.

7. *The Principle of Disposition*. Generally speaking about civil procedure, since parties may *dispose freely of their actionable rights*, their *motions and legal statements are binding upon the court*—and upon other *authorities carrying out proceedings*. This *general* procedural issue, with respect *especially* to *real estate registration proceedings*, means that the *RER-authority cannot go beyond the limits of the applicant's requests*. As the ARER's Section 6 orders, this Principle has *two sides*:

- on the one hand, with some minor exceptions, registration or recording *proceedings shall commence upon the client's request* or *the order of an authority*;
- and, on the other hand, solely *those rights and facts* of legal significance *may be registered and recorded* in the RER which *are designated in the application* or *in the order of authority*.

2.4.2. The Collateral Register

1. *Basic Principles Thereof*. The collateral register (henceforth: CR) contains the *mortgages established on non-registered movables*, *rights* and *claims separately for each mortgagor*, as well as other *security rights*. According to the *Principle of Open Accessibility*, the CR is *accessible to public* on the *internet free of charge*, and *without personal identification*.

2. *The Contents Thereof*. The CR contains the following information *for each registered mortgage*: the *contents of the application* for registration, the *time of registration*, and the *entry number*.

3. *The Bases of the CR. Registering*, *modifying* and *deleting* entries takes place by means of a *standard electronic form* based on a *written statement made on the internet website of the CR*, which is to be made out by the *mortgagor* and/or the *mortgagee*, *without any examination of the statement's contents* but after an *electronic identification* of the acting person.

4. *The Registration and Deletion of a Mortgage*. A statement for *registration* of a mortgage can be made by the *mortgagee or mortgagor*:

- if by the *mortgagee*, the mortgage can be registered on the strength of that statement *if the mortgagor consented*;
- if by the *mortgagor*, mortgage may be registered on the strength *solely of that statement*, i.e. there is, by *saine raison*, *no need of the other party's consent*.

Mutatis mutandis, a statement for *cancellation* of a mortgage can be made by *both of the parties*:

- if by *mortgagee*, the mortgage, by natural logic, *may be cancelled with respect solely to that statement*,

– if by *mortgagor*, the mortgage may be cancelled *in the base of that statement plus if the mortgagee*:
  - *gave a consent* for the cancellation, or
  - *did not make a statement for maintaining the entry* within a *period of 30 days* from the date of the mortgagor's statement for cancellation.

CHAPTERS FROM THE LAW OF OBLIGATIONS

As to *possibilities regarding the extent of the volume*, in this part, a *selection of topics* having greater significance from the enormous *Sixth Book of the Civil Code about the Law of Obligations* is made. This part was elaborated by the *whole team of the Department of Private Law*, and the chapters have their own author(s). Therefore, the authors are represented before the headings of each autonomous part.

I

BENKE, JÓZSEF

BASIC ISSUES OF OBLIGATION AND LAW OF OBLIGATIONS

1. Notion, Characteristics, Functions

1. The *most significant attributes* of the obligation are as follows: the *enforceability* of the behaviour undertaken as the content of the obligation (*Grosschmid*), the *correlativeness* of the legal situation (*Szladits*), the *defence of the creditors' interests*—both parties are creditors for the opposite services at the same time (*Fürst*); it is a *legal relationship between certain parties*, the *object* of which is a *valuable service*, and, in which *demands and liabilities are unitary* (*Eörsi*).

According to all these, the obligation is a *relative legal relationship* between *certain parties*, by which the *beneficiary is entitled to demand the performance of a valuable service from the obligated party,* and *to enforce it legally*. The Civil Code itself says that „*an obligation is a commitment to perform a service and an entitlement to demand the performance of that service*" [Section 6:1 § 1].

2. Most of the norms of the law of obligations are *derogatory provisions*. Mandatory rules appear only *rarely* and *exceptionally* among the legal norms of this field of private law. According to this, *upon a mutual consent*, *parties may depart from the common provisions relating to the parties' rights and obligations*, *if it is not prohibited by the Civil Code* [Section 6:1 § 3]. Therefore, *without contrary provision of the parties*, *derogatory provisions as mandatory rules* also become the content of the legal relationship of the parties. If an agreement is *contrary to a mandatory* rule, it usually becomes *void*. *Functions of derogatory provisions* are the *settlement of interests*, the *optimisation of costs*, the *reasonableness*, and, in some cases, the *equity*.

3. The *law of obligations govern* the following issues:

- the definitive or provisional transfer of advantages arising from *in rem* rights (for instance purchase, lease);
- contracts for services to meet needs (e.g. contracts for services, engagement contracts, maintenance agreements etc.);
- unlawful property changes arising from the infringement of *in rem* or *in personam* rights (like the breaches of contract, or the damage);
- offers manifold ways of settlement of property changes having no legal basis (for example invalidity, and unjustified enrichment).

As the *static law of rights in rem* govern the *enjoyment and exploitation of own assets*, the *dynamic law of obligations* rules the legal situations of acquiring definite or provisional *enjoyment of assets of another*.

2. Origins and Development of Obligations and Contracts

1. The *notional distinctions*, which established our *modern private law thinking* enrooted in the course of *survival of Roman Law in the Middle Ages*, were born in *Ancient* Roman Law. Such distinctions were e.g. the *classification of actions* into *in rem* and *in personam* species as well as *dividing obligations* into *civilian*, *praetorian* and *natural* ones. Numerous ancient terms and legal categories has survived *more or less intact*, such as the *definition of obligation* by the *Institutions of Justinian* ("*iuris vinculum*", see in Inst. 3, 13 pr.), which corresponds with our contemporaneous notion of obligation in the Civil Code (see Section 6:1 § 1]: „*obligation is a ligament by law, through which we are forced to perform a service by necessity*". The classification of the sources of obligations (by the 2nd century AD jurist Gaius and later on by Justinian in the 6th century) can also be maintained (cf. Section 6:2 of the new Civil Code], which are namely: *contracts*, *delicts*, *quasi contracts*, and *quasi delicts*.

Thanks to the achievements of the great 12nd and 13th century Italian jurists, i.e. the *Glossators*, and their posteriors, i.e. the 14th century *Conciliators* (*commentators*), jurisprudence reached the point of being able to divide the categories of *rights in personam* and *rights in rem* in the course of the 15th century.

The *Legal Humanists* of 16th and 17th centuries (esp. *Vinnius* and *Hahn*) elaborated the notion of *relative* and *absolute private law relationships*.

This process was closed by the 19th century *German Pandectists* who formed the main categories of *civil procedural law* and *substantial private law*, and systematised substantial private law into a *new institutional system* of five parts such as 1) the *General Part* and the *Law of Persons*, 2) *Law of Rights In Rem*, 3) *Law of Obligations*, 4) *Family Law*, and 5) *Law of Succession.*

The early 19th century Codes of Civil Law, such as the *French Code Civil* and the *Austrian ABGB*, were based on the former *Roman institutional system*, but the civil codes of the 20th and the 21st centuries, such as the *German BGB*, the *Swiss ZGB*, the *Dutch NBW* or the *new Hungarian Civil Code*, follow for the most parts this *new institutional system*.

In the legal systems of *Anglo-Saxon* world, *there is no autonomous system of Law of Obligations*. *Law of Contracts* and *Law of Torts* correspond to the Continental notion of Law of Obligations.

2. *Contracts* are not only the *most typical* but also the *most significant sources of obligations*. There was a very long journey from the early Roman law ideas to the principle of *pacta sunt servanda*, according to which "*agreements must be kept*" just because of the *parties' consent* and *regardless of any other questions*. The *major stages* of this century-consuming procedure were the followings:

- The 2nd century Roman jurist, *Gaius* said in a principled way that a *bare agreement* (*nudum pactum*) *cannot produce a ligament of law* i.e. obligation (Gai. Inst. 3, 89). Law was then *ruled by the forms* and *formalities* (misspelling a single word from the prescribed text of contracting resulted in the legal collapse of the transaction).
- It was the formation of the *stipulation* being independent of certain prescribed words, which made the *first step towards* making these *burdens of forms relaxed.*
- The next pace was the evolution of the so-called *"real" contracts*, i.e. a contract, which comes into being by the voluntary prevenient performance of a party of the contract.
- It was followed then by the grade when the *formless consent of both parties* could create the contract i.e. a so-called *consensual contract*, which was, at the same time, *convenient with a certain type* of contracts (*burden of types*). Today every contract named in the Civil Code are consensual.
- Another station was in the 4th century AD when *burden of forms and types* were relaxed by the fact that *bare agreements* (*nuda pacta*) became also *enforceable through legal actions*. These enforceable bare agreements were called the *pacta vestita* (*agreements clothed with action*).
- A millennium was necessitated then for developing the general principle of *pacta sunt servanda*, according to which: "agreements are to be kept" (see *Grotius* then *Wolff*). The 16th century *Law of Nature*, in the base of *Christian Canonic Laws*, emphasised the "*bonds of the given word*", which was the *legal fundament* of contracts *binding solely through the expressed promises of parties*. The French Code civil declared that "*les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*" (Art. 1134), which means that "*contracts are laws between its parties*".
- The former goal, which was to keep the words of this just evolved principle *by any means*, however, *necessitated some corrections* later on: this *stop-go approach* lasts until these days as follows:
    - Newer and newer *socio-economic and political crises* emerging continuously from the 17th century had pointed out that parties usually have the risk in their *long-term contractual relationships* that *making* or *performing* the contract *under the same terms* may *harm their relevant lawful interests* in consequence of an *unforeseen circumstance* that has occurred *after the conclusion* of the contract; if so, this party is entitled either to *refuse the conclusion or the performance* of the contract, or to *request to have the contract amended* by court, or to *recover the already fulfilled performance*. Behind this rule, there is the principle of *clausula rebus sic stantibus* (by *Jhering*), which could only be formed *within the legal relationships of parties of equal market power*, and which is as such the *first correction and limitation* of *pacta sunt servanda*.
    - The next significant turning point in the *monopoly capitalism* was a process leading to the *loss of harmony in the relationship between the parties of equal strength.* Even larger companies of increasing power appeared in the market and applied *standard contract terms drafted unilaterally in advance*: the weaker party called *consumer* who had a *poor choice:* either to *accept the terms as whole*, or to *refuse*

contracting.

- This new phenomenon also *needed a correction*: its result was *consumer protection law*.
- After all these, the following issues has emerged in the *20th century Continental Private Laws*:
  - thanks to the process of *public law elements' intrusion into private law* (*Wieacker*, *Josserand*) novel *public law constraints* has appeared towards *freedoms* declared also by private law; the ending point of this proceeding was the *idea of social market economy*, which takes its form by declaring that "*property entails social responsibility*" (*Fundamental Law of Hungary*, Art. XIII);
  - another issue was the *disintegration of the relative structure of obligations*: the composition of obligation has been rived and opened for *establishing new obligations for persons not taking part in the original private law relationship as parties*; such is the institution of *product liability* of the manufacturer and distributor of defective products;
  - the last important phenomenon was the *growing casuistics of non-contractual liabilities for damages*; its one ground was the *industrial development* (see e.g. the liability for hazardous operations or for nuclear damages), and, the other ground was the process of *counteraction towards public law elements' intrusion into private law* (such as e.g. the liability for the actions of public authorities).

3. The Sources of Obligations

The *Sixth Book of the Civil Code* is composed of *two major parts*: the one is the *First Part* containing the *common provisions relating to obligations* (Ss. 6:1–57), the other consists of the *other five Parts* incorporating the *general and special rules of every facts establishing obligations* (Ss. 6:58–592).

The Civil Code gives a trifold answer to the question of *which facts establish obligation*: *a)* by the *structure of the Sixth Book*, *b)* by an *exemplificative enumeration of facts among the provisions of the First Part* (cf. Section 6:2 § 1], and by the last part of the *Sixth Part about "other" facts establishing obligation*. A common point of these various issues is that the *facts establishing obligation cannot be listed exhaustively*, but only major *types* of such facts containing many *sub-types* can be named.

According to all these, the *named group of facts establishing obligation* are as follows: *contracts*; *torts*; *other infringements of personality rights, rights in rem and other rights*; *unilateral acts in cases provided for by law*, three of them was named, such as *offering rewards*, *public commitments*, and *securities*; *unjustified enrichment*; *negotiorum gestio*; *implicit conduct*; and *public law sources* of obligations such as the virtue of *statutory provision*, *court ruling* or *administrative decision*, if *so ordered by these*, and if *obligor, obligee, and service are accurately specified*.

The last part (Part Six) of the Sixth Book of the Civil Code *upon facts "other" than contracts, torts and other infringements of rights*, regulates the following facts establishing obligation: the *unjustified enrichment*, the *negotiorum gestio*, the *implicit conduct*, the *offering rewards*, and the *public commitments*.

4. The New Hungarian Law of Obligations

1. *Hungarian Law of Obligations* has been *comprehensively, substantially, and deeply reformed* with the 15 March 2014 entry into force of the Act V of 2013 upon the Civil Code. These reforms and changings can be summarised as follows:

- *incorporating institutions of other laws* into the Code (e.g. factoring, financial leasing);
- *codifying* legal standpoints appearing in *published court decisions* and other *court issues of principle* (among the rules of invalidity of contracts, breaches of contracts, or matrimonial property law);
- *forming new institutions* (such e.g. as debt-undertaking or product guarantee);
- *reviving the older practices of principle of the High Courts before the previous Civil Code* of 1959, more exactly, before 1948 (e.g. applying the rules of unjust enrichment in case of a contract's invalidity);
- *codifying institutions living solely in transactional or market practices* (e.g. fiduciary asset management, transfer of contract);
- *reforming and re-structuring old institutions* (e.g. assignment, compensation);
- *using optional norms for allowing conducts, the legal grounds of which were textually abolished* (e.g. first-loss

guarantee based on the parties' agreement); this does not mean, therefore, that such institutions would also be terminated since *optional law grants the possibility to establish* such legal relationships by the parties' *not prohibited* agreements;

- *following the methods and outcomes of Jurisprudence*;
- *using the results of comparative law*.

2. These reforms had their well-established legal grounds based on *social*, *economic*, *practical* and *theoretical* circumstances and considerations, which can be *classified* as follows:

- the *general reasons of the comprehensive private law reform regarding also the law of obligations*:
  - *expanding private autonomy in the base of social market economy*;
  - *codifying* the *living institutions of law*, and incorpo*rating the institutions of specific laws and judicial as well as transactional practices*;
  - making laws for a *better compliance with EU law* (e.g. consumer protection).
- the *specific reasons of reforming the law of obligations*:
  - re-newing private law *traditions and dogmatics* in a wider measure;
  - reaching a *more conscious use of optional laws* within transactional practice;
  - building-in the outcomes of *international law* and *EU law*;
  - elaborating *common provisions* regarding *every kinds of obligations*;
  - fulfilling the *monistic system of private law* by the absorption of *commercial and business law*;
- the *more specific reasons for reforming the law of contracts*, see among many others the followings:
  - expressing that *parties are not liable solely for the failure of contracting*, since *the risks of contract negotiations are borne by the parties*;
  - forming an *autonomous part of standard contract terms*;
  - making a *general framework* for *contracting in competitive selection processes* and for *contracts concluded by electronic means*;
  - *classifying the reasons for invalidity*, and *amending* some of their *specific provisions*;
  - *incorporating the black and grey list of unfair contracts terms*;
  - *dividing contractual and delictual liability* for damages, and deeply *reforming* the provisions of the *contractual* liability;
  - *significantly reforming* the provisions of *warranty*;
  - *expanding the application scope of the regulation of unjustified enrichment*.

II

MOHAI, MÁTÉ

SETTLEMENT OF THE OBLIGATION

1. General Regulations

1. *The general rule of performance*. At the beginning of the general regulations of the settlement of the obligation the 6:34 § of the Cc. declares as of conceptual importance, that a service must be performed according to the contents of the obligation. Under this generic clause, the performance of the service must suit the contents of the obligation. If it does not, in most cases the rules of breach of contract should be applied accordingly.

2. *The time of the performance*. The time of the performance of the service can be confirmed by a delivery date or a delivery period. In case of a delivery date, the service can only be performed on that given day. If a period for the delivery was set, the obligor can perform the service any time during that period, except if the circumstances suggest that the obligee is entitled to pick the delivery date within the delivery period. If the delivery date can be confirmed based on the purpose of the service, the obligor shall perform the service on that date. If the delivery date cannot be confirmed under these rules, the obligor shall perform the service after the due preparation time.

3. Performance before the delivery date. The obligee must accept the performance of the service offered by the obligor before the delivery date, if the early settlement doesn't harm the obligee's essential lawful interests, and if the obligor covers the extra costs occurring from the early settlement. If the obligee accepts the early settlement, it doesn't affect the time of performance of his services.

4. *The place of performance*. Unless otherwise provided for in the Cc., the place of performance is, where the obligor's secondary establishment was at the time when the obligation was established, or, in case the obligor doesn't have a secondary establishment, the obligor's registered office or his home address, or, in case the obligor doesn't have a home address, his habitual residence. If the obligor has several secondary establishments, the place of performance is the one that has the closest connection to the obligation. If the obligor notifies the obligee that the place of performance has changed after the establishment of obligation, the place of performance is the new secondary establishment or registered office, or the new home address or habitual residence. The obligor shall advance and bear the extra expenses that arise from changing the place of performance.

5. *Acknowledgement of the performance*. The obligee must provide a written acknowledgement of the obligor's performance or to return the promissory note at the obligor's request. If a person presents the written acknowledgement of performance from the obligee, he shall be recognized as a person authorized to accept performance, unless the circumstances suggest that he has no entitlement to accept performance from the obligor.

6. *The bearing of the expenses of performance*. The obligor shall borne the expenses arising in connection with the performance of the service.

7. *Distribution of specific service*. If the obligor shall deliver things of a specific type and quantity to the same obligee, but to different places, and the obligor is unable to deliver the entire quantity, he shall distribute the available quantity according to the instructions of the obligee. If the obligee refuses to command, although he was requested to do so by the obligor, the obligor must reduce the quantities proportionately.

8. *Settlement in case of several debts*. If the obligor shall perform several homogeneous services to the obligee and the performance offered by the obligor does not cover all of the debts, the obligor is entitled to choose the debt at the time of the performance, which he wants to apply such performance to [Section 6:41 § 1]. If the obligor did not designate the debt, which he wants to apply such performance to, and his intention isn't recognizable, the obligee can decide which debts—that are overdue and uncontested—the performance shall be applied to. The obligee must provide information to the obligor of his choice

in due time [Section 6:41 § 2]. If neither party has chosen a debt, or the obligee did not provide information to the obligor of his choice, the performance shall be applied to the debt that expired earlier, or if the debts are of the same maturity, to the one that has less security attached, in case of equally secured debts, to the one that is more burdensome for the obligor [Section 6:41 § 3]. If it cannot be settled under these rules, the performance shall be applied to all debts proportionately [Section 6:41 § 4].

2. Settlement of Monetary Debts

1. *Payment*. A monetary debt can be settled by the obligor by assigning the ownership of money to the creditor or by cash in or credit transfer to the creditor's payment account. A monetary debt is settled at the time of receiving the money if paid in cash, or at the time when the creditor's bank entered, or should have entered the money to the creditor's payment account. These provisions also shall be applied to the performance of any other obligation regarding the transferring of money.

2. *Early settlement of monetary debt*. The obligee must accept the early payment.

3. *The place of the settlement of a monetary debt*. The place of the settlement of monetary debts is the obligee's secondary establishment at the time when the obligation was established, or, failing this the place of settlement is the creditor's registered office his home address or, failing this, his habitual residence in the case of natural persons. If the debtor doesn't settle the monetary debt by cash payment, then the place of settlement is the secondary establishment of the creditor's bank at the time when the obligation was created, or, failing this, the bank's registered address. If the creditor had more than one payment account at the time when the obligation was established, the debtor has the right to choose the place of settlement. If the obligee has more secondary establishments, the place of settlement is the one that has the closest relationship to the obligation. If the place of settlement has changed after the establishment of the cash debt, and the debtor is notified by the creditor of the change, the place of settlement will be the new secondary establishment or registered office of the creditor, or the new home address or habitual residence if the creditor is natural person. The creditor shall advance and to bear the extra expenses arising from the change of the place of settlement.

4. *Terms of payment of a monetary debt*. Monetary debts shall be paid in the currency at the place and time of it's settlement [Section 6:45 § 1]. If the monetary debt was determined in another currency, it must be converted at the rate at the time of settlement set up by the central bank of the place of settlement—or, failing this, at the money market rate. If a monetary debt is to be settled in another currency, and the debt cannot be settled in that foreign currency at the time of settlement, it shall be settled in the legal tender at the place and time of its settlement [Section 6:45 § 2].

5. *Settlement in case of several debts*. If the total paid in settlement for a monetary debt is not enough to cover the entire debt, the total shall be used for paying the costs first, then the interest, and, finally, the principal debt, if the creditor did not provide otherwise, and his intentions are not clearly discernible. The mentioned order set out in the Civil Code is a permissible rule, the creditor may provide otherwise, or in the absence of his explicit intention, his recognizable intention is the starting point regarding the order. A debtor who is late in settling the debt is not entitled to deviate from the general rule regarding the order for settling the debt. Of course, the parties can also regulate the order in an agreement between them.

6. *Interest*. Unless otherwise provided for in the Cc., monetary debts are subject to interest. The rate of the interest is the same as the base rate of the central bank. If the debtor shall pay in another currency, the interest rate is the same as the base rate of the central bank of the foreign currency, or if it isn't one, the money market rate. Calculating the interest, the interest rate which is in effect on the first day of the calendar half-year affected shall apply to the entire period of the affected calendar half-year.

7. *Late interest*. In cases of monetary debts, the debtor shall pay interest on late payment from the time of the delay calculated by the central bank base rate in effect on the first day of the calendar half-year, or—if the monetary debt shall be settled in a foreign currency, by the base rate of the central bank of the foreign currency, or failing this, by the money market rate -, even if the debt was otherwise free of interest [Section 6:48 § 1].

If the debtor shall pay interest up to the time of delay to the creditor, the debtor shall pay interest on

the late payment in addition to the interest due, as of the date of delay at a rate of one-third of the central bank base rate in effect on the first day of the calendar half-year, or—if the monetary debt shall be settled in a foreign currency, by one-third of the base rate of the central bank of the foreign currency, or failing this, one-third of the money market rate -, but aggregately not less than the default interest specified in Subsection (1)[Section 6:48 § 2]. Estimating the interest, the central bank base rate which is in effect on the first day of the calendar half-year affected shall apply to the entire period of the affected calendar half-year. [Section 6:48 § 3]. Even if the obligor beats his default, he shall pay the interest [Section 6:48 § 4].

3. Compensation

1. *Compensation of pecuniary claims*. The Cc. deals with the set-off in the general rules for the settlement of the performance, as a special case of settlement. Since this form of settlement is used in the major part of cases in financial accounts, the Cc. primarily provides rules for the set-off of monetary claims. The credit institution's right to debit the account kept by the account holder with its claim shall be judged in accordance with the rules of the set-off (BH2007. 56).

The debtor is entitled to settle his debt also by way of compensation of his overdue pecuniary claim against his monetary debt by means of a legal statement made out to the creditor. The set-off is made by a one-sided legal statement addressed to the creditor, there is no need for the consent of the creditor, which means, that the set-off is a form of settlement and not an agreement. Obligations cease to exist up to the value of the compensation.

The set-off is the debtor's statement to the creditor, that he won't settle his obligation, but he won't claim the creditor's expired debt to the same value. The set-off eliminates the debtor's debt within the facilities of settlement (BH2015. 281).

2. *Limitations on the compensation of pecuniary claims*. A lapsed pecuniary claim can also be offset if it had not yet lapsed at the time when the monetary debt became due. Only the same type of monetary debt can be offset against a pecuniary claim provided for by an enforcement order or composition, or if it is executed in a notarial document. Only those monetary debts can be offset against pecuniary claims which are exempt from judicial enforcement, that derive from the same legal basis.

3. *The exclusion of compensation*. A set-off is not allowed against claims regarding maintenance payments and benefits, with the only exception of overpayments; and against a pecuniary claim for compensation for a damage that was caused purposely. A pecuniary claim that cannot be demanded in court is not entitled to be offset. The following claims cannot be demanded in court:

- claims originating from gambling or betting, except it has been authorized by the relevant authority;
- claims originating from a loan promised or granted explicitly for purposes of gambling or betting;
- claims that cannot be enforced by judicial process, as expressly excluded by the law;
- claims arising from contracts or terms guaranteeing or confirming the claims mentioned above.

4. Court and Notarial Deposit

1. *Settlement through court deposit*. The debtor can settle his obligation of payment or to deliver securities or other documents through court deposit if:

- the person of the creditor is uncertain, and the debtor is unable to identify the creditor's identity and it is not his fault;
- the creditor cannot be found at the place of the settlement of the obligation;
- the creditor refuses to accept the properly offered performance by the debtor; or
- the creditors did not permit the debtor to provide settlement into the hands of all of them in case of collectiveness of obligees.

The regulations on deposit contracts shall be applied to the obligations of the depositary. The state does not pay interest on the court deposit, no custodial fees and handling fees are charged. The court's finance office handles the cash deposit on the custody account.

2. *Recovery and limitation*. The obligor can withdraw his deposit until the creditor is notified of the deposit by the court. The creditor is able to demand the delivery of the deposit within five years from the date of receipt of the notification from the court. If the creditor's right to demand the deposit ceases, the debtor can demand the deposit back.

3. *Release of the deposit*. The court can deliver the deposit to the obligee. If the deposit was made because the identity of the obligee is uncertain, the deposit can be delivered in the base of a binding or final decision verifying the identity of the obligee. In case of collectiveness of obligees, the court can give out the deposit only at the request of all obligees, or in the base of a binding decision verifying the identity of the obligee. The debtor is entitled while making the deposit to lay down that it can only be delivered to the creditor if the performance of the creditor is confirmed.

4. *Notarial deposit*. If the conditions for settlement through court deposit are satisfied, the debtor also can settle his debt by way of a notarial deposit. The provisions regarding court deposit also shall be applied to notarial deposit.

5. Settlement by a Third Person

The creditor must also accept settlement offered by a third person if the debtor has given consent to the settlement by the third person and the service is not bound to a specific person, and if it does not require any expertise or skill that the third party does not have. The debtor's consent isn't required if the third person has an essential lawful interest in the settlement and the debtor failed to settle the debt, or it is evident that the debtor won't settle the debt in due time. The third person has the right to demand compensation from the debtor, unless the nature of the relation between the debtor and the third person suggests otherwise. If a third person has a claim against the debtor as a result of his settlement of the debt, the assurances of the terminated claim remain in effect, and will be transferred to the new claim. This provision shall be also applied if the debt is settled in the base of a lien or if the debt was settled by a guarantor.

III

FABÓ, TIBOR

THE FORMATION OF CONTRACTS

1. Basic Issues

The issue of formation of contracts raises the following problems: existing, non-existing contracts, nullity of contracts; the role of the intent of the parties; the contents of the contracts; the technical issues how the contract comes into existence.

1. *Existing, Non-Existing Contracts, Nullity of Contracts.* It is important to differentiate among the valid, void and non-existing contracts. The merit of any contract is the *mutual and congruent expression of the parties' intent* concerning all essential issues as well as those deemed relevant by either of the parties. There is no need for any additional so-called real act like performance of one of the parties (*principle of consensuality*). Provided the parties agreed upon the essential contractual terms *the contract came into existence*. The existing contracts *can be null and void because of reasons determined by the law* and this way the otherwise existing contracts will not be available to achieve the goals of the parties. When an agreement in *essential issues is missing* from the agreement there is *no contract at all*.

2. *The Role of the Intent of Parties: Freedom of Contract v. Statutory Obligation to Contract. Coming into existence of a contract means either the conclusion of the contract by the parties* when they express their mutual intent *or* those cases as well *when the court establishes the contract* according to the provisions on statutory obligation to contract. Statutory obligation prevails for example in insurance law concerning *obligatory liability insurance* (entrepreneurs who carry on medical or legal activity or the owners of cars).

Where a party unjustifiably refuses to conclude or maintain a contract by abusing his dominant position, the other party shall have the right to bring action and request the court to establish the contract between them under the principle of statutory obligation to contract.

Where the parties agree to enter into a contract *at a later date*, and they define the material terms of that contract, their preliminary contract establishes obligation to contract. If one of the parties *refuses to conclude the contract without proper, legally accepted reasons*, and the other party *brings action*, the court shall have powers to *establish the contract* under the terms and conditions of the preliminary contract.

3. *The Contents of the Contracts.* The parties shall have the right to agree in the content of their contract (*principle of freedom of contract*). The elements of the content can be *essential, accidental* or *natural issues*. Those issues shall be qualified essential which the law or either of the party deems relevant. Any issue deemed relevant by the parties shall be essential if either party expressly indicates that an agreement on such issues is a precondition for the conclusion of the contract. That is to say, the essentiality of these issues is accidental, depending on the parties' intent.

There are several mandatory, so-called *cogent* (binding) legal provisions (e.g. the rules defending consumers' rights) which become the content of the contract even if the parties do not agree upon it or expressly are going to exclude it from the content of their contract.

The parties need not agree on issues which are regulated by statutory provisions. When the parties did not agree upon the non-essential (natural) issues the provisions of the Civil Code will supply their missing intent. Lack of their agreement in these issues shall be interpreted so that they accepted the provisions of the Code as natural part of their contract.

If the contract is concluded, but the parties have not clearly defined the amount of consideration, or if the market price has been stipulated as the price, the average price prevailing on the date of performance in the market regarded as the place of performance shall be paid. Any usage which the parties have agreed on in prior business dealings and by any practice they have established between themselves shall be the content of their contract, too.

2. Concluding Contracts: Offer, Binding Period, Acceptance

Where the parties conclude the contract by way of their free and mutual intent the model of establishing the contract is very simple one. The person (offeror) who is going to establish a contract shall make a *legal statement showing the relevant issues and clearly indicating his intention to enter into a contract (offer*). Where he does not exclude it he shall be bound by his statement. The *binding period* shall commence when the offer takes effect. The offeror may specify the period for his offer to remain binding. In lack of this the *binding period shall terminate*:

- when the offer is made between persons present, if the other party fails to accept the offer immediately;
- in the case of distance contracts, upon the expiry of the period of time within which the person who made the offer can normally expect—in light of the nature of the services specified in the offer and the manner in which the offer was delivered—to receive a response;
- if the offer is refused by the other party.

The binding period shall cease if the offeror revokes the offer by means of a legal statement addressed to the other party, and the revocation reaches the other party before the other party sends an acceptance. An offer may not be revoked

- after it has entered into effect,
- if the offer indicates that it is irrevocable or
- if the offer states a fixed time period for its acceptance.

Where the other party (addressee, offeree) indicates assent to the offer his statement shall be deemed acceptance as a result of which the contract comes into existence. Where *his statement differs* from the offer in essential issues it shall be deemed *new offer*.

3. Methods of Concluding Contracts

The needs of the economy lead to certain techniques in the field of concluding the contracts. Sometimes the selection of the best contracting party in other cases the need for speed up the contractual process motivated the "actors" of the economy to invent the best legal solution for serving their interests. The Civil Code itself regulates free special ways of concluding the contract we discuss hereunder.

1. *Invitation to Tender in Competitive Selection Process.* Where a party publishes a *contract notice inviting several persons to submit a proposal*, where the *contract is awarded* following a selection process conducted under the criteria set out in the notice to the offeror *who made the best offer*, the *party* having published the notice *shall be subject to contracting obligation*.

2. *Conclusion of Contracts with Standard Terms and Conditions.* Standard terms and conditions are available to speed up and simplify the process of concluding the contract when the subject of those can be specified according to species and quantity (standardized products of industry or agriculture). There is no need to stipulate the terms and conditions in course of every transaction since *the terms are drafted in advance and the species and the quantity are to be agreed.* Not only favours but disadvantages are also significant when parties use this technique since there are at least three important issues to be cleared.

- What shall be deemed standard terms and conditions?
- When these terms and conditions shall be deemed content of the contract of the parties?
- What shall be the consequence when there are unfair terms and conditions in the standardized terms of the contract? (This is the question of nullity of the term which shall be discussed in frame of nullity of contract.)

a) The Notional Elements of Standard Terms and Contracts. Standard contract terms mean contract terms

- which have been unilaterally drafted in advance
- by one of the parties for several transactions involving different parties, and
- which have not been individually negotiated by the parties

Where it is not clear whether the terms were individually negotiated it is the party applying the standard contracts terms who shall prove that those were really negotiated individually.

b) Conditions of Becoming Content of the Contract. As general rule, contract terms shall become part of a contract only if they have previously been made available to the other party for perusal before the conclusion of the contract, and if the other party has accepted those terms. According to a special rule it is not enough to provide the opportunity of knowing the terms, but *the other party shall be explicitly informed* of any standard contract terms that differs substantially

- from the relevant legislation or
- from usual contractual practice, except if they are in line with any practice the parties have established between themselves.

The other party shall be explicitly informed of any standard contract terms that differ substantially from any stipulations previously applied by the same parties. The abovementioned terms shall form part of the contract only if the *other party has expressly accepted them after being informed about them.*

3. *Contracts Concluded by Electronic Means.* Nowadays more and more transactions are realized by using electronic means. The Civil Code provides rules just for those contracts which belong to the group of online trading. In connection with contracts concluded by this way, the party providing the electronic means for concluding the contract shall give all the information which the Code prescribes.

IV

BÉRCESI, ZOLTÁN—HARCI-KOVÁCS, KOLOS

INVALIDITY OF THE CONTRACTS (ABSOLUTE AND RELATIVE NULLITY)

1. The concept and types of nullity

The contract is mutual and unanimous disclaimer of the parties, which disclaimer is made with the parties' intention to achieve specific objectives and to precipitate specific legal effects. However, sometimes the parties' mutual will declaration aimed to produce legal effects are not suitable for effects to trigger, so for the aim of the contract to attain. Therefore, null is the contract, if inadequate for statutory reasons (grounds for nullity) to trigger the targeted effects of the parties. There is two types of nullity in private law: absolute and relative.

The *absolute nullity* is the complete *ipso iure* form of nullity. An absolute null contract is invalid as from their conclusion. There is no need for a separate procedure to establish the nullity and it may be referenced in any procedure. The court ex officio required to detect whether a contract is null.

The absolute nullity can be referenced -unless the Civil Code rules otherwise- by those who have a legal interest therein or the law expressly authorizes. The legal interests of parties are to be considered above all, so the verification of the presence of a legal interest is required in case of third parties.

The Civil Code does not specify a time limit for the ex officio detection or reference of the absolute nullity. The application of the legal consequences of the absolute nullity however takes place only within the limits of the statute of limitation and adverse possession.

The *relatively null contract* is created valid and becomes invalid only if it is effectively attacked by persons entitled to. A relatively null contract is therefore conditionally null. In the case of effective attack, similarly as the absolute null contract, it becomes null from the time of entering the contract (*ex tunc* scope).

The law defines the range of the persons entitled to attack the contract. According to this, entitled is the injured party, as well as all those who have a legal interest to attack. The entitlement to attack is a pecuniary subjective right, therefore subject of succession.

There is for the attack by the entitled a one-year limitation period available, which can be exercised - by the entitled one's choice- by a disclaimer for the other party or by litigation directly before the court.

2. Grounds for Invalidity

1. *Classification of the grounds for nullity*. Classification of the grounds for nullity. The legal reasons resulting in the invalidity (grounds for nullity) of a contract the Civil Code divides into three groups. The first group includes those in which the contractual consent of the parties is defected, the second the formal errors of the contractual declaration, the third the defects of the legal effect sought by the contract, leading to the invalidity of the contract. Reasons leading to invalidity can however be grouped according the reasons that, result the contract in *ex lege* invalidity (null), and reasons that, after effectively attacked by persons entitled to lead to invalidity (relative nullity).

2. *Defects in consent*. The general traits of defects in consent. The parties' defect in consent may be several and only under special circumstances do they result in nullity legal outcome. Broadly, the contracting party's will declaration error is in all cases, when the party does not reach the purpose by concluding the contract which was originally intended, or it was not in his intention to reach the purpose by concluding the contract.

3. *Relative null contracts*. Outside the contract law rules of the Civil Code there are consent defected contracts in the provisions of the Second Book as well:

- legal statements of minors of limited legal capacity [Section 2:12 (1) on the Civil Code] and
- legal statements of incompetent minors [Section 2:14 (1) on the Civil Code],

- incompetency of persons of legal age [Section 2:9 (1) on the Civil Code],
- legal acts of persons of partially limited legal capacity [Section 2:20 (1) on the Civil Code] or
- legal acts of incompetent adults under legal guardianship [Section 2:22 (1) on the Civil Code].

The Civil Code regards these as relative null contracts, i.e. the invalidity of the contract shall be referred to due to the interest of incompetent person.

4. *Mistake.* According to the legal definition the condition of applicability of the invalidity caused by the mistake, is that the mistake was:

- relating to significant material circumstance,
- existing at the time when contract is concluded,
- caused or could have been recognized by the other party [Section 6:90 (1) on the Civil Code]. Mistake can be pleaded within the framework of relative nullity.

5. *Misrepresentation and threat.* Subtracting the legal consequences of the nullity of misrepresentation and threat, -compared to the mistake- the intentionality is an additional factual element. The party's straight, or at least contingent intention must extend to cause and keep misapprehension, or in case of unlawful threat, intentionally envisage negative consequences, with respect to which the other party's declaration became different from the originally intended.

6. *Disguised stipulations, sham contracts.* Disguised stipulations and concealed motives shall be immaterial with respect to the validity of the contract. In case of a sham contract, the contract is concluded with respect to both parties consciously defected consent, in the way that, the parties' declaration coincident however, the actual transaction will or is not directed at contracting, or the expressed will have different content. A sham contract shall be null and void, and if such contract is intended to disguise another contract, the rights and obligations of the parties are to be adjudged in the base of the "disguised contract".

7. *Errors in contract statements (formal errors).* Formal invalidity is avoidable by performance or amendment. If a contract is annulled for any breach of formal requirements, it shall become valid by acceptance of performance, up to the extent performed. Any amendment to and termination or cancellation of a contract made in the absence of statutory formalities shall be deemed valid, if the actual state conforming thereto has been established with the parties' mutual consent. [Section 6:94 (1)-(2) on the Civil Code]

8. *Formal invalidity not avoidable by performance or amendment.* If the contract is to be executed by law in an authentic instrument or private deed representing conclusive evidence, or if the contract pertains to the transfer of a real estate property, any amendment to and termination or cancellation of a contract made in the absence of statutory formalities shall be null and void, even if the actual state conforming thereto has been established with the parties' mutual consent.

9. *The defect of in the intended legal effect.* The common characteristics of the nullity reasons caused by defect in the intended legal effects. Under the name of defect in the intended legal effects, the Civil Code names cases in which the application of the legal effects of nullity avoids the parties from fulfilling the purpose of the contract concluded. The common meaning of the rules presented is that the legislator with the tool of nullity restricts the parties' private autonomy, in order to prevent and eliminate adverse social and economic effect of the desired goal.

10. *Illegal contracts.* Unlawful is a contract if it's important, essential content incompatible with the cogent, mandatory part of Civil Code. Moreover, contracts concluded by circumventing the law shall be null and void. In case of this transaction, in the matter of the service itself is not contrary to the law, however, the transaction objective pursued is to circumvent a mandatory legal provision.

11. *Immoral contracts.* Since the content of the norm is not rooted in the law, so the legislator has the task of evaluating a case of obvious contravention of the contracts, thus filling the gap in the law with content. Judicial practice does not only examine contractual service in this regard, but also reveals all the relevant circumstances of the case assessing the intention of the parties to the contract, the purpose to be achieved by the contract and the objective to be achieved in concluding the contract in the determination of the goodwill.

12. *Usurious contracts.* The conditions of determination of the usurious contracts:

- between the service and the remuneration there is strikingly disproportionate difference (objective),
- one party to be in a disadvantaged position which makes him conclude the contract with such terms (subjective),
- the injury-causing party conducts intentionally to utilize the disadvantage of the other party to benefit disproportionately (subjective).

13. *Gross disparity in value*. The legal provision of the gross disparity in value allows the impugnment of the nullity based on the *breach of contractual equivalence* (in Greek *synallagma*). The *determination of gross disparity*:

- difference between the value of a service is grossly unfair,
- at least one party is not controlled by the intention of gratuitous assignment,
- the circumstances shall exist at the time of concluding the contract.

14. *Nullity of fiduciary collateral arrangements*. Any clause in which a consumer undertakes the commitment for the transfer of ownership, other right or claim for the purpose of security of a pecuniary claim, or for the right to purchase, shall be null and void [Section 6:99 on the Civil Code].

15. *Unfair clause in consumer contracts and consumer disclaimers*. Any clause of a contract that involves a consumer and a business party that derogates from the provisions of this Act on consumer rights to the detriment of the consumer shall be null and void [Section 6:100 on the Civil Code]. In a contract that involves a consumer and a business party, any disclaimer by a consumer of a statutory right shall be considered null and void [Section 6:101 on the Civil Code].

16. *Unfair standard contract terms*. The Civil Code considers all instances as unfair contract terms, in which for the detriment of the party with the weaker empowerment the other party attempts to benefit or take a more advantageous position by infringing the good faith and general integrity. Article 6:102-106 on the Civil Code are based on the following regulatory logic:

- the legislator determines concerning the general contractual terms, if when a contract is considered unfair and rules about validation rules of the terms based on unfairness [Section 6:102 on the Civil Code].
- separately regulates the application of unfair terms in consumer contracts, where, in the case of a consumer contract, the legal effect of invalidity is linked not only to the unfair terms of the general contract terms but also to the contractual terms which is not individually discussed but unfair [Section 6:102 on the Civil Code].
- the Civil Code relating the consumer contracts provides a catalogue of the unfair contractual terms: the obviously unfair and therefore prohibited terms and terms, unless the contrary is proved, to be considered unfair by reciting those [Section 6:104 on the Civil Code];
- the Civil Code separately regulates the rules of public-interest proceedings in connection with consumer contracts [Section 6:105 on the Civil Code] and public-interest proceedings in connection with contracts between business parties and with contracts between a contracting authority and a party other than a contracting authority [Section 6:106 on the Civil Code].

17. *Impossible performance. Incomprehensible and inconsistent terms*. According to the Civil Code contracts aimed at impossible services shall be null and void, if the impossibility is unavoidable objectively. A service shall not be deemed impossible solely on the grounds that the obligor does not (yet) have the object of the service in his possession at the time the contract is concluded. Incompatible or contradictory contractual clauses impose on the contract and impede the will of the parties. Therefore, the law of such contractual clauses regard void.

3. The Legal Consequences of Invalidity

The prime and fundamental legal consequence of the nullity is the prevention of the legal effects aimed by the contract. The null contract does not bind the parties, none of the parties can demand provisions defined as the subject of the contract. A null contract cannot be enforced in front of the court. The grounds of nullity must be perceived by the court ex officio, thus rejecting the lawsuit based on the null contract. The legal consequences of the nullity are exercisable following a claim for judicial

enforcement. Such legal consequence may be the validation of the contract by eliminating the grounds of nullity or by the restoration of original conditions (in integrum restitutio) furthermore, in certain cases, the unjust enrichment rules apply. The legal consequences related to the nullity next to the above is (due to the nullity) the obligation to reimburse benefits, expenses and interests occurring by the usage without legal entitlement, money and the damages caused. In case of the grounds of nullity is applicable not for the complete contract but only for distinctive parts, and this clause of the contract is not an essential or indispensable part of the content of agreement than the legal consequences of the nullity are only applicable to this section of the contract. If, however, it could be assumed that the parties would have not concluded the contract without the null clauses than the nullity is extended to the contract as whole and the contract is considered null.

V

BENKE, JÓZSEF

INEFFECTIVENESS OF CONTRACTS

1. Species and Legal Consequences of Ineffectiveness

Ineffectiveness of contracts can be handled in a *wider* as well as in a *narrower sense*. Its broader notion incorporates the *narrower cases plus* those ones, in which the *cause of ineffectiveness is the invalidity* of the contract. Ineffectiveness has *two species*: the *absolute* and the *relative* ineffectiveness.

1.1. Absolute Ineffectiveness

Since an *absolute* ineffective contract *has yet or already no effect* towards *the parties or anyone else*, a relatively ineffective contract *has no effect or has only certain decreased effects* towards a *concrete person* or a *certain group of persons identified by law*. An *invalid* contract is at the same time *absolute ineffective*. However, the character of absolute ineffectiveness of an *invalid* contract and that of a *valid* one is not the same at all, viz.:

- although, *by the operation of law*, an *invalid* contract *cannot have effects targeted by the parties*, it *does have* certain *non-aimed effects* also by the operation of law;
- on the contrary, the ineffectiveness of a *valid* contract may be resulted from many causes such as:
  - the *parties' agreement*, this is called *temporal ineffectiveness* (cf. *conditions and terms*; see Sections 6:116sq),
  - the *operation of law*, in the case e.g. of: the lack of third parties' *consent* required by law [Section 6:118), and the lack of an *official approval* required by law [Section 6:118).

1.2. Relative Ineffectiveness

Relative ineffectiveness is called otherwise as *personal* ineffectiveness. In its cases, the contract or other transaction has no effect, although it is *valid*, because it *infringes the rights or harms the legal interests* either of *third parties (extranei) in general* or that of a *certain third person*. These cases are, therefore, not the case of such infringements, which may lead to invalidity of the contract. The legal consequence of such a situation is that this contract or other transaction *is effective towards everyone except the infringed third party or parties*, *towards whom it may have no effect*.

The *cases of relative ineffectiveness* can be *classified into three groups* of matters of facts:

- It is common in the first group that these contracts have no effect *towards that very person of good faith* who *did not have and ought not to have* any knowledge about certain facts *being relevant with respect to the contract in question*; here are some examples:
  - any restriction of the power of representation vested upon the legal person's authorized representative shown in the registry of legal persons, cannot have any effects as against third parties, if the third party did not know, or should not have known about the restriction (3:31);
  - the restriction or withdrawal of the power of attorney in terms of a third person shall be effective only if he was aware or should have been aware thereof [Section 6:15 § 4];
  - restrictions on the scope of authority of a person who shall be construed as representative since this one is presumed under reasonable grounds to be authorized to make pertinent legal statements in commercial establishments shall be inoperative towards third persons, unless the these have been aware of such restrictions [Section 6:18 § 1].
- The *failure of mandatory registration of the contract* may lead to the situation that it or an element of it becomes ineffective *towards third parties*, for instance:
  - a marriage or a partnership contract shall be considered ineffective towards third parties if

the contract is not recorded in the national register of such contracts (Ss. 4:65 § 2; 6:515 § 3];
- if the contract between landowner and building-owner regulating their rights and obligations relating to the construction of the building and the use of the land was recorded in the real estate register, it shall be considered ineffective towards third parties [Section 5:19 § 1].

– In some cases, the relative ineffectiveness of a contract towards third persons is a *private law sanction*, which becomes effective, if the *content or the goal of the transaction cannot be supported by law*; in these cases, the *knowledge of third parties about certain relevant facts has no significance*; such a case is:
  - a disposition contrary to the restraint on alienation or encumbrance shall be ineffective with respect to the person whose right it is intended to protect [Section 5:32 § 1];
  - *if the acquiring party acted in bad faith or had a gratuitous advantage originating from a contract, by which the basis for satisfying a third person's claim has been deprived entirely or in part, this contract shall have no effect towards this very third person* [Section 6:120 § 1];
  - if the owner enters into a contract by breaching his obligations stemming from a right of pre-emption, such contract shall be ineffective towards the holder of the right of pre-emption [Section 6:223 § 1].

1.3. Legal Consequences of Ineffectiveness

1. A contract is ineffective, if (a) *it has not yet become effective* or (b) *it has already lost its effect* or (c) *third parties's consent or an authority's approval lack or these were was refused*. The *common legal consequence* of these cases is that the *performance of such contracts may not be demanded*.

2. Sometimes, on the ground of an ineffective contract, one party or both parties of it has already performed the service. In this case, the *legal consequences of invalid contracts* shall be proper applied:
– beyond the consequence that the performance of an ineffective contract may not be demanded, there can be *further consequences*, which shall be invoked by the court *at the party's request* (6:108 § 1];
– courts may apply the consequences of ineffectiveness *in a way that differs from the party's request*, but it may not prescribe a solution that is *protested by all parties* [Section 6:108 § 3];
– in connection with performing in the base of an ineffective contract, each party has the right to *reclaim the service that has been provided from the other party in kind*, if that party *also returns the service that has been received by him/her in kind* (cf. Section 6:112 §§ 1–2);
– a contract *becomes effective retro-actively to the date of conclusion*, if parties *subsequently eliminate the grounds for ineffectiveness* [Section 6:111 § 1];
– the questions of *collateral demands*:
  - the parties shall provide *compensation for the proceeds and interests not restituted by in integrum restitution* according to the rules of *wrongful possession* [Section 6:115 § 1 and see also Sections 5:9–12);
  - the *rules of unjust enrichment* shall be applied for *performances on the ground of an ineffective contract* in two cases: on the one hand, in the case of *hindrances*, it shall be applied *instead of in integrum restitution*, on the other hand, in the case of *unrestituted collaterals together with in integrum restitution* in a complementary way [Section 6:115 § 1].

2. Conditions, Terms; Pending Conditions

1. The Civil Code says [Section 6:116) that *if parties have made the effective date of a contract contingent upon an unpredictable future event*, which is called "condition", the contract shall *become effective when such condition is met* (*suspensive condition*); and, *if parties have made the termination of a contract contingent upon an unpredictable future event*, the contract shall *expire when such condition is met* (*resolutive condition*).

These provisions shall also apply, if parties have attached the entering or the termination of effectiveness of a contract *not to an unpredictable future event* but *to a certain date*. This is called "*term*".

2. Some unilateral acts and contracts *do not tolerate conditions and terms at all* (or they do so *only partially*):
– marriage declaration cannot be made subject to a condition or time limit [Section 4:5 § 1];
– in contracts which involve a consumer and a business party, the contract term shall be considered

unfair, until proven otherwise (and therefore void), if its object or effect is to allow a business party to be bound by commitments subject to compliance with a specific condition, the fulfilment of which depends exclusively on the business party [Section 6:104 § 2 f);
- any condition that is manifestly in contradiction to good morals, unintelligible, impossible, or contradictory shall be invalid; and, a testamentary bequest rendered contingent on an unlawful suspensive condition shall be invalid, and such bequest rendered contingent on an unlawful resolutive condition shall be disregarded [Section 7:38 § 1–2);
- any disclaimer of inheritance rendered contingent on a condition shall be invalid (7:89 § 4].

3. So long as a *condition is pending* (see Section 6:117), *neither party shall be entitled to do anything* that would *infringe upon or violate the other party's rights upon the satisfaction or failure of the condition*. Parties may not fail to act reasonably for gaining that the parties can satisfy their obligations when the condition occurs.

Persons who have actionably caused the satisfaction or failure of a condition shall not be entitled to establish any right thereupon. This is a special case of *nemo suam turpitudinem allegans auditor*, by which a person may not rely, in support of his claim, on an unlawful act he/she has committed. Anyhow, this does not mean that the *furtherance of the condition's occurrence* would be *per se an unlawful conduct*: sometimes this is just indispensable.

3. Contracts Subject to Third Parties' Consent or an Authority's Approval

1. If the *consent of third parties* or an *official approval is required by law for the effectiveness* of a contract, the contract shall *become effective upon that consent or approval with a retro-active effect to the date of the contract's conclusion* [Section 6:118 § 1]. *Until the statement of consent or approval is granted*, and *within the deadline for making such statements*, the rights and obligations of parties shall be legally considered with respect to the regulation of *pending conditions* [Section 6:118 § 2]. This means that none of parties shall be entitled to do anything that would infringe or violate the other party's rights upon the satisfaction or failure of the condition [Section 6:117 § 1]. The contract *shall not become effective*, if the *third party fails to give the consent* or the *authority fails to grant the approval*, or if they fail to make such statement within the deadline conveyed by one party to another [Section 6:118 § 3].

2. There are many laws, which limit freedom of contract by binding the effectiveness of the contract to the consent of third parties or to an authority's approval. These laws belong mainly to the field of public law and administrative law but some of them are the part of private law in the Civil Code. The *lack of consent or approval* not always affects the effectiveness of contracts, but such a shortage *may lead also to diverse legal consequences* such as e.g.:
- *absolute ineffectiveness* (e.g. when a person makes a legal statement in the name of another without authorization, it shall invoke any legal effect upon the represented person's consent; 6:14 § 1];
- *relative ineffectiveness* (e.g. the entitled party's consent is required for any disposition contrary to the restraint on alienation, in the lack of such consent, the disposition shall have no effect with respect to the person whose right it is intended to protect; cf. Section 5:32 § 1];
- *invalidity* (e.g. the legal statements of a minor with limited capacity can only be valid with the consent of his/her legal representative; cf. Section 2:12 § 1];
- a *special (sui generis) liability for damages* (e.g. the lessee is entitled to sub-lease the leased thing to third parties only subject to the lessor's permission, and without it, the lessee shall be liable for damages that otherwise would not have occurred; cf. Section 6:334 §§ 1 and 3).

4. Fraudulent Contracts and "Paulian Action"

1. The new Hungarian Civil Code preserves the ancient Roman Paulian Action in a modern sense, since it declares that "*A contract, by which the basis for satisfying a third person's demand has been deprived entirely or in part, shall have no effect in respect of this third person, if the acquiring party acted in bad faith or had a gratuitous advantage originating from this very contract.*" (cf. Section 6:120 § 1]. *Bad faith and gratuitousness shall be presumed* if a person concludes such a fraudulent contract *with his/her relative* or *with a legal person with whom this person is associated by way of majority control* or concludes such a contract *with a member or executive employee of the legal*

person or one of their relatives [Section 6:120 § 2]. *At the third party's request*, the acquiring party is obliged to *tolerate satisfaction from the acquired property and enforcement against such property* [Section 6:120 § 3]. If the acquiring party *alienated* the property acquired through a fraudulent contract *in bad faith*, or *lost the object of property in bad faith*, he/she *shall be liable for up to the value of the acquired property* in respect of the third party [Section 6:120 § 4].

2. The third persons (this is called the *fraudis participes*), who made a contract with another creditor's debtor (this is called the *fraudator*) for a total or partial deprivation of the debts' and claims' financial cover, may stand in three different legal situations, in which *there are more than one fraudis participes* since the *advantage* from the fraudulent transfer *is acquired by a person other than the one who made the fraudulent contract statement* (cf. Section 6:120 § 5]:

- the fraudulent contract is made in favour of *an already existing another third person*;
- the fraudulent contract is made in favour of *a yet non-existing another third person* which *comes into existence just through the fraudulent transfer* (e.g. making a new foundation through making its fund available by a fraudulent conveyance or establishing a new firm by a fraudulent contribution);
- the asset of the debtor conveyed through a fraudulent transfer may also be acquired by a new extraneous person, if the *first fraudis particeps further transfers it to another person* [Section 6:120 § 4].

3. The *monetary value of fraudator's debt*, the cover of which was deprived totally or partially by the fraudulent transfer, which is to be construed as a claim being the legal basis of the creditor's demand against his/her debtor called the fraudator, *shall be determinable*. The *legal title of this claim* is, however, totally *irrelevant*. The *determinability of the debt's monetary value is indispensable*, because the *irrecoverability of the claim against the fraudator cannot be proven without this data*. Scil. it is to be examined *at first place* whether the claim against the fraudator *can or cannot be covered by his/her assets another than the ones transferred to a third person*. If this examination results that the *claim can totally be covered by other assets of the debtor, the transfer is not fraudulent*, but if in the contrary, it is proven that the *claim can only partially not be covered* by another assets, the transfer *is fraudulent*.

4. With respect to fraudulent conveyances, there are two relevant points in time: the one is the time of the *conclusion of the fraudulent contract*, the other is the time of the *submission of the action for taking a legal proceeding in the base of Section 6:120* by the defrauded creditor against *fraudator* and *fraudis particeps*. In order to determine *whether the transfer was fraudulent or not*, there are some *prerequisites* which are to be met:

- the creditor shall have a claim against his/her debtor (i.e. the *future fraudator*) at the time of the conclusion of the fraudulent contract;
- this claim shall be due and legally enforceable at the time of taking the action based on 6:120.

Thus, it is not necessary that the creditor's claim is due and enforceable at the time of the defraudation, and that the creditor submits the action for enforcing the claim in court before the time of taking the action on the ground of 6:120.

5. *Deprivation of the basis of satisfaction (cover): Irrecoverability*. In accordance with the deprivation of the cover, the question, whether the fraudator's *residual assets can offer a total or only a partial cover* for satisfying the creditor's claims, *shall be examined with respect to the time of the conclusion of the fraudulent contract*. Only *partial* deprivation *can establish* the action in the base of 6:120. It is, however, an additional requirement that there shall be a causal link between irrecoverableness and fraudulent contract.

6. The *legal consequence of creditor's defraudation* is that *the fraudulent transfer shall be relatively ineffective towards the defrauded creditor*. This is *in favour of the defrauded creditor* since the fraudulently transferred asset shall be the financial cover *exclusively of the defrauded creditor's claims* who can find satisfaction from this very asset without standing in the queue of all of the creditors. (If the legal consequence of defraudation would be the invalidity of the contract, the *in integrum restitution* would result that the fraudulently transferred asset would *return to the debtor's property*, and thus it would be the cover of the claims of the fraudator's *every creditor*, who *would have then queuing in a line of the claims' ranking*.)

Further consequences of the sanction of *relative ineffectiveness* are as follows:

- the acquiring party is obliged to *tolerate satisfaction from the acquired property* and *enforcement against it*;
- in case of *loss* and *further transfer* of the fraudulently transferred asset, the *fraudis particeps* shall be *liable for up to the value of the acquired property in respect of the third party* [Section 6:120 § 4].

VI

MOHAI, MÁTÉ

PERFORMANCE OF CONTRACT

1. General provisions

1. *The passing of the risk of damage*. Unless the Cc. disposes otherwise, the risk of damage passes on to the other party with the performance of the contract. Who bears the risk of damage, shall bear the liability for damages, for which no compensation can be demanded from anyone. For example, in the case of injuries to the animals during the unloading carried out by the obligee after the settlement, the risk of damage has already been passed to the obligee (BH1996. 527).

2. *Quality of the service*. The performance of a contract must be suitable with its designated purpose, which means that services, at the time when supplied:

- must be capable of any specific purpose defined by the obligee and which the obligee told the obligor at the time the contract was concluded;
- must be suitable for their intended purpose and in conformity with other, similar services;
- must be of a quality and performance that are normal in similar services and that the obligee can reasonably expect, given the nature of the services and taking into account any public statements from the obligor on the specific qualities of the services or—if produced by a person other than the obligor—the producer or their representative;
- must comply with the description given by the obligor and have the qualities of the services the obligor presented to the obligee as a sample or model; and
- must be in conformity with the quality requirements defined by the law [Section 6:123 § 1].

The services don't shall conform to the public statements referred to in Paragraph c) of Subsection (1) if the obligor demonstrates that:

- he was not and he did not shall be aware of that statement;
- it had been adequately corrected by the time the contract was concluded; or
- the obligee's decision to conclude the contract could not have been influenced by the statement [Section 6:123 § 2].

In accordance with Paragraph c) of Subsection (1), the manufacturer, the importer and distributor or any person who places his name, trademark or other distinctive sign on the thing is regarded as the producer of the service. By judging the compliance of the service with the intended purpose quality requirements shall be taken into account as well. If the parties have not defined the quality of the object defined by type and quantity, the performance must be in conformity with commercially available goods of standard of good quality [Section 6:123 §§ 3-5).

3. *Documentation delivery*. The obligor shall give the obligee all information description and other documents regarding the service provided.

4. *Additional service*. If the obligor offers to perform additional services than those in the contract, the obligee can refuse such additional services. If the obligee accepts those services as well, he shall provide additional compensation proportionate to the additional services received according to the provisions regarding the payment of the contract price in terms payment dates and methods.

5. *Notification of hurdle*. Where any hurdles seem to occur in the performance of a contractual obligation, the parties must notify one another thereof, unless the other party should have been aware of the hurdle even without notification. If the party fails to notify the other party of the hurdle, he shall be held liable for damages in accordance with the provisions on liability for losses caused by non-performance.

6. *Obligation to examine performance*. The obligee must examine whether performance is as contracted in terms of quality and quantity within the shortest possible time. The obligee doesn't shall verify those qualities whose quality has been certified or those that are covered by guarantee. The costs of verifying

performance in terms of quality and quantity are borne by the obligee.

7. *Performance at the same time*. When the delivery date arrives, either party can demand from the other party the performance of due services if he offers to perform his own service at the same time.

8. *Employment of subcontractors*. The parties can employ other persons for settling their obligations or exercising their rights. If the obligor shall fulfil his obligations in person due to the nature of the service, to statutory provision or to the parties' agreement, he can only employ other persons where this is necessary in order to protect the obligee from suffering any losses.

9. *Time of settlement of a monetary debt*. If the parties did not fix the time of payment, it shall be done within thirty days of receipt of the creditor's request for payment or of receipt of the invoice. If an authority shall settle the debt in the case of a contract concluded with a party other than an authority, it shall be done within thirty days following the date of receipt of the creditor's request for payment or invoice, in which case the date of receipt of the invoice cannot be the object of an agreement between the parties [Section 6:130 § 1].

The payment shall be done within thirty days after the creditor's performance of the contract:

- if the creditor's request for payment or invoice was received before the creditor's performance (or the end of the procedure of acceptance or verification in the case of works contracts);
- where the date of receipt of the creditor's invoice or request for payment is not determinable; or
- where the debtor shall pay before the time of receipt of the creditor's invoice or request for payment [Section 6:130 § 2].

In contracts between ventures, any contract term that is deemed contrary to good faith and fair dealing and as such regarded as unilaterally and unduly unfair to the creditor in derogation from the section 6:130. of the Cc. may be contested by the creditor alleging to find such clause as unfair. In the case of a contract concluded by an authority that shall settle the monetary debt with a party other than an authority, the payment due date fixed in the contract for the monetary claim may exceed the time limits referred to in Subsections (1)-(2) of 6:130 § of the Cc. only if the parties agreed to allow deferred payment of the monetary claim, provided that this is in fact justified on account of the nature of the contract, however, in these cases too, the payment due date for the monetary debt can't exceed sixty days.

In the case of a contract signed by an authority that shall pay the monetary claim with a party other than an authority, the payment due date fixed in the contract is invalid in respect of the part exceeding a 60 day limit.

In contracts between ventures, where the period fixed in the contract for payment exceeds sixty days by way of derogation from Subsections (1) and (2) of 6:130 § of the Cc., unless proved otherwise it must be deemed contrary to good faith and fair dealing and must be regarded as unilaterally and unduly unfair to the creditor.

In the case of a contract between an authority that shall pay the monetary claim with a party other than a contracting authority, by way of derogation from Subsections (1)-(2) of 6:130 § of the Cc., where a deadline does not exceed sixty days and it is deemed contrary to good faith and fair dealing and as such regarded as unilaterally and unduly unfair to the creditor, it can be contested by the creditor alleging to find such clause as unfair [Section 6:130 §§ 3-4).

10. *Early settlement in the case of consumer contracts*. In contracts between a consumer and a venture any term excluding the early settlement of a monetary debt, and any term imposing extra charges on the consumer apart from the costs arising directly from early settlement are invalid.

11. *Reduction of the stipulated interest*. The court can reduce an unreasonable interest at the debtor's request.

12. *Expense*. The consideration covers the expenses which are usually incurred in connection with the performance of the contract.

2. Specific cases of performance

1. *Performance in case of alternative services*. If the obligor can fulfil the obligation through any service among several ones, he is entitled to select the one for performance. If the obligee is entitled to select, but he is late in selecting, the right to choose transfers to the obligor.

2. *Performance in case of divisible services*. In case of divisible services, the obligee must accept a partial performance, as well.

3. *Performance of a contract concluded in favour of third parties*. If the parties have concluded a contract regarding services to be performed for third parties, the third party can require directly the performance of the service if:

– this right has been expressly provided for by the parties of the contract; or
– it is obvious because of the purpose of the contract or because of the circumstances of the case.

The third party has the right to require performance of the service to be performed for him as of the date on which he receives notice of the contract from either party. If the right to require performance of the service is declined by the third party, the service can be required by the party who concluded the contract in his favour. The obligor can enforce his objections to the contract in respect of the third person as well.

VII

NOCHTA, TIBOR

BREACH OF CONTRACT

1. Essence, Legal Consequences and General Provisions Relating to Breach of Contract

1. The purpose of every contract is to perform that obligation. The contract will accomplish its purpose when it is concluded in a specified place, time, manner and content as the parties agree in the contract included. *If any of the content items of the contract is not fulfilled, i.e. performance of the contractual obligation fails, breach of contract is achieved.*

The breach of contract is a legal institution relating to the performance phase of the contract, meaning the defect, disorder, disability of performance. Resulting that the breach of contract can be realized not just by the instances determined by law but also any conduct or other circumstances, which will result in the contract or its content not to be realized.

The breach of contract by its nature is objective fact, failure to comply with any obligation of the contract results in breach of contract. The contract is not realized by breach of contract, if the party does not receive the service according to the content of the contract, regardless of whether it is factors outside of the obligor's behaviour, or the subjective or objective circumstances in the control of the obligor. The fact that the breach of contract is an objective fact, does not mean, that from the legal consequences of breach of contract in some cases would not be an *exculpation.*

2. The fundamental legal consequences of the breach of contract give answers to breach of contract of one of the parties*, for a reason for which he bears the risk, and what rights the other party may enforce towards the obligor.* The breach of contract penalty system is built on multiple levels, from general to the specific. The legal conditions relating to specific legal consequences affecting any breach of contract can be found within the general rules, from these the specific rules of named breach of contract cases may differ, supplemented with rules of specific named contract types.

The most basic, deducting from the onerous principle, objective and natural consequence of breach of contract is that there is no *reimbursement* for the *unfulfilled service* or for the part not fulfilled. This consequence is independent from the fact why the service was not realized, or whether the obligor is liable. In the contractual relation, breach of contract of the content of the contract applies -due to either behaviour, activity or omission, or happening independently- in itself, even without damages, irrespectively whether the contracting party exculpated himself. However, if breach of contract liability is established, further liability for damages may be enforced. Four essential rights in case of breach of contract:

- *Right of requiring performance [Section 6:138 on the Civil Code],*
- *Right to withhold performance [Section 6:139 on the Civil Code],*
- *Withdrawal, termination [Section 6:140 on the Civil Code],*
- *Compensation for loss [Section 6:141 on the Civil Code]*

Collateral applications of the breach of contract consequence, *can be enforced together, if it is not mutually exclusive*. Enforceable parallel are the withdrawal and compensation for loss, but exclusive are the requiring performance in nature and withdrawal.

3. Performance in nature: the legal consequence of a valid (effective) contract, based on which the performance can be claimed, and in case of breach of contract, the contractual performance through law (court) can be enforced. The Civil Code requires as a legal consequence in case of any breach of contract, that the injured party is entitled to claim the contractual performance in nature. Attached to the performance claim is the right of the obligee that in case of any breach of contract, has stipulated a reasonable due date for subsequent performance. If this period too elapsed without result further consequences shall follow, e.g. obligor's delay, lack of conformity.

Execution in kind is excluded if it is *impossible or otherwise illegal for physical or legal reasons.* Execution in kind is excluded also if the obligee concluded a *contingency contract,* as the contingency nature of the *transaction substitutes the performance in nature*. There is no impediment, that the aggrieved party shall be entitled to require performance *linked to the person,* as it is just as enforceable as any other service. Not excluded to claim performance in the case of gratuitous contract, or in case of contract of gift, although in this case the obstacle of performance may be *clausula rebus sic stantibus* principle.

4. *The right to withhold performance* is handled by the Civil Code as a general *consequence* of breach of contract. The obligee shall be entitled to withhold his own performance as commensurate until the obligor has tendered performance not only in case of lack of conformity, but in *any event of breach of contract*. The withholding of performance is *not permanent but temporal:* the obligee shall be entitled to withhold his own performance as commensurate until the obligor has tendered performance or has provided adequate guarantees.

5. According to the Civil Code, the contract may be terminated unilaterally if in consequence of breach of contract, the obligee's *interest in contractual performance has ceased,* and the acceptance of performance no longer is expected.

The *withdrawal* is *retroactive* to the date of concluding the contract, so the performed obligation may be requested to be returned by the withdrawing party. *The restoration of original conditions* may be applied, similarly to invalidity, if the conditions at the time of the contract concluding may be restorable naturally and the obligee is able to return the service.

In case of the irreversible services there is an inability to return the service, therefore in the event of breach of contract instead of *withdrawal* the contract shall be terminated. This applies to every instance where the *law grants withdrawal rights* but does not name specifically the termination. If the law does not order due date for termination, the termination is immediate.

6. *It is a contingency contract,* if the obligee—if he withdrew from or terminated the contract—shall be entitled to conclude a contingency contract to *achieve the objective of the original contract*. In the economy acquisition is a more frequent contingency transaction, however sometimes there are *sales* contingencies. The contingency contract serves to *repair* the damages cause by the breach of contract, its primary function is, to satisfy the legitimate interest of the non-contractual partner. If the partner of the non-performing party concludes a contingency contract, he may demand from the obligor to cover the difference between the contract price and the price quoted in the contingency contract, and the costs arising in connection with the *conclusion of the contingency contract,* under the principle of *compensation* of damages.

7. At the regulation of *liability for any loss caused by breach of contract* provision the Civil Code *strengthens* the rules on the *exculpation* of the non-performing party, cutting it off from the *imputability principle applied by tort liability*. To counteract the more stringent exculpation rules, the amount of damages for the loss caused by breach of contract, including lost income, foreseeable at the time of the conclusion of the contract is confined.

Limitation or exclusion of the consequences of breach of contract: the Civil Code breaks this regulation from the imputability however grants the exculpation in case of all *three conditions conjunctive existence:*

- *circumstances of the breach of contract is outside of the control of the defaulting party*
- *to the defaulting party the circumstances outside of his control is -objectively- not foreseeable at the time of the conclusion of the contract*
- *it was not to be expected that the parties to avoid the circumstances hindering the contractual performance*

The Civil Code in both liability cases *initiates from the principle of full compensation*. This principle applies without limitation to the damages *directly by the services* due to the breach of contract. The defaulting party is liable for the damage therefore shall perform full compensation for the damage in the service (*adhesive damage)justified costs* required for the contractual performance, of the contingency purchase (or contingency selling costs) etc. with these damages, as a possible consequences of breach of contract, the defaulting party always shall calculate in the event of breach of contract.

The financial losses and pecuniary advantage lost (lucrum cessans) caused by the breach of contract in the assets of the aggrieved party is part of the full compensation. The damages should, as far as possible, bring the aggrieved party into a position as would have been the case in the case of a contractual performance.

8. *Interim breach of contract:* during the performance, the party's failure to take measures or make the statements as required is a breach of contract before the due date of the contract.

9. The essence of the *premature breach of contract becomes obvious before the contracted date of delivery that the obligor will not be able to effect performance as due.*

2. The Different Types of Breach of Contract

1. *The obligor's delay* mean the breach of the content elements of the contract, namely the *due date.* An obligor shall be in delay if he does not perform his obligation when due. In any other case -if the time of performance of the contract is not settled- obligor is in delay if he does not perform his obligation after the necessary preparation time of the performance.

Objective legal consequences of delay:

- *the obligee shall be entitled to require performance in nature*
- *shall be entitled to withdraw from the contract*
- *shall be entitled to terminate in legally named cases of the obligor's delay*

The obligee shall prove the cessation of an interest in performance. It shall not be necessary to prove if according to the agreement of the parties or due to the imminent purpose of the service, the contract had to be performed at a definite time (fixed due date). If the obligee lawfully withdraws or terminates the contract, then hereinafter the general rules of breach of contract applies for the settlement and legal relationship of the parties.

Compensation for damages due to delay: the obligor shall reimburse the obligee for damages caused by his delay, if it is in excess of the interest on late payment in the case of a monetary claim, unless the delay is excused. The obligee's damage may be caused by as consequence *damages* of the delay of performance or during the delayed performance in the subject of the service.

Delay in payment of a monetary claim is independent from the fact that the use of the monetary claim until the due date was *complimentary or onerous.* The rules of the delay in payment of monetary claim are dispositive, so the parties may free agree on the amount of monetary claim. The *capitalization of the delayed monetary claim is excluded.*

2. *Late acceptance by the obligee*: if the obligee refuses to or *does not accept the performance offered he is in delay*. If the obligee is obliged to accept the performance before the due date, then the delay in acceptance occurs before the due date of performance. *Consequences of obligee's delay:*

- In the event of late acceptance, the obligor shall, under the principles of *negotiorum gestio*, be required to safeguard the thing, whereas risk shall pass on the obligee.
- The damage risk, for which nobody can be held responsible—i.e. the risk of the damage threat - the obligee bears, even though the subject of the service is in the possession of the obligor.
- The general provisions of breach of contract also rules to what extent the delay by the obligee excludes any simultaneous delay of the obligor.
- The obligee -similarly to other named breach of contract- is liable for the obligor's damages

3. *The lack of conformity, as a breach of contract means when the obligor's performance at the delivery date is not in compliance with the quality requirements laid down in the contract or stipulated by law.*

a) The *legal consequences* of the lack of conformity are assessed only in case of onerous contracts. In case of lack of conformity of gratuitous contracts according to the general breach of contract provisions receive mitigated liability for damages. Besides the *warranty,* the legal consequences of the *lack of conformity may also be commercial guarantees, right to damages*, *warranty of title*—in case of a contract between consumer and business party- product guarantee. According to the burden of proof principle, the *burden of proo*f of lack of conformity is on the obligee. The obligee shall prove that, any lack of conformity detected by the consumer existed at the time of delivery of service (or goods).

b) *The warranty is the objective legal consequence of the lack of conformity;* the obligor is liable for the lack of conformity -regardless if it is exculpation. *The obligor is liable due the extent of the business risk covers any activity-related disorder.* The warranty is the legal consequence of lack of conformity, in which the obligee of the onerous contracts is entitled to claim reparations for *defect occurring in the service*, resulting in decline of value of his performance interests. The obligee shall enforce his claim only against the obligor of the specific contract. This is a marker in the case of the service is delivered to the obligee through more intertwined contracts.

Relating the *warranty* the Civil Code priorities unambiguously the *warranty rights ensuring performance in nature*. The option between *warranty rights (ius variandi):* On the base of warranty rights, the obligee shall have the option: *the chosen warranty right shall be clearly and unmistakably determined by the obligee.*The obligee shall be entitled to *switch* from the warranty right he has selected to another. *The cost of switch-over shall be covered by the obligee*, unless it was made necessary. On the base of warranty rights, the obligee shall have the option to choose *either repair or replacement as a first step*. Unless compliance with the chosen warranty right is impossible or it results in *disproportionate expenses* on the part of the obligor as compared to the alternative remedy, taking into account the value the service would have had there been no lack of conformity, the significance of the breach of contract, and the harm caused to the obligee upon compliance with the warranty right.

As the second step, the obligee may ask for a commensurate *reduction in the consideration,* repair the defect himself or have it repaired at the obligor's expense, or to *withdraw* from the contract.

The Civil Code orders the obligee's right to warranty shall lapse after *one year* from the delivery date. In connection with contracts that involve a consumer and a business party, the obligee's right to warranty shall lapse after *two years* from the delivery date.

c, The essence of the *product guarantee* is that, *the manufacturer has a guarantee obligation to the consumer for the lack of conformity at the time of product sold.* A product shall be deemed defective if it *does not meet the requirements related to conformity in effect at the time of placing on the market*, or it does not meet the specifications provided by the manufacturer. The *consumer -instead of the warranty rights against the vendor with whom he is in direct relation, escaping the relative structure of contracts, intersects the contract concatenation- directly claims guarantee rights against the manufacturer.*

The main difference between *product guarantee* and warranty guarantee is that it does not serve to repair the defects of the product (adhesive damage) but *reimbursement of personal injury in correlation with the product defects.*

d, *Commercial guarantee*: while the warranty without the parties agreement by law is connected to lack of conformity, and the guarantee is undertaken *voluntarily* in order to perform errorless. Undertaking the commercial guarantee means a more *stringent obligation* than the warranty. Both rule are objective in nature, i.e. the obligor cannot exculpate himself from the warranty nor the commercial guarantee, the *commercial guarantee however is a more stringent obligation form due to the burden of proof.* In case of warranty the errorless performance is *presumption: the obligee shall prove that the service was defective at the time of performance*, whereas in case of *commercial guarantee the presumption is the defective performance.* The burden of proof changes and the obligor shall prove, that the cause of the defect arose after performance.

e, *Damages may be claimed primarily in the scope not covered by warranty for consequential damages.* This claim applies to any type of damages *(actual damages, loss of profit, costs)* including the damages resulting from price differences.

The obligor shall be excused of liability -according to the general rules of contractual liability- if lack of conformity has its origin due to an unforeseeable and unavoidable circumstance outside its control. The liability for damages in terms of excuse is stringent, however compared to warranty it is still milder, in theory it is possible, that the obligor proves: the lack of conformity and the damages resulting from it, was caused by unforeseeable and unavoidable reasons (for example unforeseen vis major circumstances, weather conditions), thus exempt from the liability for damages, but not from warranty.

f, *Warranty of title:* the obligor is to perform not just without physical but legal defects, in the *absence of this, it is a breach of contract just as much as it would be with physical defects*. If the acquisition of ownership, other right or *claim is hindered by a right of third parties,* the obligee shall withdraw from contract -according to the general rules of breach of contract- or in case of irreversible service the obligee shall be entitled to

terminate the contract and to claim damages-according to the general rules of contractual liability for damages.

4. *Impossibility of performance- the impossible contract from onset is a question of impossibility (!)*- specifies the instance if performance has become impossible, due to circumstances after concluding the contract. The party gaining knowledge of the impossibility of performance shall immediately notify the other party thereof regardless in whose control the impossibility occurred or whether he is liable for damages. If performance has become impossible, the *contract shall be terminated.*

If performance has become impossible for a reason that c*annot be attributed to either of the parties,* the services performed *shall be settled.* The *monetary value of the services provided* before the time when the contract was terminated shall be *compensated*, provided that the service is not indivisible, and so it is suitable to partially satisfying the needs of the entitled. If the service is indivisible, thus partial performance did not take place until the termination, for which cash compensation shall be payable. If the remnants of the object of a service that has become impossible have remains in the possession of the obligor in full or in part (divisible service), or if the obligor has received or has the right to demand compensation instead of the object of the service from another person, the obligee shall be entitled to demand surrender of the remainder or compensation against a commensurate part of the consideration.

The obligee is entitled to claim *residual service (residuum) and the compensation (surrogatum)* replacing the subject of the service, for proportional compensation, regardless which party is liable for the impossibility.

5. *Withholding performance:* The law names withholding performance without legitimate reason as an independent breach of contract instance. *Either the obligor or the obligee can maintain such conduct*. If the obligee withholds performance without legitimate reason for the contractual service, the other party shall be entitled to apply the consequences of either delay, or subsequent impossibility.

6. *Failure to make legal statement:* If the party is required *under the contract to make a legal statement, (Prohibition of abuse of rights, Article 1:5 on the Civil Code]* and fails to do so, the *statement shall be drafted by court verdict*, thus the court *enforcing the contractual performance. The contractual will to a make a legal statement, so the obligation from the obligor does not shall exist, the court is not replacing the obligation.*

VIII

FABÓ, TIBOR

CONFIRMATION OF CONTRACT

1. Confirmation of Contract in General

1. *Protection of the Contractual Interest.* The Civil Code of Hungary contains general rules on the breach of contracts. These provisions are applicable in any types of contracts. We can see some other rules of breaching a contract among the provisions of the special types of contracts. There is no need to stipulate these consequences since all these provisions shall be the part of the parties' agreement provided, they did not exclude the applicability of those. In addition, the parties themselves *can agree upon additional legal consequences* in the interest of increasing the level of the protection of their contractual interest. Stipulating *earnest money, contractual penalty and forfeiture clause* are available for motivating the parties to comply with the terms of their contracts since those impose additional obligations on the party who violates the contract.

2. *Collateral Relation between the Contract and the Instruments of Confirming It.* In this context collateral relation refers to the condition that for the validity of the stipulation of all these analysed instruments requires an existing and valid contract containing such obligations the enforceability of which is provided by the law. Should the contract suffer in lack of existence or is null and void the confirmation of the contract must not and will not be valid.

3. *Earnest Money, Contractual Penalty and Forfeiture Clause As Consequences of the Liability for Breaching the Contract.* All these legal institutions join to those violations of contract where the party is liable for the breach of contract, that is to say, the party cannot prove that the violation occurred in consequence of unforeseen circumstances beyond his control, and there had been no reasonable cause to take action for preventing or mitigating the damage. Earnest money and contractual penalty serve as compensation for the suffered damages up to the stipulated amount of those. The party shall have the right to claim this amount even if there was no damage at all. Should the caused damage be higher than the stipulated amount the party shall prove it for receiving the total compensation of his damages. Forfeiture clause does not result a claim for damages but the party violating the contract shall loose certain right(s) which otherwise he would be entitled to have.

4. *Judicial Correction of the Excessive Sanction.* The excessive deposit of earnest money, excessive contractual penalty may be reduced by court at the obligor's request and if the forfeiture of a right afflicts the obligor excessively, such adverse disposition may be mitigated by the court.

2. The Earnest Money

1. *Notional Elements, Marking Off Earnest Money, Advance Payment and Retention Money. Earnest money* shall be an amount stipulated by the parties and to be paid for the other party at the time of coming into existence of the contract (or even later but before the due date of the performance of contractual obligations). This amount *serves as a safeguard* of the parties' contractual interests provided this intention is expressly indicated in the contract. *Advance payment is just a part of the performance* of the contract not having any safeguarding function. In case of any doubt the paid money shall be deemed advance payment. *Retention money* is due according to the agreement of the parties when one of them has the right of unilaterally terminating the contract and the party takes the advantages of this right.

2. *Legal Effects of Stipulating Earnest Money.* Should the contract be performed the earnest money shall be credited to the amount payable. Disadvantageous legal effects will appear where *frustration of the contract occur* and *one of the parties is responsible* for this. (In this context frustration does not mean just the impossibility of performance. Frustration can also happen when the party is in delay and the other party is entitled to and in fact terminates the contract because of it.) The person responsible for the failure of performance shall *forfeit* the earnest money that he has given, or *refund twice* the amount of the earnest

money he has received. If the contract falls through for reasons attributable to neither or both of the parties, the earnest money shall be returned. Even if the party gave back the received amount or paid the double of the earnest money this shall not constitute an exemption from the consequences of the breach of contract (e.g. the party shall have the right for demanding performance).

3. The Contractual Penalty

1. *Notional Elements, Characteristics.* Stipulating contractual penalty one of the parties or either both parties undertake the obligation of paying the agreed amount of money where *the party violates the contract and he is not able to prove that he is not liable for that*. Penalty shall be paid following the violation happened (unlike earnest money which is due in advance). Penalty is similarly as earnest money concerning its compensatory function. Penalty is also due even if there is no damage at all because of the violation of the contract. The expression of "lump sum minimum compensation" refers to this characteristic. Where the damages are higher than the amount of penalty the violated party shall prove the exact amount of his damages.

2. *Stipulation of Contractual Penalty.* Formation of contractual penalty requires *written declaration* where the parties determine which type of violations of the contract shall result the obligation of paying penalty and the amount or at least how they will calculate the amount of that. Any type of non-performance, breach of contract can serve as a basis of penalty. Usually delay in performance, lack of conformity or frustration of performance are those violations where the party agree upon contractual penalty which can be a determined amount of the value of the service or a certain percentage of it depending on the time of delay period. In certain cases, usually because of protecting consumers' interest, contractual penalty becomes the content of the contract because of so-called cogent (mandatory) statutory provisions.

3. *Relation of Contractual Penalty and Claims Based on Breach of Contract.* Depending on the type of violation of the contract the *obligor shall decide whether he enforces the penalty or requires the fulfilment of contractual obligations*. In other cases, the penalty claim and the claims based on the violation both can be enforced. For example: enforcement of contractual penalties stipulated for non-performance precludes any demand for performance, but payment of contractual penalty stipulated for late performance shall not constitute an exemption from performance. In addition to contractual penalty for lack of conformity, the obligee shall not be entitled to make any guarantee claim.

4. The Forfeiture Clause

Should the party of the contract violate the contractual rights of the obligor, as a result of forfeiture clause this party shall lose certain right(s) or advantages provided by the contract. Delay in performance may lead to losing the instalment opportunity. Omission of informing the other party on the failure of performance in time may result lack of warranty. Forfeiture of those rights which the law does not allow to give up (e.g. legal capacity, right for life and for human dignity) shall be null and void.

IX

FABÓ, TIBOR

CONTRACTS TRANSFERRING OWNERSHIP RIGHTS

1. The Contracts Transferring Ownership Rights in the Civil Code

The significant service of these contracts is transferring ownership rights for money (or other thing) or for free, that is to say *"dare" (to give)* obligations like sales contracts, exchange contracts and contracts of gift. First the *general rules of the sales contracts* than the rules of *special modes of sale, types of sales contracts* than the rules on exchange contract and contracts of gift can be found in this part of the Civil Code.

2. Basic Rules of Rights *In Rem*; Certain Aspects of Law of Obligation

1. *The Way of Acquisition of Ownership (Modus); Legal Title (Causa).* All the above contracts the purpose of which is transferring ownership can result the acquisition of the ownership provided the requirements of rules of the *rights in rem* (*ius in rem*) also are realized. In the interest of acquiring ownership of a thing the Hungarian private law requires a legally accepted (provided) way of acquisition ("modus"). "Modus" involves those *legal facts* which are necessary for acquiring the ownership of a thing. Among the different types of these ways the *acquisition by transfer* is relevant from the view of the analysed types of contract.

The necessary legal facts of the transfer are as follows: the *transferor shall be owner* of the thing and there shall be a *legal title* (sale contract, contract of gift, etc…) which serves as a legally accepted purpose of change in ownership rights. Provided the subject matter is a *movable* there shall be *transfer of possession* of the thing as well. In case of an *immovable* the acquisition of ownership requires not the transfer of possession but the *registration of the new owner* at the *land register*. Transfer of possession is "just" a *contractual* obligation of the seller but *not the condition of acquiring ownership* of the immovable. *Causa*, legal title is a legal abstraction which *refers to the purpose* of the transfer: what is the intent of the parties in course of transferring and acquiring the ownership? The purpose can be e.g. receiving money for a thing (the legal title is contract of sale). The *contracts* for transferring ownership *serve as legal titles* of the transfer.

2. *Transactions in Course of Transferring Ownership Rights: Commitment Transactions and Disposal Transactions.* Acquiring ownership rights (in the same time fulfilment of the obligations of the transferor) requires the *expression of transactional intent* on the one hand *in course of concluding the contract* that provides the legal title (causa), from the other hand *in course of transferring the possession of the thing*. According to the Civil Code passing over the thing, *transferring the possession* of it (as fulfilment of the commitment transaction) *has transactional (contractual) nature* and it is considered as so-called *disposal transaction*.

In case of immovable transferring the possession as a transaction (together with the commitment transaction providing the legal title, causa) is the fulfilment of one main obligation of the transferor, only, which *shall be completed with* the other main obligation: providing *permission of the transferor* allowing the registration (in land register) of the ownership of the transferee (*permission for entry*, a statement of authorization for registration from the right-holder). This is a unilateral disposal transaction which is the condition of registering the ownership of the new owner. Provided the registration, happens the transferor fulfilled his obligation of transfer of ownership.

3. The General Rules of the Sales Contracts

1. The substance of this contract is transferring ownership right of a thing against money. The Civil Code first gives *general rules* of the type describing the main obligation of the parties: the seller and the buyer. Then the rules of *special modes of sale* (right of pre-emption, repurchase right, purchase option and right to sell, hire purchase, purchase upon delivery subject to inspection, purchase upon delivery subject to testing, purchase by sample) can be found in the Code. Specialties of these contracts can be found in

the way how they are come into existence or the way how they become effective or the specialties in payment rules. The rules of sales contracts end with the provisions of the *subtypes of sales contracts* (forward transactions for the sale of things defined by type and quantity, sales contracts for the supply of own produced agricultural goods, sales contracts for the supply of agricultural goods produced with the buyer's involvement). These subtypes' main characteristics are in subject matter of those: the things are either generic things or restricted to things having special features. The deadline rules of performance of the contract or special provisions concerning the allocation of the contractual risks when the quantity of the subject matter of the contract will not be enough for performing the contractual obligations are also playing a role in these subtypes of contracts.

2. From the view of *validity usually there is no need for written contract* when the subject of a contract is movable. When *immovable* is concerned the contract *shall be concluded in written form*.

3. Anybody who has legal capacity can be either seller or buyer. When seller is an enterprise and the buyer is a consumer there shall be special rules employed on their sale contract which are more favourable for the consumer.

4. Under sales contract the seller undertakes to transfer the ownership of a thing to the buyer, and the buyer undertakes to pay the price thereof, and to take possession of the thing. In course of selling a real estate property, in addition to transferring ownership the seller shall also transfer possession of the thing and the contract shall be executed in writing [Section 6:215].

5. Parties can agree upon entitling the seller to *retain title of ownership until the purchase price is paid in full.* This agreement *shall be executed in writing* and in the base of that contract relating to real estate property, the seller shall have the retention of the title recorded in the real estate registered together with the name of the buyer. In case of movable property, the seller shall have the retention of the title registered in the collateral register or in the relevant registry if ownership of the movable property is recorded in a public register and if hypothecation of the thing is to be registered in the proper registry by law.

4. The Special Modes of Sale

1. *Right of Pre-emption*. Right of pre-emption can *based on the written agreement* of an owner and the other party or *established by the law* (statutory pre-emption right). The latter prevails the contractual right of pre-emption related to the same thing. In both cases the point of these special modes of sale is that *the owner of the thing should not sell it* to any third party *before communicating the offer* in full the person who has the right of pre-emption on the conditions fixed in the offer of the third party. The holder of pre-emption right *can establish the contract of sale with the owner of it by accepting the offered conditions within a certain binding period even if the owner would not like to sell the thing to the holder of this right*. If the holder of pre-emption right *fails to issue* a statement of acceptance during the binding period, the *owner shall be entitled to sell the thing* according to the offer received from the third party or under terms which are more favourable for the seller. If the owner breaches his obligations and enters into a contract with the third party, such *contract shall be inoperative in respect of the holder of the right* of pre-emption who shall be able to enforce his *claims* arising from such nullity *within thirty days* after gaining knowledge thereof. In the same time, he shall make a statement of acceptance, and verify his ability to perform.

2. *Repurchase Right*. This right makes possible for the seller of a thing by way of unilateral statement of him/her to repurchase it from the buyer of that. Establishing this right, the buyer shall grant this option for the seller at the time of conclusion of the written sales contract. Having this right, the earlier seller may purchase the thing by way of a statement made to the buyer.

3. *Purchase Option and Right to Sell*. These rights can be based also either on written contract or established by statutory provisions. If somebody becomes the holder of the right to purchase a specific thing, he shall be entitled to buy the thing with a *unilateral statement*. The holder of the right to sell a specific thing shall be entitled to sell the thing with a unilateral statement to the obligor of the option to sell. In both cases the price shall be fixed in the contract establishing the option.

4. *Hire Purchase*. Specialty of this contract is that based on the parties' agreement, the buyer shall be entitled to pay the *purchase price in several instalments at specific dates*, and the *possession of the thing is transferred* to the buyer *before the purchase price is paid in full.*

5. *Purchase upon Delivery Subject to Inspection, and Purchase upon Delivery Subject to Testing*. The rules of both special types concern the effect of the contract. The parties conclude the contract before the buyer could inspect or test the thing. According to their agreement the seller shall provide the opportunity of investing or testing the thing for the buyer who shall have the right to decide whether he wants their contract to be effective which depends on his unilateral legal statement. If the buyer does not make any statement following the investigation within a proper deadline the contract shall not be effective. If the buyer tested the thing and does not make any legal statement within a proper deadline the contract shall be effective. In both cases the buyer has the chance to know the characteristic of the thing therefore the seller is not liable for any lack of conformity if able to verify that the buyer has detected, or should have detected, the defect upon the inspection or test.

6. *Purchase by Sample*. In course of concluding the contract the parties can decide *to define a certain characteristic of the subject matter of the contract by reference to a sample, too*. The seller shall supply such thing which corresponds to the cited properties of the sample and he shall be liable for any latent defect in the thing if the defect also existed in the sample.

5. Sub-Types of the Sales Contracts

1. *Forward Transactions for the Sale of Things Defined by Type and Quantity*. The main element of this type is that the parties agreed upon *selling and buying things defined by type and quantity, in the future*. The subject matter of the contract can be industrial or agricultural product as well, but it is not matter who produced the thing or what is the origin of those. The essential terms are: the *supply shall happen in the future and with things defined by types and quantity*. If performance has become impossible because of any reason (beyond the behaviour of the buyer) the risk is on the seller who shall perform anyway if there is such type and quantity on the market that the contract requires. Since it can happen that the buyer will not need for the ordered things, the buyer shall have the right to withdraw from the contract provided the seller has not yet offered the delivery of supplies. Although this withdrawal is allowed by the law the buyer shall reimburse the damages caused to the seller through exercising the right of withdrawal.

2. *Sales Contracts for the Supply of Own Produced Agricultural Goods*. The emphasis of this subtype of contract is on *the origin of the agricultural product*: it is *the seller* who *shall produce* it. He shall supply agricultural goods and/or produce of his own production or livestock that he himself has raised at a future date. If his own agricultural production is not enough for supplying the contractual quantity and the reason of that failure is out of his liability (*vis maior*) he will not be responsible for non-performance.

3. *Sales Contracts for the Supply of Agricultural Goods Produced with the Buyer's Involvement*. The characteristics of this type are similarly as the above-mentioned contract with the addition that in this case *the buyer himself contributes somehow* by providing the assistance for facilitating performance of the seller and to provide information to the seller in that context (giving advice, providing loan, sowing, fertilizer, etc.) The seller shall cooperate with the buyer in the provision of such service by following the instructions communicated. The seller shall pay the contracted price for the buyer's service and shall repay the part of any production advance received from the buyer that is not covered by the purchase price even if the production result is insufficient to cover such payments.

6. Exchange Contracts

The parties of exchange contract undertake reciprocal transfer of the ownership of things. In such cases each party shall be deemed as the seller in respect of his own service and the buyer in respect of the other party's service and the provisions pertaining to sales shall be duly applied.

7. Contracts of Gift

1. *Basic Notions of Gifts*. A contract of gift means any contract under which the donor (i.e. gift-giver) undertakes to transfer the ownership of a thing without any consideration, and the donee (i.e. gift-receiver) undertakes to take possession of the thing. If the object of the contract of gift is a real estate

property, in addition to transferring ownership the donor shall also transfer possession of the thing; in this case, the contract of gift shall be executed in writing. The provisions relating to gifts shall also apply to contracts for commitments for the gratuitous transfer of rights and receivables.

2. *Withholding Performance*. The donor shall be entitled to refuse performance of the contract if he is able to prove that his performance of the contract can no longer be expected due to a significant change in his circumstances or in his relationship to the donee after the contract has been concluded.

3. *The Recovery of Gifts*. At first, it shall be emphasized that gifts of ordinary value shall not be reclaimed. The donor shall be entitled to recover a still existing gift insofar as the gift is considered essential for his livelihood on account of changes in his circumstances after the conclusion of the contract and returning the gift does not jeopardize the livelihood of the donee. The donee shall not be obligated to return the gift if subsistence of the donor is appropriately provided for in the form of alimony or other similar maintenance provided in kind. If the donee or his resident relative commits a serious infringement to the detriment of the donor or one of his close relatives, the donor shall be entitled to reclaim the gift or demand the replacement value of the gift. The donor shall also be entitled to recover a gift or demand its replacement value if the assumption known to the parties at the time of conclusion of the contract, that provided the sole basis for giving the gift subsequently and permanently, disappears and if the gift would never have been given without this assumption. A gift cannot be recovered if the gift itself or its replacement value no longer exists at the time of the infringement or if the donor has condoned the injury. The donor's failure to reclaim the gift for an extended period of time without an appropriate reason shall be construed as forgiveness and/or waiver of the right of recovery.

X

NOCHTA, TIBOR

CONTRACTS FOR PROFESSIONAL SERVICES

1. Common Rules

1. The contracts for professional services are aimed at the services, *performance of activities for someone else,* in which *beyond the performed activities, the contractor undertakes the risks of achieving the result, the remuneration, the contractor's fee payment is a prerequisite of the production of result*. The *general rules of the contracts for professional services apply*—regardless the *nature of the service, the specificity of the activity*—to all *named subtypes* of the contracts for professional services, such as:

- *Design contract*
- *Construction contracts*
- *Research contract*
- *Contract for travel services*
- *Agricultural services contract*
- *Public service contract.*

2. The professional service activity reflected in the general rules usually refers to the *individual behaviour that performed in order to achieve results based on expresses individual wishes*, which can be continuous, regular, recurring.

3. Beyond the specific service the obligation of result is the other essential element. The contractor's fees are paid then and only then if the contractor achieves the result undertaken in the contract; the contracted fee is payable at the time of the fulfilment of the contract. The fulfilment of the result is part of the contract and, therefore *there is no fee paid if regardless the diligence of the contractor or because of objective reasons it is not satisfied.*

The obligation for result is not identical with the responsibility for result. *The leeway of the results only concerns the fee requirement* in itself, however, it does not cause the liability consequences of breach of contract, *only if it is the result of the contractor's breach of contract*.

4. The contracts for professional services are characterized by *performance's multi-phase nature*, it *does not mean a single legal action*. The individual phases can be *divided into two parts*:

- One part is the *contracted activity*
- Other part is the *delivery of results* produced by it

5. The *rights and obligations* of parties: The contractor shall arrange the conditions -work place, work equipment, materials, and subcontractors, contributors- for carrying out the activity so as to ensure that the works will be completed safely and professionally in due time, in a manner that is economically viable. The contractor shall perform the activity with its own employees as well as -*without the consent of the customer*- shall employ *subcontractors*. To create the material and personnel conditions means any material that is required for completion of the works shall be *obtained by the contractor at its own expense*. The regulations are, however, dispositive, therefore the parties may differ from the main rules and may agree that as the work progress, before the result is produced, according to the stage of completion of the work fees are paid in the form of advances.

6. *Customer's right to give instructions*—in case of a contracts for professional services- no instructions shall be given *for the organization of work*. The new demands on the one hand cannot make the fulfilment *unreasonably burdensome*, especially *cannot result in a completely different work-result*, on the other hand the *fee of the hand extra work (see below) can be demanded*. The customer's layman expectations, instruction may be professionally, *uneconomic*, *unreasonable*, *not feasible, illegal* may carry out the works according to the customer's instructions, at the customer's risk. The contractor *is acquitted from legal consequences of defective*

performance if the defect is resulted from the unprofessionalism or unreasonableness of instructions of which the contractor *warned* the customer. The customer inspects whether the contractor fulfils its duty *according to the content of the contract and instruction*s.

7. *The customer's "unlimited" withdrawal and termination right* means with a one-sided statement the customer shall be entitled to withdraw from the contract only before the beginning of performance, cannot be withdrawing from a contract terminated by performance.

8. The contractor shall perform in *conformity with the contract*, but this *cannot be handled rigidly*. The contractor may *not refuse those subsequently incurred works*, which are based on the *new orders*, or *necessary* to the production of results and *justified*. These only have effect on the fees. *Subsequently occurred* works are:

- *Extra work,* the works o*rdered subsequently*
- *Additional work*,
  - works included in the plan but *not taken into consideration for the calculation of the contract price;*
  - work that is *considered essential* for the completion of the works in a condition proper for use or the intended purpose, *not calculated in advance*

The *extra work* is solely the work ordered by the customer *after the completion of the contract*, (*supplementary order*) means the new and different, more costly demands of customers which *usually* occurs in the form of plan amendment.

The *additional work* opposed to the extra work is not arising from a new or modified customer order, because the *originally targeted result* of the contract will not change but compared to the prior estimated it can be achieved only by *additional work and additional costs*. Additional work was already included in the content of the professional services contract *plan documentation* (schematics, technical description) however in calculation of the contractor's fee it was not *sufficiently foreseen* work items, which therefore have additional costs.

9. The *contract price* determination is a *relevant content requirement* of the contract for professional services. If the parties have not agreed upon contract price, the contract for professional service *is not concluded,* service will not be required, and the legal consequences of the absence of the contract applies. The agreement on the fee can be made in two ways. The parties may determine the contract price:

- *upfront in a fixed sum,* so-called *flat rate*
- or may agree *ex post lump-sum settlement*

10. *The rules of breach of contract:* following from the nature of *result obligation* of the contract for professional services, *that the contractor takes the objective risk of the leeway of results (lack of performance)*. If the result is for any reason cancelled, the contract for professional services objectively fails, the contractor's fee shall not be entitled. *In the event of non-execution* the contractor shall be entitled for fee *in two cases*:

- the *cause of impossibility has occurred within the control of the customer,* the contractor is entitled to the *full price*, but has compensation obligation.
- the *cause of impossibility has occurred within or beyond the control of both parties*, the contractor shall be entitled to a *proportionate amount of the remuneration for the work done* and *for his expenses*, *not for the full amount*, but only *to the extent that the customer has intervened* in the failure. If *impossibility has occurred within the control of the contractor, he shall not be entitled to demand remuneration.*

2. Sub-Types of the Contract for Professional Services

1. *Design work* as an activity based on the d*esign contract* aims at:

- *construction-installation work plan,* i.e. to create a structure, rebuilding of an existing building, the plan preparation relating to alteration, repair, demolition.
- *technology and installation plan preparation,* i.e. mechanical, industrial equipment, technological processes design
- *other technically feasible activity to design* (for example, gardening work, soil melioration)
- *further data detection to facilitate planning* (for example, soil mechanics, geodesy, water exploration studies)
- *preparation of a prior plan, which by raising multiple variants provides an opportunity for selection*

– *professional review for already completed plan or*
– *revision, site adaptation of a completed plan*

The design documentation for construction shall be implementable, which means that the completed facility in compliance with plan is suitable for its intended use. The result of the design quality errors is if the applied technical solution is unreasonably expensive, in excess, or unreasonable.

2. On the base of a *construction contract* the building contractor *undertakes to carry out building* of specifically designed facility, other things, buildings, his service is in the execution of plan documentation. The result specified in the contract may be:

- new building or other structure, building unit created based on the construction plan
- also, in the base of the technical plan partial or complete rebuilding of *existing structure*, overhaul, maintenance and repair, breakdown (so-called investment, maintenance work)
- machine, power transmission, calculation—news—and ventilation equipment, technological and other wiring, plumbing, transport equipment technological mounting and
- any activity produced result of which *process is determined by technical design*

The *construction journal* is among paramount importance to the construction plan:

- the cooperation of parties
- disclosure of obstacles
- information
- exercising the right of inspection

The result of the construction process is *transferred through a technical transfer procedure*, the execution of which is governed by the *specific law*. According to this, at completion of the construction work the contractor *reports as finished, and notifies* the purchaser, which date to deliver the work result.

3. The research contract is a contract of pecuniary interest *but not necessarily obliged of result!* The researcher can undertake a research result as a service, but it is also possible that he does not undertake research results. For this reason the research contract is *on the border of professional service contracts and assignment contracts* and to a certain degree -although named professional service contract- is a *mixed* contract. From one aspect the research contract has complete *obligation of result*. The researcher is *obliged* to pour his *intellectual creative activity into a protectable intellectual creation* (performance).

4. *Contract for travel services* is regulated by the Civil Code as a sub-type of professional service contracts. Although the travel contract services physically can be split up, however, they are legally indivisible, since the part services alone are not suitable to satisfy the client's contractual interest, that's why the contract breach affecting the travel's purpose, due to the indivisible nature, supervene on the entire contract. Under a contract for travel services the contractor undertakes to make arrangement for travel and for accommodations at points of excursion and to provide the related services [Section 6:254 (1) on the Civil Code]. Requirement is the written form, and the contract position is transferable. These rules are *unilaterally (claudication) cogent, any contract clause that derogates from the provisions to the detriment of the consumer shall be null and void.* [Section 6:254 (5) on the Civil Code]

5. *Agricultural services contracts* appear in the Civil Code as a new sub-type. The *essential element* of the agricultural services contract is that, *the land on which the producer* undertakes to produce specified in the contract, vegetation, product, crop, propagating material, etc. is the *property of the customer* so the product of the crop from the beginning, and through the production process *does not become the producer's property,* so *property transfer does not occur*. The agricultural services contract's *obligation of result*: the *producer is only receiving the fees, if performs the agricultural activity specified in the contract*, and produces the *contract results*. There is an increased importance of the parties' *cooperation obligations*.

XI

FABÓ, TIBOR

CONTRACTS OF CARRIAGE

1. Legal Regulation of Carriers' Activities

Not only the Civil Code but other rules (*government decrees* and *international treaties*) are also relevant as legal sources of regulating these activities. In Hungary there are special decrees on carriage depending on what type of vehicle (truck, aircraft) the carrier employs. Due to this circumstance and due to the fact of *globalization* of the carrier activity regulated by international treaties *the Code Civil itself shall be applied when the special rules, treaties do not contain different provisions*. The *carriers usually elaborate their general terms of contracts* in which they are going to standardize the legal conditions of their operation.

2. Legal Definition, Characteristics, and the Conclusion of Contracts of Carriage

Contract of carriage is such a "result oriented" obligation (i.e.: fee is due when the goal of the contract was achieved, only) in the base of which the carrier shall transport the consignment to its destination and deliver it to the consignee while the consignor shall pay the fee agreed upon.

The contract itself has *two subjects, the carrier and the consignor* but the activity of the carrier *concerns third parties, the consignee*, too. The latter is not subject of the contract with the carrier. He has legal relationship usually with the consignor who employed the carrier in the interest of performing a contractual obligation he undertook towards the consignee. It can also happen that the consignor and the consignee is the same person (the seller sends the bought goods for himself via carrier).

We shall *differentiate between* on the one hand the *contracts of carrier* on the other hand the *shipping contracts*. Contracts of carriage together with shipping contracts as legal frames of these activities play definitive role all over the world in organizing the flow of goods. Under a shipping contract the forwarding agent undertakes to conclude contracts and to make legal statements relating to shipments in his own name and on the principal's behalf for the agreed fee. This agent provides complex service which can involve even the forwarding of the goods with his own vehicle as well, but the point is that the agent shall organize the forwarding activity such a way that he shall conclude the necessary contracts (with carriers, storehouses, insurer companies) and make declarations such as custom declarations. The carriers themselves often carry on forwarder activities, too and a result of this the integration of the characteristics of these services significant.

There are no special rules concerning how to conclude these contracts. The general rules of contracts shall be applied. For the validity of the contract there is no need for written form even if the special decrees require preparing a so-called *consignment note*. In itself this is not a contract but if it meets the requirements of the rules of Civil Code or the applicable government decrees, it provides a presumption in favour of the existence of the contract of carrier and proves the receipt of the consignment, and—in the absence of any reservation made by the carrier in the consignment note—that the consignment and its packaging at the time of delivery was apparently in a good condition, and that the amount of the consignments coincides with the one shown in the consignment note. Concluding the contract, the parties shall agree upon the quantity of the consignment, the location of receipt, the destination, the person of consignee and the fee of carrier.

3. Parties' Legal Statuses within the Contractual Obligation

1. *Rights of the carrier* are as follows:
- to transport the consignment to its destination and deliver it to the consignee;
- if so instructed by the consignor, he shall make out the consignment note and provide a copy to

the consignor; or give an acknowledgement of receipt of the consignment;
- to present means of transport at the place and time stipulated in the contract, in a condition suitable for carriage and to commence carriage without delay;
- if carriage is in any way obstructed, the carrier shall immediately notify the consignor and ask for instructions where deemed necessary;
- to notify the consignee immediately of the arrival of the consignment.

2. The *rights of the carrier* are as follows:
- to demand the fee for his services (in certain cases just a part of it)
- as regards loading and unloading, the carrier shall have the right to give instructions as to the placement of the consignment
- to refuse to accept the goods for carriage when the consignor does not fulfil his obligations concerning the packaging and providing necessary documents or as regards the dangerous goods and shall be entitled to terminate the contract
- he shall be entitled to statutory lien up to the amount of freight charges and expenses on the things he gained possession of in connection with carriage, or which are at his disposal in the base of documentary evidence

The carrier shall be liable for the violation of the contract according to the general rules of contractual liability of the Civil Code. Any contract term limiting or excluding the carrier's liability shall be null and void, also if it pertains to damages caused deliberately or as a result of gross negligence.

3. *The Consignor's Obligations, Rights, and Liabilities.* The consignor *shall pay the fee* agreed upon provided the carrier transported the consignment to its destination and delivered it to the consignee. In the event of loss or destruction of the consignment in part or in full and the carrier cannot prove that he is not liable for that the consignor shall have the right of repudiating of payment in part or in full.

The *consignor shall*:
- *package* the consignment in a way to provide sufficient protection for the goods and prevent it from jeopardizing the physical safety or property of others;
- *give information* necessary for handling the consignment on the packaging, or failing this on the consignment itself; and
- *hand over* to the carrier the *documents* necessary for transporting and handling the consignment;
- The consignor shall be liable toward the carrier for the loss or damage resulting from discrepancies in packaging, or from the lack or inaccuracy of, or any flaws in the data, information and/or documents relating to the consignment.

4. The *consignor shall be entitled*
- to withdraw from the contract prior to the commencement of carriage,
- to reserve all rights to the consignment until it is delivered, or the consignee receives it but without providing adequate safeguards to the carrier the instructions must not cause more burdens than the contract imposed him.

5. *Special Rules on Period of Limitations for Mutual Claims*. The period of limitation for claims arising out of or in connection with contracts of carriage shall be one year. When damages were caused deliberately or as a result of gross negligence the general rule (five years' period of limitation) shall be applied.

XII

BÉRCESI, ZOLTÁN—HARCI-KOVÁCS, KOLOS

ENGAGEMENT-TYPE CONTRACTS

1. Engagement-Type Contracts in General

1. *The system of engagement-type contracts*. The Civil Code Book Six Chapter III Title XVI defines the engagement-type contracts as a separate group type. The classic personal service contract is considered the subtype of the type group, the rules of which should be appropriately applied on a subsidiary basis to the specific separate engagement subtypes. The consignment, the agency, the shipping and the fiduciary asset management contract types are all specific (sub)types based on the principles of the personal service contract.

2. *Common features, containment issues of engagement type contracts*. The subject of such contracts is any activity benefiting other persons, which is specified in the diligent attendance of the duties undertaken by the agent. The distinction between the engagement-type contracts and the contracts for professional services is a question resulting in quintessential legal effects among the *facere*-type contracts. The basis of the distinction is the target of the service: contracts for professional services aims to produce a definite result (*obligation of result*) or a product (creation) achievable with work, while the goal of the engagement-type contract is the diligent fulfilment of the tasks specified by the principal, regardless of the results targeted (*obligation of diligence*).

2. Personal Service Contract

1. *The concept and subject of personal service contract*. Under a personal service contract, the agent undertakes to carry out the assignment the principal has entrusted to him, and the principal undertakes to pay the remuneration contracted [Section 6:272 on the Civil Code] Therefore, the parties agree on the fulfilment of task(s) specified by the principal. The agent to fulfil the service can resort to other's involvement, unless the nature of the service, statutory provision or the parties to this contract agree on his personal proceedings.

The activities subject of the assignment can be standardized in two directions: so-called non-legal acts (e.g. educational activities) can be distinguished from so-called legal acts (typically making a legal statement, concluding a contract). In the latter case if a contract or another legal statement is required for carrying out the assignment, the contract shall function as a power of attorney as well. [Section 6:274 on the Civil Code]

2. *The legal status of the parties*. The principal's right to give instructions. The agent according to the personal service contract proceeds in the interest and benefit of the principal. The agent shall carry out the assignment following the instructions of the principal. The agent may disobey the principal's instruction if it is essential for the principal's interest, and the principal cannot be notified in advance. In such a case the principal shall be notified without delay, the failure of which shall trigger a claim for damages from the principal. [Section 6:273 (2) on the Civil Code]

If the principal gives unreasonable or impracticable instructions, the agent shall be obliged to warn him thereof. If the principal insists on his instruction in spite of warning, the agent shall be entitled to withdraw from or to terminate the contract or may carry out the assignment according to the principal's instructions, at the principal's risk. The agent shall refuse to comply with such instruction if compliance would constitute an infringement of the law or any administrative decision, or it would jeopardize the safety or property of others. [Section 6:273 (3) on the Civil Code]

3. *Remuneration, costs*. The personal service contract in principal is a pecuniary type contract, therefore the agent is entitled to remuneration for carrying out the assignment. The law interprets gratuitous service contracts, where the provisions of personal service contracts shall apply to contracts where the agent

agrees to provide services without any compensation. [Section 6:280 on the Civil Code]

Since the assignment serves the interests of the principal, it is evident that the costs occurring by carrying out the assignment shall be the principal's liability. The parties can freely agree on the methods of reimbursement, in the absence of it, however, the agent is usually required to advance the costs.

4. *Agent's statutory lien*. In consequence of the assignment the principal's properties that come into the possession of the agent have peculiar assurance functions. The agent shall be legally entitled to statutory lien on the property in order to secure his claims for expenses and remuneration. [Section 6:277 on the Civil Code]

5. *The termination of the personal service contract*. The common rules of termination of a contract are the guiding principles of the termination of the personal service contract. Special rule types are laid down by the law in case of the extraordinary (immediate) termination of the personal service contract, as follows:

- either party shall be entitled to terminate the contract
- in the event of termination by the principal, the principal shall pay compensation to the agent for damages resulting from the termination, unless the notice is given on account of the agent's non-performance
- if the agent terminates the contract at an unsuitable time, he shall pay compensation to the principal for damages resulting from the termination, unless the notice is given on account of the principal's non-performance. [Section 6:278 on the Civil Code]

3. Consignment Contract

1. *The general traits of consignment contracts*. The consignment contract is ruled in the Civil Code among the engagement-type contracts. Its significance is that instead of the actual or later owner of the good, someone else—the consignment agent—conclude the sales. The consignment agent undertakes to conclude a sales contract for a movable property in his own name -not as a representative- and receives commission for his activity. It holds economic importance for security consignments of consignment stores and investment service providers.

2. *The concept of consignment contract*. Under a consignment contract the consignment agent undertakes to conclude a sales contract for a movable property in his own name, on the principal's behalf, and the principal undertakes to pay the commission agreed upon.

3. *The subject of the consignment contract*. The subject of the consignment contract shall be only movable property. Accord to the rules of the Civil Code A consignment contract that requires the consignment agent to acquire ownership of a real estate property shall be null and void. [Section 6:281 (3) on the Civil Code] Although the consignment contract for sales is the most common form of the legal consignment relationship, the Civil Code extend the rules to those legal relations, in which the consignment agent is undertakes other (not sales) contractual obligations.

4. *Protection against the consignment agent's creditors*. Important rule on the civil Code protecting the principal's interests, is that consignment agent's creditors cannot impose demands on the goods, rights or claims acquired and available for the consignment agent based on the established consignment contract.

5. *Limit pricing*. The nature of the consignment contract is that the economic goal desired to achieve by the principal—e.g. sales or acquisition of a good—depends largely on the expertise negotiating and client obtaining abilities of the consignment agent. Since the principal is not himself involved in negotiating and bargaining, it is in his best interest to limit the budget in which the consignment agent can act. For the creation of the budget serves the so-called limit pricing, so the price which, as a rule, the consignment agent cannot in case of acquisition consignment exceed, or in case of a sales consignment below this price cannot conclude a contract.

6. *Legal status of the consignment agent*. Given the status of the consignment agent, it can be concluded that the agent is obliged to:

- conclude a contract in his own name, on the principal's instructions, with a third person,
- fulfil obligations that are undertaken against third person in the contract,

- the sales contract concluded under a consignment contract shall bind the consignment agent to consign the good bought to the principal,
- the consignment agent shall be responsible to the principal for the performance of all obligations that are undertaken by his contracting partner in the contract (del credere liability).

7. *Consignment commission*. The consignment agent shall be entitled to commission. This commission is applicable only if the sales contract has been concluded, or if the contract has not been concluded due to reasons within the principal's control.

8. *Right to accession*. The commission agent may himself conclude a sales contract with the principal, if the market value of the thing can be clearly determined relying on publicly accessible information. In this case the consignment agent shall claim the original commission, because based on the Civil Code, the consignment agent's claim for commission shall not be affected if the sales contract with the principal is concluded by the consignment agent himself.

4. Agency Contracts

1. *General rules of the agency contracts*. The Civil Code with rules regarding the agency contracts responds to those engagement-type contracts, in which the assignee's (in this case the agent) obligation as a main rule covers not the concluding of a contract on behalf of the principal, but preparation and facilitation of the contract.

2. *Obligation to provide information*. The Civil Code enforces the agent to notify the principal if he is engaged in providing agency services to a third person, the agent's infringement of this obligation in itself is a breach of contract.

3. *Agents' fees*. The fee shall be payable at the time the mediated contract is concluded, the fee shall be payable to the agent also if the parties conclude the contract after the termination of the agency contract [Section 6:291 (1)-(2) on the Civil Code].

4. *Long-term agency contracts*. Under an agency contract the agent undertakes to enter into a long-term relationship and to negotiate—acting independently—contracts for the principal to be concluded with third parties, and to conclude such contract in the principal's name, and the principal undertakes to pay the fee agreed upon [Section 6:293 (1) on the Civil Code].

5. *Principal's obligations*. The principal shall, at his own expense, provide assistance and supply information to the agent to the extent necessary to carry out his assignment. According to the special *clausula rebus sic stantibus* rule the Civil Code disposes, that the principal shall notify the agent without delay if the quantity for which the contract can be or intended to be concluded is significantly less than what the agent has expected.

6. *Termination of contract*. Either party shall be entitled to terminate a contract for an indefinite period by notice with effect to the last day of the calendar month. The Civil Code regulates differentiated the termination period with regards to the permanency based on the time of the relation between the parties. The termination period is:

- one month during the first year of the contract
- two months during the second year,
- three months during the third and subsequent years of the contract [Section 6:297 (1)on the Civil Code].

7. *Indemnification of the agent*. As a result of the activity of the agent during the term of the contract, the principal may conclude a contract with new clients after the termination of the legal relationship and thus, in case of termination of the contract, the principal becomes economically more advantageous than the agent. The Civil Code allows -in order to maintain the economic balance of the contract- that the agent to claim, within a one year limitation period after the termination, an amount of indemnification not exceeding one year's average commission the agent had received during the last five years before the contract was terminated, or if the agency contract had existed for less than five years, the average calculated for one year from the sum received during the life of the contract.

5. Shipping Contracts

1. *The concept and subject of consignment contract*. Under a shipping contract the forwarding agent undertakes to conclude contracts and to make legal statements relating to shipments in his own name and on the principal's behalf, and the principal undertakes to pay the fee agreed upon.

Shipping is a double-natured legal transaction. In the aspect of legal their legal relationship, the principal and the forwarding agent establish a commission-type (diligence) obligation, the construction of which is based on consignment. However, the basic content element is the (principal) service agreement intent to establish a legal relationship of enterprise-type of transportation. The mixed nature of the shipping contract is revealed by The Civil Code "Application of the provisions relating to consignment and carriage contracts", according to which unless otherwise provided for by the Civil Code, the regulations on consignment contracts shall apply to the relationship of the forwarding agent and the principal, and provisions governing contracts of carriage shall also apply to the obligation to provide information relating to the consignment, to the handling, protection and transport of consignments, to the forwarding agent's lien rights, and to the period of limitation on claims arising out of or in connection with contracts of carriage.

2. *The rule types concerning the legal status of the parties*. Enforcement of claims against the collaborators. The forwarding agent shall enforce the principal's claims against the carrier and other contractors hired by the forwarding agent, if so instructed by the principal, at the expense and risk of the principal. The forwarding agent shall be entitled to perform carriage himself instead of contracting third parties. [Section 6:304 on the Civil Code]

3. *Specific liability rules of the forwarding agent*. The forwarding agent's liability is mainly the general rule of responsibility of breaching contract. The provisions relating to carrier's liability shall also apply to the liability of a forwarding agent if: a./ he had the consignment forwarded together with the goods of others, on the same means of transport, and the damage was caused for that reason; b./ the consignment in his possession is lost or damaged. [Section 6:307 on the Civil Code]

4. *Specific liability rules of the principal*. The principal shall be liable for any damage resulting from the instruction, insufficient packaging and/or labeling of the consignment, or from any discrepancies in the data, documents and information supplied by the principal.

5. *Statute of limitations*. The period of limitation for claims arising out of or in connection with shipping contracts shall be one year, except for damages caused deliberately or as a result of gross negligence. [Section 6:306 on the Civil Code]

6. *Commission*. The forwarding agent shall be entitled to any freightage discount granted subsequently and to the referral fees (commission) paid by carriers for the consignments delivered. [Section 6:305 on the Civil Code]

6. Fiduciary Asset Management Contracts

1. *General features of fiduciary asset management contracts*. The significance of fiduciary asset management contracts. The economic justification of the contract is that there are life situations when for the asset owner it is unprofitable or legally not permitted to maintain the possessor nature, therefore, the property or a part thereof is released to an adequately expert asset manager. The fiduciary asset management contract regarding the purpose is equivalent with the Anglo-Saxon trust legal concept.

2. *Concept*. Under a fiduciary asset management contract, the fiduciary undertakes to manage the assets, rights and receivables entrusted to him by the principal (herein after referred to as „assets managed") in his one name and on the beneficiary's behalf, and the principal undertakes to pay the fee agreed upon [Section 6:310 on the Civil Code].

3. *Subjects of the fiduciary asset management*. The right to determine the beneficiary and the conditions for the commencement and termination of beneficiary entitlements lies with the principal. If the contract contains an entitlement for the fiduciary to designate the person of the beneficiary, the fiduciary shall also be entitled to specify the share to be allotted to that beneficiary. Designating the fiduciary as the sole beneficiary shall be null and void.

The beneficiary under the contract may require the fiduciary to release the assets managed and its profits. Creditors of the beneficiary shall be entitled to lay claim to the assets of the beneficiary from the point in time when said assets and their proceeds are to be released to the beneficiary

Fiduciary can be a natural person and a legal person as well. The principal and the beneficiary shall have the right to check the fiduciary's activities relating to asset management. The principal and the beneficiary may not give instructions to the fiduciary. The fiduciary shall have the right of disposition over the managed assets according to the conditions and within the limits set out in the contract. The fiduciary shall keep confidential all facts, data and information about which he gained knowledge in the course of or in connection with carrying out his fiduciary responsibilities. At the request of the principal or the beneficiary the fiduciary shall be required to provide information on the managed assets. As a main rule the fiduciary shall bear responsibility for performance of the obligations undertaken towards third persons with the assets entrusted to him. The assets managed shall not be mixed in any way with the fiduciary's own assets or with other assets he manages, and the fiduciary shall keep separate records of such assets. The fiduciary shall be entitled to charge his remuneration and justified expenses, along with other claims arising out of or in connection with asset management directly from the managed assets.

4. *Termination of fiduciary asset management*. Fiduciary asset management shall terminate if:

- there are no assets left to manage,
- the fiduciary resigns, after three months following the resignation,
- there is no fiduciary managing the assets for a period of over three months, at the time of termination of the fiduciary mandate,
- the principal was the sole beneficiary, at the time of his death,
- for indefinite duration, or longer than 50 years duration fiduciary asset management relation ceases to exist after 50 years.

5. *Settlement obligation*. If fiduciary asset management is terminated, the fiduciary shall remain subject to the obligation of settlement and to provide information relating to the managed assets as if fiduciary asset management still existed.

6. *Allotment of assets managed*. The fiduciary, if his mandate is terminated, shall release the managed assets to an additional or a replacement fiduciary appointed by the principal, or, failing this, to the principal.

XIII

BENKE, JÓZSEF

LICENSING CONTRACTS

1. Common Peculiarities and Rules of Licensing Contracts

1. Within licensing contracts, the Civil Code regulates *four types of contract*, three of them are for consideration, and one of them is gratuitous: *lease*, *residential lease*, and *leasehold* contracts are *for consideration*, and the *lending* contract is *gratuitous*.

2. Licensing contracts establish *typically permanent* (i.e. *long lasting*) *legal relationships*, the object of which is *conveying the temporary use of an own or another's thing*. This kind of service usually *prerequisites* the *transfer of possession*, and in the case of *leasehold*, there is a *surplus element*, i.e. the lessee is entitled to *utilise* the thing, i.e. to exploit it by collecting the proceeds and advantages thereof.

3. The *main service* of these contracts is the *temporary conveyance of the right to use of a thing*. By nature, this service is *irreversible*. Irreversibility means that *in integrum restitution is impossible* because of *physical* (natural) or *legal grounds*. The *giving back* or the *return* of the thing *does not shape* an *in integrum restitution* in a legal sense. Irreversibility also has legal consequences with respect to the rules of:

- *warranty* and other *consequences of lack of conformity* [Section 6:178. §);
- contracts can be *terminated only for the future*, there is *no right of withdrawal* [Section 6:140 § 1];
- since in integrum restitution is impossible, in case of *invalidity*, the rules of *payment for the monetary value for sui generis unjust enrichment* shall apply (see Section 6:113 § 1].

4. *The Right of Removal (ius tollendi) and Retaining (ius retentionis), and the Statutory Lien*. In case of licensing contracts, especially in leases, residential leases, and leaseholds, it is a *common and usually phenomenon* that by performing the main service, the *possession of the lessor's asset is transferred into the possession of the lessee*. It is also a typical circumstance that the *lessee's own things are taken into the immovable object* (be it a *house*, a *flat*, an *office*, or another *building* or *construction*) of the licensing contract owned or utilised by the lessor. With respect to the lessee's things, *lessee is entitled to the right of removal*, *lessor is entitled to the right of retaining* and to *statutory lien*:

- On the one hand, it is then followed by that the *lessee* is *entitled to remove* his/her *own thing taken into or combined with the rented building* at the time of *termination of contract*.
- Parallel to this, and on the other hand, the *lessor* of a real estate property shall be *entitled to statutory lien* on the lessee's property *found within the rental property for the value of unpaid rent and any additional costs*. According to this, the lessor is entitled to retain the lessee's properties for the satisfaction of his/her claims (fee and costs). If the lessee *does not perform voluntarily* with respect to the *retaining*, the lessor can satisfy his/her demands by using the lessee's things as pledges.

5. Another basic element is that these agreements *necessitate a relationship of trust and confidence with a specific individual* since the object thereof is *transferring temporarily an own thing for another*. As consequence emerges that the lessee is entitled to *sub-lease or assign the use of the leased thing to third parties subject to the lessor's permission and with a strict liability*

6. The indirect object of licensing contracts, i.e. conveying the temporary conveyance of the use of a thing (or the exercise of a right) is always an *individual* and sometimes a *unique service*. It follows that:

- the *lessor*, if the rented object was *unintentionally perished*, *is not obliged to give a new one*;
- and the *devastation of the thing* makes the contract *terminated*.

7. With respect to the fact that licensing contracts usually are *long-lasting relationships*, it is an important phenomenon that *the value of the rented object may significantly change*. This changing can be:

- either a *decrease* or an *increase*;
- either *considerable* or *unremarkable*;
- *the changing of value can be caused*:

  - by facts belonging to the *lessor's* sphere,
  - by facts belonging to the *lessee's* sphere,
  - by facts belonging to *both party's* sphere,
  - by facts belonging to a *third person's* sphere,
  - by *natural events*.
- the *parties' conduct* causing the changing in the value of the rented thing:
  - may *correspond to the Principle of Expectability* or may *not meet it*;
  - may be a *breach of contract*, or on the *contrary*;
  - may be *lawful* or *otherwise unlawful*.

If the value of the rented thing has changed, parties fall into a *legal relationship for settlement*. The following issues *do not belong to the objects of settlement*:

- the costs emerging by the performance of obligation of *value saving investments*, and
- the *natural depreciation* of the thing caused by *conform use*.

According to this, the following items *do belong to the scope of settlement*:

- the costs of *non-compulsory, value adding investments*,
- itself the *increase of the value*,
- the *decrease of value* caused by the *non-conform use* of the thing.

8. The validity of *lease contracts of things* and *gratuitous lending contracts* has *no formality requirements*: these contracts may be concluded either *orally* or *in writing* or *by conduct*. *Written form is indispensable* for the validity of *residential leases* and *leaseholds*, moreover, an *authentic instrument* or a *private document representing conclusive evidence* is necessitated for the validity of *leaseholds of arable lands*.

9. In case of every licensing contracts, the Civil Code gives the right of *unilateral termination* of the contract *for the future*, i.e. with an *ex nunc effect*. This right of unilateral termination *ex nunc* is twofold:

- it can be, on the one hand, a *freedom of the parties*, this is called *termination by notice*; in the case of *fixed-term* contracts, such freedom of termination is *very limited*, but in case of contracts of *indeterminate duration*, freedom of termination by notice is *almost unlimited*;
- in can be, on the other hand, a *private law sanction based on a substantial breach of contract*, this is called *immediate termination* (termination *without notice*), which is *irrespective of the contract's duration*.

Termination is an *assigned legal statement*, which *becomes effective* according to the rules in Sections 6:5 § 1–4 (e.g. a *distance* legal statement becomes effective when *delivered to the addressee*). An *effective termination statement ceases the contractual relationship without the consent of the addressee* since it is based on a right of making a *unilateral* statement for the termination with *ex nunc* effect [Section 6:213 § 1].

2. Lease Contracts

1. The *content of the legal relationship* (i.e. the *rights and obligations* of the parties) can be summarised as follows. At first place, the *lessee is entitled to*:

- *use* the thing *for its intended purpose* and *in accordance with the contract*;
- *sub-lease* or *assign the use* of the leased thing to third parties subject to the lessor's permission:
  - if *with permission*, the lessee is *liable for the conduct of the sub-lessee and the user as for his own conduct*;
  - if *without permission*, the lessee is *liable for damages that would not otherwise have occurred*.
- *free terminate* the contract if the leased thing is *designed for human habitation*, and it is in a condition representing a *potential risk to health*; the lessee may terminate *even if he/she had or ought ot have knowledge about this fact at the time of the contract's conclusion*;
- *remove* (*ius tollendi*) his/her separable investments that has been added to the thing at his own expense without causing any damage to the thing;
- *protest against the extent of the lessor's statutory lien*; in this case, the lessor shall enforce his lien by court action within 8 days, and, by failing this term, the lien ceases;
- *retain* (*ius retentionis*) the thing *without using it* until his/her *claims against the lessor* arising from the lease *are settled.*

2. The *lessee is obliged to*:
- *pay the lease charge*:
  - *monthly, in advance*;
  - the charge usually is *money*, but it can be *any valuable service* as well;
  - *its measure* is regularly *subject to the parties' agreement*;
  - if *market conditions significantly change*, and it *harms the principle of proportionality* between the values of charge and use, parties are entitled to request to *amend* the contract, and, if it is *unsuccessful*, the contract can be *contested*;
  - if *lease charges' or other costs' payment failed*, the lessor *first issues a written demand* for remittance of overdue payments *within a reasonable period of time* and *notifies* the lessee of the *consequence of termination*, and if the lessee *again fails* to remit payment within this period, the lessor is entitled to *immediate termination*; *without termination*, the lessee *may further use*;
- *accept* the rented thing;
- to pay a *use fee for the use without title* if *continues to use* the thing *after the termination* of the contract;
- *in integrum restitution* if altering the rented thing without legal entitlement;
- *bear the minor expenses required for the rented thing's maintenance*; if *fails* to do so, the *right of termination is granted* for the lessor (see above);
- *prevent and mitigate damages*, within which is obliged to *notify the lessor* in the event of *imminent danger* to which the thing is exposed or if *any work for which the lessor is responsible is required*; furthermore, is obliged to *permit to carry out these works*;
- *permit any potential buyers* of the rented thing *to inspect* it *without causing any unnecessary disturbance* to the lessee and, prior to the termination of the lease, to *permit any potential future lessees to inspect* it at an *appropriate time* and in an *appropriate manner*;
- *return, leave, and vacate* the thing to the lessor *at the time of termination* of the lease.

3. The *lessor is entitled to*:
- the *lease charges*;
- *inspect the use* without causing any *unnecessary disturbance* to the lessee;
- *terminate* the contract of lease if:
  - the lessee *fails to stop inappropriate or non-contractual use of the thing despite being asked*;
  - the *measure of unlawfulness of this kind of misuse is significant*, termination can be exercised *immediately without any call*;
  - the lessee caused a *serious harm* in the thing, which endangers even the appropriate use.
- *carry out the work for which he/she is responsible* and *prevent damages*;
- the lessor of a *real estate property* shall be entitled to *statutory lien on the lessee's property found within the rental property for the value of unpaid charges and costs*; so long as this lien exists, the lessor is entitled to *block the removal* of hypothecated assets; lessor enjoys a *priority in the ranking of the liens* on the thing.

4. The *lessor is obliged to*:
- *convey the temporal use* of his/her own thing or another's *thing*;
- *warranty*: the lessor shall guarantee that the thing leased *is and will be suitable for use as contracted for the entire duration of the lease*, and that it is *otherwise in conformity with the provisions of the contract*; the lessee is *entitled to terminate the contract instead of withdrawing* it, and is *not entitled to demand replacement*;
- *warranty of title*: the lessor shall guarantee that *no third person has any right to the leased thing that can prevent or restrain the use* of the thing; lessee is *entitled to terminate the contract instead of withdrawing it*;
- *bear every other expense* and the *public duties* in connection with the thing.

5. *Cease of fixed-term* lease:
- lease ceases after the *expiry of the fixed term* of lease; however, if the lessee *continues to use* the thing *after the expiry of the lease term*, and the lessor *does not protest* against it *within 15 days*, the lease *transforms into a lease for an indefinite period of time;*
- lease terminates by the *devastation of the thing* leased, the *cause* of which is *irrelevant*;
- *preferential termination*: *fixed-term* leases can also be *terminated* in specific cases as follows:

- the *heirs of the lessee* are entitled to terminate fixed-term lease *by giving notice within 30 days;*
- the *new owner of the leased thing* is entitled to terminate the fixed-term lease if he/she *was misled* by the lessee regarding the *existence or important conditions* of the lease;
- *otherwise*, *fixed-term lease contracts cannot be terminated* (cf. immediate termination).

6. *Cease of* lease of *indeterminate duration*:

– by the *devastation* of the thing, the *cause* of which is *irrelevant*;
– *either party* is entitled to terminate such lease contracts according to the followings (this is called *ordinary* termination otherwise *termination by notice*):
  - *any time* in the case of *daily lease from one day to another*;
  - in *weekly* lease, *on the first day of the week* to take effect *at the end of that week*;
  - in *monthly* lease, *at the latest by the 15th day of the month* to take effect *at the end of that month*;
  - in the case of *longer* lease terms*, at the latest by the thirtieth day preceding the end of the lease term.*

7. *Basic specific rules of residential lease contracts*:

– *security deposit*: *by agreement*, the tenant is obliged to give a security deposit t*o the landlord to assure performance of his/her obligations*, this sum *cannot exceed the monthly rent three times over*;
– *compensation for the right of removal*: the tenant may not exercise his/her right of removal if the *landlord offers appropriate compensation* for the right of removal, and *this does not harm the tenant's relevant lawful interests*;
– *special warranty right of termination*: the landlord shall *notify the tenant in writing* of the *planned works* and of the *expected duration* thereof *in due time before the beginning of works*; the tenant has the right to *terminate* the lease *before the last day of the month following the time of receipt of the notice;*
– *termination by notice*: *either party* is entitled to terminate the lease of *indeterminate duration* at the latest by the *15th day of the month* to take effect *at the end of the next month*;
– the reason for an *immediate termination* (without notice): if the tenant is engaged in any *flagrant misconduct against the neighbours in contrary to the requirements of co-existence*;
– *special obligations of the landlord* based on the *Act LXXVIII of 1993 upon residential leases*:
  - *conveying* the flat or house *together with the apartment furnishing* appropriate to *comfort level*;
  - *maintaining* the *building* together with its *equipment*;
– *special rights of the tenant* according to the Residential Leases Act (see above):
  - use the *common places* of the building with *no harm of other tenants' interests*;
  - *swap the lease right in the house* with the *permission of the landlord*;
– peculiar causes of cease:
  - the tenant *swaps the object* of residential lease;
  - the tenant *was expelled* from Hungary;
  - the lease was *terminated by court or by authority decision*.

3. Leasehold Contracts

1. *Leasehold* contract is a *special type of lease* contract. Whilst *lease* contract are for grounding the lessee's entitlement of *using a thing or exercising a right*, *leasehold* contracts establish, beyond these, the right to *utilise or exploit a thing or a right* as well. This major difference in the contents of the service characterise the *diversity in the regulation*, too. However, *unless otherwise* provided for, the *regulations governing lease* contract *shall apply to leasehold* contracts *mutatis mutandis*; rules of lease shall apply mainly with respect to the following questions:

– *concerning every kind of leaseholds*: bearing the *costs and public dues*; *statutory lien*; the *devastation of the object* of leasehold; parties' *rights and obligations by termination* of contract;
– concerning every kind of leaseholds *except agricultural leaseholds*: *paying the rent*; *termination* of leasehold; *returning* the thing leased; *termination by notice*.

2. The system of regulation in relation to *agricultural leasehold and leasehold of arable lands* can be summarised as follows:

- The *major part* of rules are *mandatory*:
  - the advantages of *partial invalidity* based on the Civil Code *cannot apply*, therefore, the *whole* contract becomes invalid, and *in toto collapses* as void and null, if *only a part of it* is invalid;
  - *Public Prosecutors* also have the *right to bring an action* for *declaring the contract's invalidity*.
- *Special laws* to apply in this field of law are as follows:
  - Act CXXII of 2013 on *Transactions in Agricultural and Forestry Land* (abbrev. in Hung. as *Fft.*);
  - Act CCXII of 2013 on the *Transitional Provisions in Relation to the Fft.* (Hung. abbrev.: *Ffté.*);
  - Act CXXIX of 2007 on the *Protection of Arable Lands* (Hung. abbrev.: *Tvt.*);
  - Act CXCVI of 2011 on *National Wealth* (Hung. abbrev. *Nvt.*);
  - Act LXXXVII of 2010 on the *National Land Fund* (Hung. abbrev.: *Nfat.*);
  - Act XXXVII of 2009 on the *Conservation and Management of Forests* (Hung. abbrev.: *Evt.*);
  - Act XLIX of 1994 on the *Associations of Forest Holders* (Hung. abbrev. *Ebt.*);
  - and Government Decree 356/2007 (23 Dec.) on the *Regulation of Land-Use Register*.

3. The *contents* of leasehold contracts:

- Under a leasehold contract, the *lessee* is entitled to *temporarily use or exercise* an *economically viable thing* or *such right*, and to *utilise* these by *collecting the proceeds thereof*, and, in return, is obliged to pay an *appropriate rent*.
- The *duration* of the contracts shall be examined *by sectors*:
  - leasehold contracts shall be concluded for *a fixed term of not less than one financial year* and *not more than 20 years* (see Fft. Section 44 § 1];
  - leasehold contracts may be concluded for *forest land and land designated for afforestation* for a *maximum duration of 10 years following the end of the growing period* (*maturity for felling*) (Fft. Section 44 § 2 and cf. also Evt. Section 20);
  - in case of a *leasehold of a right to hunt*, the duration is based on the *wildlife management agenda of the hunting ground* (Vtv. Section 17 § 3];
  - in case of a *leasehold of a right to fishery*, the duration is *at least 5 years but not exceeding 15 years*.
- The *rent* usually is *money* but is also can be performed *totally or partially in kind*:
  - In the so-called *share cropping*, rent is in kind by defining it as a *certain percentage*—usually 50%—of the actual produce of the land leased (see Ffté. Section 66);
  - In the so-called *share farming* (cf. Ffté. Section 67), parties make a consent about *what and how to produce* on the land leased, *how to share proceeds and risks,* how to *bear the risks of perish by vis maior*, and how they *share the use of agricultural equipment*.
- The *gratuitous* forms thereof: *irregular lending* and *gratuitous land-use for the favour of another*.
- The *right to utilise (exploit) is the essential element* of the leasehold contract:
  - *Exploitation* is the *acquisition* of ownership of those *produces, progenies, proceedings,* and other *advantages* reached during a *prudent management* of the thing leased, which were *not excluded* from the acquisition by the parties' agreement.
  - The lessee has the *right to acquire the ownership* of these advantages *by separation thereof*; if the lessee *does not possess* the thing from which the advantages originate, shall become owner *by taking possession* thereof (cf. Section 5:50. §).
- *Prudent management* and *cultivation of the land according to its designated purpose:* These are the major obligations of the lessee, the actual content of which are defined by sectoral legislation, and the breach of which result a substantial breach of the contract opening the lessor's right of immediate termination [Section 6:354 § 2]. The lessee of an *arable land* shall *cultivate the land according to its designated purpose* and shall *preserve the fertility of the land* in the course of doing so.
- *Sub-leasehold of land is void* with *one sole exception* regulated by Ffté. Section 64.
- The objects of leasehold are *economically viable immovables, economically viable* and *non-consumable movables*, and *economically viable, transferable, marketable rights* (e.g. hunt, fishery, spectrum-use and land-use rights), as well as *future things and rights* (which come into being subsequent to the conclusion

of the lease contract thereof).

- The *rent*, i.e. *leasehold payments* are made *subsequent to the period to which it pertains*. For years, in which the *crop yield remains below two-thirds of the average due to natural disaster or some other extraordinary event*, the lessee is entitled to *request a reduction or consolidation* of lease payments. The *lessee must notify* the lessor of such request *prior to having the crop in question harvested*. *Reduced or cancelled* lease payments *may not be demanded subsequently*.
- In the position of the *lessor* may stand a person, who is *entitled to disposition* for the thing leased: such person is e.g. the *owner* or *usufructuary* of the thing.
- In the position of the *lessee* may stand either a natural or a legal person, however, with numerous restrictions by law:
  - *farmers* and *agricultural producer organizations* subject to the Fft. Section 40;
  - *association of forest holders, public education institution of the agricultural sector, institution of higher education of the agricultural sector, listed churches* etc. (Fft. Section 40);
- The *right of first refusal for tenancy*: If the owner (here: *lessor*) *enters into a contract in breach of this right*, such contract shall be *relatively ineffective with respect to* the holder of the right (here: *lessee*). The lessee may enforce the claim arising from the infringement of this right *within 30 days after getting knowledge* of such contract, but *to a maximum of 3 years after concluding* such contract (this is the *general law* in Civil Code Section 6:223 with some sectoral exceptions);
- *Bearing costs* and *public dues:* the *lessee* bears *all applicable public dues* on the thing as well as the *costs of renovation and repairs* being *necessary for the thing's maintenance*, whereas the costs of *extraordinary* renovations and repairs are borne by the *lessor*.
- *Statutory lien*: the *lessor* is entitled to statutory lien *on the proceeds* of the thing *and/or on the lessee's property found in the leasehold area up to the extent of lease payments*.
- *Termination*: every type of termination is *valid in writings* since being in writing, as a form, is the *validity requirement* either of the *leasehold contract* [Section 6:6).
  - *Termination by notice*: *agricultural* leasehold contracts concluded for an *indefinite duration* can be terminated *by the end of the fiscal year by giving six months' notice*. To the *notice period* of leasehold contracts *for other things or rights*, the provisions on the termination of *lease* shall apply.
  - *Immediate termination*: the lessor is entitled to immediate termination if the lessee:
    - *fails to cultivate* the leased land *despite of being asked to do so*, or
    - *is engaged in conduct that seriously jeopardizes the overall success of production, the fertility of the land, the livestock, or equipment*;
    - despite of being asked *in writings* to do so, *fails to perform the obligation of exploitation*;
    - *without the lessor's permission*, made *sub-leasehold*, *changed the goal* of exploitation or made a *land conversion*.
  - *Preferential immediate termination*: if the *lessee's health deteriorates* to such a degree, or if *permanent changes occur in the living conditions*, which *impede the ability to perform the obligations* arising from the leasehold.
- *Obligation of return:* If an *agricultural* leasehold is terminated, the *arable land* and *other leased things* shall be returned *in a condition that allows immediate and proper continuance of production*.

4. Gratuitous Lending Contract

1. Under a lending contract the *lender* undertakes to *make available for use*, *for a limited period of time* and *not for direct or indirect economic or commercial advantage*, a *specific thing*, and the *borrower* shall *accept the thing*.

2. The *lender is entitled to refuse performance* of the contract if:

- *proves* that the performance *can no longer be expected due to a significant change*, which happened *subsequent to the conclusion* of the contact, *in the circumstances either of the parties* or *in their relationship*;
- or such circumstances emerged after the conclusion of the contract, on the ground of which termination could be applied.

3. *Rights and obligations of the borrower*:

- The borrower is *entitled to use the thing properly and in accordance with the contract*.
- The borrower bears (liable to cover) the *costs of the thing's maintenance* and is entitled to *compensation for other related expenses* in accordance with the regulations on *negotiorum gestio*.
- The borrower is entitled *to offer to return the thing at any time*.
- The borrower is entitled to make available the thing for use to a third person with the lender's permission; if he/she did so
  - *with permission*, the borrower *is liable for the conduct of the user as if it were his own*;
  - *without permission*, the borrower *is liable for damages that otherwise would not have occurred.*

4. *Rights and obligations of the lender:*

- The ownership of the *thing's interim proceeds* is acquired *by the lender (by separation)*.
- *Termination by notice*: *Both parties* are entitled to terminate the contract of indeterminate duration by giving 15 days' notice.
- If the *borrower offers to return* the thing, the *lender shall not be entitled to refuse to take it back* at any time without good cause.
- *Immediate* termination is the right of the lender, if:
  - the *specified aim* of the lending has become *impossible*;
  - the *borrower damages* the thing, *uses* it in a way *contrary to its purpose or the contract*,
  - the borrower makes the thing available to a third person *without permission*,
  - there is a *risk* that the borrower *will not return the thing in its original state*;
  - the *parties' relationship has become worse* due to the conduct of the *borrower*;
  - the *lender inevitably necessitates the thing* for re*asons unforeseen at the time of the contract's conclusion*.

5. A lending contract is *terminated* when the *thing is returned* or by the *death of the borrower*.

XIV

MOHAI, MÁTÉ

DEPOSIT CONTRACTS

1. General Provisions of the Deposit Contracts

1. *Deposit contract*. Under a deposit contract the depositary shall safeguard personally that the contract pertains, and to return it when the contract is terminated, while the depositor's obligation is to pay the fee. Guarding immovable property—as it is not at risk of loss—may only be subject to supervision against depreciation, which falls under the terms of the personal service contract.

2. *Use of the deposited thing, entrusting it to others, collecting its proceeds, and handling*. The depository shall safeguard and to keep record of the deposited thing separate from his own and from other deposited things. The depositary shall treat the deposited thing if it comes from the nature of the deposited thing. The regulations relating to personal service contracts shall also apply to the treatment of deposited things. The depositary cannot use or make use of the deposited thing and cannot give it to another person or for safekeeping, unless this is necessary in order to protect the depositor from suffering any losses. In case of infringement of this provision the depositary is liable for all damages that otherwise would not have occurred. The depository shall collect the proceeds of the deposited thing if, by its nature, it has any. The depositary shall give account to the depositor regarding the collected proceeds. The depositary can use the proceeds to cover his expenses but shall give the rest to the depositor.

3. *Refusal to receive the thing*. The depositary has the right to refuse to receive a thing if conditions occur under which he could terminate the contract in the case of a fixed-term contract.

4. *Statutory lien*. The depositary is entitled to a statutory lien on the depositor's property that is in his possession in part of the deposit as a security of his claims for fees and expenses.

5. *Termination of the deposit*. The depositor can abrogate the contract whenever he wants to. If the parties agree in the contract, that the depositary shall release the thing to third parties in case of conditions stipulated in the contract or in case of termination of the contract, the depositor can only terminate the contract, if the third party agrees to the termination. If the duration of the contract is indeterminate, the depositary can terminate it by giving fifteen days' notice. If the duration of the contract is fixed, the depositary can only terminate it, if the thing is at risk, or if he safeguards the thing not as part of his profession and circumstances emerge, of which he was unaware at the time he signed the contract, to make further safeguarding of the thing considerably difficult. If the contract is terminated before the fixed duration of the deposit, the depositor shall pay a commensurate proportion of the fee. The depositary shall return the thing at the place where it was safeguarded by him. If the depositor refuses to pick up the thing, the regulations on *negotiorum gestio* shall be applied.

6. *Voluntary deposit*. The provisions of the chapter of the Cc. regarding the general provisions relating to deposit contracts shall be applied accordingly to deposit contracts where the depositor does not shall provide any compensation. The depositary can demand the payment from the depositor for necessary expenses. The depositary is liable according to the principles of non-contractual liability for loss incurred by the depositor resulting from the loss, destruction or damage to the thing.

2. The Collective and the Exceptional Deposit Contract

1. *Collective deposit contract*. If the object of the deposit contract is a replaceable property and if the depositary is entitled to safeguard the replaceable property of different depositors together in the same place, without having to separate them by depositors or to identify them individually, the depositors become co-owners of the replaceable properties of the same type and quality and, when the deposit is terminated, the depositary shall return property of the same type and quality as the property deposited in the proportion due to the depositor in accordance with his share of ownership. The depositary does

not need the consent of the other co-owners to release an amount in proportion to the share of ownership. In case of a collective deposit, the depositary does not need the consent of the depositor to place the securities under the care of investment service providers or clearing houses authorized to provide safe custody services.

2. *Exceptional deposit contract*. If the object deposited is a replaceable property and the depositary has the right to use and to dispose over the object, the depositary acquires ownership of it and is liable to return to the depositor the object of the same type and quality, in the same quantity at the time the deposit contract is terminated. Under the rule above, there are two conditions of the establishment of an exceptional deposit: the subject of the deposit is money or other replaceable things (securities, grain, etc.), and the parties must be implicitly or explicitly agree that the ownership of the deposited thing passes to the depositary, and he is not required to return the same thing, but to return the thing in the same type and quality, in the same quantity (e.g., wheat of the same quality, the same series of securities).

3. *Account-keeping obligation in case of collective and exceptional deposit contract*. If the depositary shall open a deposit account on the depositor's behalf for securities held under collective and exceptional deposit contracts, the regulations on the transfer or charging of dematerialized securities shall be applied to the transfer of these securities.

3. The Hotel Deposit Contract

1. *Hotel deposit contract*. The liability of the hotel covers things put by the guest in a place in the hotel that is designated or usually used for this purpose, or in his room, and to things of guests handed over to an employee of the hotel who seemed to be entitled to receive his things. The liability of the hotel is maximum fifty times the price of the hotel room for one day. Any additional limitation to or exclusion of liability is null and void. The hotel is only liable for securities, cash and other valuables, if the hotel has received the thing for safekeeping or if the hotel has refused to receive the thing for safekeeping. The hotel's liability for these things is unlimited.

2. *The hotel's lien*. The rules about the lessors' lien shall be applied to the hotel's lien as a depositary.

3. *Liability of institutions open to the public*. The rules about the liability of hotels shall be applied to the liability of baths, cafes, restaurants, theatres, and other similar institutions that are open to the public, and slop-rooms, with the following exceptions:

- their liability shall be applied only to the things that are usually taken to these institutions by the visitors;
- if there is a suitable place provided for visitors for the safekeeping of their property, the institution is liable only for damages to things deposited in that place.

XV

BENKE, JÓZSEF

CREDIT AND ACCOUNT CONTRACTS

1. General Part

1. In the title of credit and account agreements, the Civil Code collected those contractual relationships, which are the *prevalent types and forms of financial operations and banking*. The *principles of the regulation* of the nominated contracts of these contractual relationships are as follows:

- nominate contracts' regulation is a *framework* legislation;
- merely the *most common and quotidian types* of contracts *appear* in the Code;
- the regulation of some contracts of the Civil Code of 1959 *under the same nomination* has been *meaningfully modified* (see e.g. loan);
- *complex types* of contracts regulated by the Code of 1959 were *split to more than one new nominate types* concerning the *major functions* of the agreements (see e.g. the former "*bank account contract*" which was divided to *payment account contract* and *payment service contract*);
- some contracts previously regulated by *special laws* or *international standards* (such e.g. as *financial leasing* or *factoring*) *were incorporated* into the Code *among other nominate* contracts;
- the new Civil Code left out some former types of contracts such as the *savings deposit contract*, since the regulation of *deposit account* contracts can *reasonably substitute* its role, because these *do not exclude* the possibility of issuing (savings) *account passbooks*; so far as *money laundry* is concerned some former types were hazardous financial instruments (e.g. the *unnamed deposits for unrestricted bearers*); the *special law* regulating these contracts is the *Law-Decree No. 2 of 1989 on Savings Deposits* (abbrev. In Hung. as *Tbt.*), according to which all savings deposit accounts *must be registered under the holder's name* (cf. Tbt. Section 1 § 2 and Section 18);
- during the codification process, there was an effort to codify the *documentary credit* as well as the *derivatives*; the opinions were, however, *not unanimous*, since international conventions upon the former offer a good legal background thereto, and the regulation of the latter would have broken the framework of the Civil Code.

2. *a)* Concerning the *legal position of the subjects*, *credit and account agreements* can be *classified* as follows:

- in some of them, *any natural person* may stand in *both contractual positions* (e.g. loan);
- in others, *on the one side* of the contract may stand *only a special legal person* such e.g. as a *financial* or a *credit institution* (e.g. account contracts);
- in others again, *according to economic practice but not with respect to a restriction by law*, usually *economic operators* stay *in the both sides* of the contract (e.g. financial leasing);
- at last, there is also professional contracts, on the *both sides* of which can stand *merely financial institutions*, i.e. *credit institutions* or *banks* (e.g. factoring).

b) The new law on *Credit Institutions and Financial Enterprises* (viz. Act CCXXXVII of 2013; Hung. abbrev.: *Hpt.*) define the *notion* and the *form of operation* of *financial institutions* with respect to their *legally appointed market activity* of financial services regulated by Section 3 § 1: which of these services *can be provided* by the actual institution or which *can be provided exclusively* by such a legal person.

According to the Hpt., the *legal notion of the widest extent* is the *financial institution*. *Credit institutions* and *financial enterprises* are recognized as financial institutions (Hpt. Section 7 § 1]. *Credit institution* means a financial institution, whose business inter alia includes t*o take deposits or other repayable funds from the public*, and to *grant credits and loans* (Hpt. Section 8 § 1]. Credit institutions may be *banks* or *specialized credit institutions*, or *credit cooperatives*; the latter one may operate in the form of a *bank*, *specialized credit institution*, *savings and loan, or credit union* (Hpt. Section 8 § 3].

c) The Civil Code nominates the *subjects of the contracts* as follows:

- *creditor* and *debtor*: both by *credit contracts* and *loan* contracts;
- *the party managing the current account* and *the other party*: in *current account* contracts;
- *account keeper* and *account holder*: in *payment account* contracts;
- *agent* and *payer* (and a *payee*): in *payment service* contracts;
- *factor* and *debtor*: in *factoring* contracts;
- *lessor* and *lessee*: in *financial leasing* contracts;
- *deposit holder* and *bank*: in *deposit account* contracts; the *Civil Code itself also defines* the *notion of 'bank'* but *only within the scope* of the Code: *'bank'* shall mean any person authorised *to conduct the business of taking deposits and keeping payment accounts* (cf. Section 8:1 § 1 point 6).

3. *a)* The *notion of 'credit' in the widest sense* is one of the core issues of private law. The *broader* notion of credit means ever*y legal relationship, in which the performance of service and consideration are separated in time*. The *provisions upon loan agreements shall apply* mutatis mutandis in these cases [Section 6:389).

This broader notion of credit is *ubiquitous and quotidian* in *every segment of the modern market economy* since *it is not concentrated only to money lending* because it helps market operators to execute and realise their commercial transactions.

Almost every kind of contracts can be concluded *in a way similarly as credit by separating the settlement timing of service and consideration*. It is common within such contracts, that the *cause of temporary separation* of services *is not a breach of contract* (e.g. a *delay*) *or an early settlement*, but *it is based on the parties' consent*.

As said, according to Section 6:389, *provisions upon loan agreements shall apply* in every contractual relationship (sales, licensing etc.), where *performance of service and consideration are separated in time*, namely

- if *the service provided by one of the parties precedes the money to be provided by the other party*, or
- if *payment of the consideration precedes performance of the main service.*

b) Account contracts can be interpreted as a *credit* as well as a *settlement* relationship: the *proportion of these characters depend on the parties' will and consent or on the duration of contract*. In the case of a *settlement period of longer duration*, during which the *money debts of solely the one party is introduced into the account* (see e.g. the relationships between *universal service providers* and customers thereof), it is obvious that *crediting* and *financing* function of the contract is *more significant* than a mere *accounting* service.

2. Framework Rules of the Contracts Nominated

2.1. Fundamentals of Credit and Loan Contracts

1. This chapter summarises the basic issues of the so-called *credit operation contracts*. The definitions of the Civil Code clearly show that there are *significant differences* between *future loan* contracts and *credit* contracts. A credit agreement is, namely, *much more* than a simple *deferred loan* agreement, since:

- under a credit agreement, the creditor undertakes *to ensure the availability of a specific credit limit*,
- and *to conduct credit operations up to the credit limit*, i.e. to conclude:
  - a *loan agreement*,
  - a *contract of suretyship* or a *guarantee contract* for *grounding security* for the debtor's *other* creditors.

In case of a *simple loan*, the creditor is obliged:

- *to make available a specific sum of money*, whilst *the debtor is not obliged to draw funds from the loan, just as in the case of the credit contracts*;
- *to pay when drawn a specific amount of money, not to conclude a loan agreement for this purpose, like it is in the case of credit agreements*.

2. The regulation of the *Civil Code offers only a legal framework*, which is concentrated around the following three issues: the *conclusion of credit operation contracts*; *ensuring the availability of the credit limit*, and the *termination of contract*. *Basic regulations are common* in the cases of *credit and loan* agreements as follows:

- the debtor is obliged *neither to conclude credit operation contracts nor to draw the funds from the loan*;
- *for ensuring the availability of money*, the *creditor is entitled to a fee*.

3. *Credit relationships* are legal relationships, in which parties intend to conclude *nominate credit operations* such as *loan*, *surety*, and *guarantee*, or *factoring*, and, beyond these, to conduct *other credit operations* such as

discounting of bills or *issuing letters of credit*. Credit relationships are twofold such as:

- in the one group, *creditor and debtor conclude* a novel credit operation contract (loan or factoring) *with each other*;
- in the other group, the *creditor concludes* a credit operation contract *with a third person* (surety or guarantee).

4. The *main service* of a *credit agreement* is *to ensure the availability of a specific credit limit*, which is an *autonomous* service of a *praestare* and *non-facere*. Its *economic essence is to provide financial security* for the debtor. A credit agreement *can fully play its role*, even if it *is limited to the mere ensuring of the credit limit's availability*, i.e. without drawing the loan.

5. The *availability of the credit limit is ensured for consideration* which is a *complex* sum of money called *credit fee* or *premium rate*. This *complex counter service* may *imply many issues* such as *interests, fees* (e.g. valuation fee, audit or inspection fee, or guarantee premium), and commissions (e.g. for ensuring availability), as well as many costs (such as e.g. amount of the administration or servicing costs). The so-called *Annual Percentage Rate of Charge* (abbreviated in Hungarian as "THM") is a *common indicator* used by *every credit market operator mandatorily in the same way*. It *exactly* shows the *total amount*, and the debtor is obliged *to pay back beyond the capital for one year of period*. It was introduced in Hungary *for the protection of deposit holders in 1997*.

6. According to the *speciality of the termination of credit agreements*, it *does not entail the termination of credit operation contracts* (loan, surety, guarantee etc.) *based on the credit agreement* [Section 6:382 § 6). Termination is *an assigned legal statement* i.e. a *unilateral act* intended to have the legal effect of termination, which *becomes effective*, if made between persons who are *present*, *immediately*, but, if between persons *in a distant place*, *when delivered* to the addressee, if *made by implicit conduct*, when *communicated* to the addressee [Section 6:5 §§ 1–3). This kind of termination is, therefore, immediate, which terminates credit contract from the time of its exercise for the future (*ex nunc*).

Limits of the right of termination:

- the termination is *valid* if its *reason is properly indicated* if that right exists for many reasons [Section 6:140 § 2];
- the creditor shall first notify the debtor for providing an *adequate guarantee*.

The following *reasons for termination* are *common* in the case of *every credit operation contract*:

- The *creditor* is entitled to terminate the contract if:
  - any *disadvantageous material changes* took place in the *debtor's circumstances*, and the debtor *fails to provide adequate guarantees* in spite of being requested to do so; the creditor is entitled to terminate *without requesting* such guarantees, if *it is evident that the debtor is unable* to do so (e.g. from the facts of the business or company register that the debtor is under the scope of *bankruptcy* or *liquidation* or *judicial enforcement* process, or that the the *seat or registered office is regularly transferred*;
  - the debtor *misled the creditor*, and this *had an impact on the conclusion of the contract* and its *contents*;
  - the debtor's *fraudulent conduct jeopardizes the performance* of either credit operation contracts.
- The *debtor* is entitled to terminate the contract *at any time*.

7. *a)* Under a *loan contract* the *creditor* undertakes *to make available a specific sum of money*, or *some other fungible property*, and the *debtor* undertakes *to repay that sum to the creditor at a later date with interest*, or *to return to the creditor property of the same type and quality, in the same quantity at a later date* defined in the agreement.

b) Making available a specific amount of money means that *the payment of money is executed by way of*

- *transferring ownership of money* to the creditor, or
- *deposit* to the creditor's payment account, or
- *credit transfer* to the creditor's payment account [Section 6:42).

c) The *interest rate* shall be the *same as the central bank base rate*; if the monetary debt *is to be repaid in a foreign currency*, the interest rate shall be the *same as the base rate of the issuing central bank* or failing this the *money market rate* [Section 6:47. §).

According to *interest freedom*, parties may *freely define the measure of interest even by derogating the Civil Code rules*, however, this freedom has *four specific limits*:

- *gross disparity in the values of services* (*laesio enormis*) leads to the *avoidance* of the contract;
- *usury* makes the contract term *null and void*;

– at the obligor's request, an *excessive interest may be reduced by court* [Section 6:132).

d) The Civil Code has modified the previous regulations on early settlement. According to this, the creditor shall accept performance offered before the delivery date, if:

– that *does not harm relevant lawful interests*,
– and *the debtor covers the extra costs* caused by the early settlement [Section 6:36 § 1].

However, in the case of *early settlement of a monetary debt*, the *creditor shall accept* early settlement of the debt before the due date [Section 6:43). This *law is based upon the assumption* that the *consideration is money payment*. In case of *loan* agreements, *money payment is not a consideration but the service*. Parties can avoid this *conflict of interests that they derogate* by their consent these *non-mandatory regulations*.

In contracts that involve *a consumer and a business*, any *term excluding the early settlement of a monetary debt*, and any *term imposing extra charges on the consumer apart from the costs directly related to early settlement*, shall be *null and void* [Section 6:131). Law acknowledges only *direct costs* as *actual loss* (*damnum emergens*), therefore, the law *does not make possible* to have claim for the *lost gains* (*lucrum cessans*) or the *lost interest*.

e) Drawing the funds from the loan is a *right* of the debtor but *not an obligation*, therefore, the *failure* of it is *not a breach of contract*, thus, if the debtor fails to draw the funds from the loan, the debtor:

– shall *reimburse the creditor for expenses* incurred *in connection with the contract's conclusion* [Section 6:385);
– shall *pay a fee* to the creditor on the loan amount kept available [Section 6:386).

f) The creditor is *entitled to refuse liquidating* the loan, if, due to any *material changes in the debtor's circumstances* or *in the value or enforceability of the collateral*, *performance of the contract can no longer be expected*, and the *debtor fails to provide adequate guarantees* in spite of being requested to do so.

In this case, the contract *remains*, thus, if the *basis of the right of refusal ceased*, the debtor can become *entitled again to get the loan disbursed*.

The Civil Code *erased the parallel right of the creditor to refuse loan disbursement* on the grounds of any *meaningful changes in the creditor's own circumstances*.

g) Special grounds for termination by the creditor in the case of loan contracts:

– the *use of the loan for the purpose* specified in the agreement *becomes impossible*,
– the *debtor uses the loan for a purpose other than the one defined* by the agreement;
– the debtor *impedes the investigation* of *solvency*, or of *adequacy of collateral* or that of the *security*, or the *realisation of the purpose* of the loan;
– the *collateral* provided for the loan *has significantly depreciated* in *value* or in *enforceability*, and the *debtor has not supplemented it* at the request of the creditor; or
– the *debtor delays the payment* and *fails to remedy* when requested.

2.2. Deposit Account Contracts

1. Deposit account contract *is the one of the many bases of banking systems*. The *major functions of banking* are, on the one side of the balance, to *collect deposits*, and, on the other side of the balance, to *relocate the collected deposits as credits by money lending* such as *credit and loan agreements*. One of the *main financial resource* of money lending is based on the *value of deposits*. So far as the *contract's content* is concerned, deposit account *is related to two another nominated contracts* such as *loan agreement* and *irregular* (or exceptional) *deposit*.

2. Under a deposit account contract, the *deposit holder is entitled*:

– *to deposit a specific amount of money to the bank*,
– *to request repayment of the funds* held on the account *before the expiry of the term* specified in contract:
  - by *the lack of the deposit holder's request*, the *bank is not entitled to repay* the funds held on the account *before the expiry of the term*;
  - the *funds not collected upon maturity are converted into a deposit of indeterminate duration*.

3. Under a deposit account contract, the *bank undertakes*:

– to *accept the sum of money offered by the deposit holder,*
– to *repay the same amount at a later date,*
– *together with interests.*
– In the case of *fixed-term contracts*, the bank is obliged to *repay the funds* held on the account *upon*

maturity or *as instructed by deposit holder*.

– In case of deposits for an *unfixed term* the bank is required *to promptly repay the funds* held on the account *as instructed by deposit holder*.

2.3. Current Account Contracts

1. Under a current account contract the *parties assume an obligation to record and settle their enforceable monetary claims arising from a specific relationship in a consolidated account* [Section 6:391).

Current account relationships are *autonomous* legal relationships, however, *in its background, there always stands an also independent financial-economic relationship* which is executed within the frameworks of *another contractual relationship* (this is the so-called *basic contract*) as well. *Current account claims* are subject to the *contents of the basic contract*, therefore, these elements *govern the extent of current account claims* but not contents of the current account contract.

2. *Establishing the balance of current account* is the *central issue* of the contract:

– the *balance of claims and counter claims introduced in the current account shall be established once a year*;
– the party managing the current account *communicates the balance* to the other party *in writing with an itemized list of transactions*;
– the other party is entitled *to contest the balance or the receivables and payables that serve as the basis for computing the balance, in writing*, *within a preclusive period of 30 days* of receipt of the written communication;
– the *individual claims* on the current account *cease to exist and are substituted by the current account balance*:
  - in the *absence of an objection*;
  - *upon the parties' agreement* regarding the items contested; or
  - if the *court has ruled on the contest*.

3. *Legal consequences related to establishing the balance* of current account:

– the parties *are not entitled to dispose over any of their claims* on the current account, as *their right of disposal applies to the current account balance only*;
– the *period of limitation on claims* held on current accounts *shall be suspended* until the balance is established;
– the *balance lapses* according to the *general provisions*;
– only the balance may be subject to judicial enforcement;
– the *guarantees of individual claims* introduced to the current account *can only be covered by the balance*.

2.4. Other Nominate Credit and Account Contracts

1. *Payment Account Contracts*. Under such contract the *account keeper* undertakes *to open a current account for the account holder for handling his financial transactions*, and the *account holder* undertakes *to pay the fee* agreed upon. The *account keeper shall accept* the account holder's *payment orders* and *direct debit orders* if these clearly indicate the *amount* of the transaction and the name of the *payee*. The *payment order may be refused* if the account holder *fails to make available sufficient funds* for the execution of the transaction. The account keeper is *obliged to receive payment transactions to the account holder's credit or debit in the name* of the account holder, and *to handle them as deposits payable on demand or as deposits*. The account holder is authorized to *dispose over the balance* of the payment account.

2. *Payment Service Contracts*. Under such contract the *agent* undertakes *to pay a certain amount of money to the payee according to the payer's instructions*, and the *payer* undertakes *to pay the fee* agreed upon. The payment order *may be refused* until the payer *provides sufficient funds* for executing it. The agent is entitled to the fee, if the funds were either delivered to the payee, or credited to the payee's account, or made available to the payee's bank.

3. *Factoring*. Under a factoring contract the *factor* undertakes *to pay a certain amount of money*, and the *debtor* undertakes *to assign his claim from third parties to the factor*. If the *obligor of the assigned claim* (this is a third person) *fails to satisfy it when due*, the *debtor becomes liable to repay the funds received with interest*, and the *factor* is

liable *to re-assign the claim*. The *factor* is required *to register the factoring assignment and the debtor's name in the collateral register*, *by the lack* of which the *claim shall not pass to the factor*.

4. *Financial Leasing*. Under such contract the *lessor* undertakes *to make available for use* an *own thing or right* for a *limited period* of time, and the *lessee* undertakes *to accept the leased asset* and *to make lease payments*:

- If the lessee has the right to use the asset *up to or surpassing its economic lifetime*.
- Or, if the use is stipulated *for a shorter period*, to *acquire the ownership* of the leased asset *at the end of the term without consideration* or *at a price which is considerably lower than the market value*.
- Or, if the *total sum of lease payments reaches or exceeds the leased asset's market value* prevailing at the time of conclusion of the contract.

Obligation of registration:

- If the leased asset is a *real estate property*, the *fact of leasing* and the *lessee's name* shall be registered in the *real estate register at the time of registration of ownership*.
- If the leased asset is a *movable asset* or a *right*, the *fact of leasing* and the *lessee's name* shall be registered in the *collateral register*.

The *lessor guarantees* that *no third person has any right to the leased asset that can prevent or restrain the lessee's use* of it. In connection with any *non-conformity of the leased asset*, the lessor shall provide *warranty, if took part in the selection of the leased asset*. The *lessee may collect the proceeds* of the leased asset, and is liable for its *public dues, costs*, and *for damages*, which *no-one else is liable for*. The *lessee* shall *make lease payments* for periods defined in the contract *in advance*.

XVI

BÉRCESI, ZOLTÁN

GUARANTEE AGREEMENTS

1. Guarantee Agreements in General

The Civil Code Book Six Chapter III Title XXI defines the contract of suretyship and the guarantee contract construction as a new contract type. This breaks with the regulatory concept of the old Civil Code, which defined the suretyship and the bank guarantee -functioning as the 'predecessor' of the guarantee contract- as part of the general provisions of the contract law, defined as supplementary binding contractual obligations.

2. Contract of Suretyship

1. *The concept, subject of the contract of suretyship and the legal nature of suretyship*. The concept of suretyship. The contract of suretyship is a type of guarantee contract by which the surety undertakes the obligation of performance to the creditor in the event of non-performance by the principal debtor. [Section 6:416(1) on the Civil Code] The suretyship is therefore the personal security of the obligation, in case the surety answers the creditor with his own assets in the event the debtor's non-performance of claims for money or monetary equivalent of the value of other services stated as the subject of the (primal)obligation.

2. *The subject of suretyship*. The suretyship may be granted to secure one or more, existing or future, unconditional or conditional pecuniary claims of a specific amount or the amount of which can be determined. The subject of the ensured obligation at all time are claims for money or monetary equivalent of the value of claim.

3. *Suretyship relations*. Ancillary obligations arise from the contract of suretyship. The obligation of surety is therefore adjusted to the scope of primal obligation in content and scope. Consequently, the obligation of suretyship is not to exceed the obligation that was took on originally. However, it shall cover the consequences of the debtor's non-performance and shall include the collateral claims that fall due after the suretyship is undertaken.

4. *The types of suretyship*. The Civil Code distinguishes two basic type of suretyship simple otherwise privilege of order suretyship and first-loss guarantee.

Suretyship in principle is the *privilege of order suretyship*. Surety is entitled to the privilege of order. The surety shall be entitled to refuse performance so long as the creditor is able to verify that he had attempted to recover the debt from the principle debtor but that did not lead to a result within a reasonable timeframe. [Section 6:419 on the Civil Code]

Suretyship may be a *first-loss guarantee* in the base of the parties' expressed agreement, or the provision of the law. First-loss guarantee is an exception from the privilege of order, where the surety cannot enforce the privilege of order. In these cases, therefore, the creditor can assert claims from the debtor and or the surety. [Section 6:420 of the Civil Code]

The law regulates a specific type of suretyship the construction of the so-called *deficiency liability*. In case of a deficiency liability the surety expressly covers that part of the debt that cannot be recovered from the debtor. [Section 6:421 on the Civil Code]

5. *The performance of the surety, termination of the surety's obligation. Dueness of surety's performance*. The surety shall be required to perform upon being requested to do so by the creditor. The surety shall without delay perform to the creditor and shall forthwith notify the debtor of performance. In the case of refusing performance, the surety without delay shall forthwith notify the debtor and the creditor of its refusal to perform, indicating the reasons.

After the surety's performance the surety is entitled to recover the claim from the debtor. (regress) To

this end the creditor shall forthwith deliver to the surety all documents and shall provide all information that may be necessary for the surety to recover his claim from the debtor [Section 6:422(1)-(4) on the Civil Code].

6. *Termination of suretyship*. The surety's obligation will be terminated, and the surety will be released from his obligation:

- Following the expiry of a fixed term suretyship the surety shall be relieved of all obligations,
- In case of an open-term suretyship—if an open-term suretyship covers all existing and future obligations of the debtor toward the creditor—the surety shall be entitled to terminate the contract of suretyship by giving at least three months' notice.

7. *The legal consequences of the surety's right of exoneration and the irrecoverability*. If the creditor waives any right securing the claim, or if the claim has become otherwise irrecoverable for reasons attributable to the creditor or if recovery becomes increasingly burdensome, the surety shall be exonerated inasmuch as he could have received satisfaction based on his claim for compensation against the debtor. [Section 6:424-6:426 on the Civil Code]

8. *The obligation of multiple sureties*. If suretyship is promised by more than one person for the same liability, the sureties shall be subject to joint and several liability toward the creditor. The internal interdependencies of the sureties should be assessed depending on the fact whether the sureties took suretyship independently, or jointly. *Multiple independent sureties*. If suretyship is concurrently promised by more than one person independently, in their relationship the sureties shall be subject to liability in the sequence they have undertaken to provide suretyship. [Section 6:427(1)-(2) on the Civil Code]. *Joint multiple sureties*. If suretyship is jointly promised by more than one person, in their relationship the sureties shall be subject to liability in proportion to their exposure. [Section 6:427(3) on the Civil Code]

3. Guarantee Contracts

1. The concept, subject and legal nature of the guarantee contract. The concept of the guarantee contract. Based on the guarantee contract the guarantor undertakes a commitment under which a specified payment is to be made to the creditor subject to the conditions laid down in the statement. [Section 6:431(1) on the Civil Code] The subject of the guarantee contract is the guarantor's commitment under which payment is to be made to the creditor -subject to the conditions laid down in the statement. The form of which is the statement of guarantee. The guarantee contract is created by the acceptance of the statement of guarantee by the creditor. The obligation of the guarantor set out in the statement of guarantee is independent of the obligation for which he has promised to answer. Based on the concept of independence, the obligation does not depend on the validity, effectiveness, the possible termination and the degree of secured obligations, or the breach of contract. The absence of relationship means the guarantor may not enforce the same objections that can be made by the debtor against the creditor. [Section 6:432(1) on the Civil Code]

2. *The validation of guarantee, guarantor's rules of performance*. The right of enforcement of the guarantee (drawing right) is an individual right of the entitled person, a person-related right. The creditor may not transfer the right of enforcement of the guarantee without the guarantor's consent. However, he shall be entitled to designate a person to whom payment is to be made by the guarantor. The practice of the drawing rights therefore means that the creditor may instruct the guarantor to perform in his stead to a third person [Section 6:433 on the Civil Code]. The guarantor is is obliged under the guarantee to fulfil the payment if the creditor requested payment. The call for payment shall be executed in writing (formal requirements) and the content must exactly comply with the requirements specified in the statement of guarantee (substantive conditions). The guarantor shall have the right to affect all objections to which he is entitled in his own right against the creditor. If the guarantor refuses performance, shall make a statement and -indicating the reasons- notify the debtor and the creditor of its refusal to perform. [Section 6:435(3) on the Civil Code] This may happen if, based on the information at the guarantor's disposal, the creditor exercises his drawing right in a manner which manifestly fraudulent or in bad faith.

XVII

NOCHTA, TIBOR

INSURANCE CONTRACTS

1. The Basic Concept and Status of Insurance Contracts in Private Law

1. Insurance law—public and private—legislation, which strongly itemize the aspects of *consumer protection*. The insurance contract can traditionally be classified as the commercial-private-law types of contract, because the economic-commercial (business) life has inherent risk and danger, dealing with the consequences of which by creating a risk and danger pooling the best tool is the insurance. The insurance contracts are in many respects different from the traditional contract model—special peculiars to them are the following characteristic attributes presented:

- they are risk-weighted contracts, because the risk and uncertainty elements are very strongly present
- *praestare (liability) service* obligation on the part of the insurer
- *the imbalance between the parties* is inevitable in the case of individual insurance
- the so-called *unilaterally (claudication) cogent* rules which means that the insurance company can unilaterally derogate from the insurance policy if it benefits the assured
- in this contract the *good faith and integrity requirements* are of a specifically high importance in every section of the contract
- the insurance relationship can also be based on *law and membership*

2. The legal basic concept of the insurance contract:

- *Insurable interest*: there is no insurance without interest, in form of property or personal the insurer undertakes to provide coverage for damage.
- *Insured value:* the value of the insurable interest
- *Insured amount*: the upper limit of the liability (service delivery) of the insurer
- *Insurant*: the carrier of the insurable interest
- *Contracting party*: those who concludes the contract on behalf of an interested person
- *Beneficiary*: the person eligible for the insurance sum
- *Insured event:* its occurrence is an indispensable condition for the insurance company's performance, although the insurance company also can *provide loss prevention side services*, must have occur after the *start of the risk-carrying*
- the insurance period*: the insurance period is specified in the contract to which the fee applies, it is as a rule a year*

3. The concept of the insurance contract: the insurance is a *coverage originating from risk pooling* for the defined and insurable risks of the insured person and premium paid proportional to risks. According to the Civil Code 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 future event after the starting date of risk coverage. The *insured person undertakes to pay an insurance premium* agreed upon. Insurance contract only be made *against payment* the *free format is conceptually excluded. Subjects: insurer, the person, which organizes the persons of the community exposed to similar risks under the insurance and takes their risk against a fee. The clients are those persons who, get into a contractual relationship with the insurer as part of an insurance.*

4. The division of insurance contracts is the following: the insurance contracts are categorized in the base of the insurer's service to indemnity insurance and fixed-sum policies.

– In case of the *indemnity insurance the insurance company's service covers the payment for the insured person's loss in the amount and in the manner defined in the contract.*

– *In case of* fixed-sum policies the insurer pays the payment or according to a *pre-defined calculation method* of a sum specified in the contract, regardless of the effect of the assurance event on the financial position of the client.

Individual and group insurance: Those insurances are considered individual insurance, in which the insured are tightly and precisely specified (by name). In contrast, in case of the *group insurance* the insurance circle is not closed and exact (by name) but to determine who qualifies as an insured person is *based on the belonging of a group (association) the legal or other relationship between the contracting party and the insured.*

5. *Contracting:* According to the Civil Code a typical instance is that the offer regarding the insurance is made by the insurer. The insurance contract is generally created by the parties' *written agreement*, but the written agreement can be replaced by the issuing of a *document* or *bond* verifying the insurance cover. If the contracting party is a consumer, the contract shall be executed also if the insurance company does not respond to the offer.

6. The *starting date of the contract* is of importance because of the *risk coverage*: According to the Civil Code the insurance company shall commence at the time of presentation of the offer. Besides this important is regarding the start of the risk coverage the liability of the *premium* (or first instalment).

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*. The parties may agree in writing in that the insurance company is to cover the insurance risk from *such point in time preceding the date of conclusion of the contract*: this instance is the *retroactive coverage*. There is a possibility for *preliminary coverage* which shall remain in effect until such time as the conclusion of the contract or refusal of the offer, *not exceeding ninety day*s.

The insurer in case of a *considerable increase in the insurance risk,* the insurance company shall be entitled to *amend the contract or may terminate the contract.*

With the conclusion of the contract the main obligation on the part of the insurer starts, the p*raestare service* and the *obligation to pay premium* is the start of the obligation of the insured. *The delay of payment of the first or continuous premiums* of the contracting party only leads to the termination of the insurance contract if the *insurer previously warned the insured in writing with no avail.* The insurer shall indicate in the request for payment the potential legal consequences. In the event of non-compliance, the contract shall be terminated with *retroactive effect to the original due date*, except if the insurance company forthwith moves to enforce its claim by judicial process.

2. The Individual Insurance Contracts

1. According to the indemnity insurance contracts the insurance company's service covers the payment for the *insured person's loss in the amount and in the manner defined in the contract.* The indemnity insurance contracts offer coverage for numerous asset risk: vehicle damage (casualty and collision), fire and elemental damage, and damage that occur during transport, agricultural damage, but the indemnity insurances include, for example, the liability insurance, legal expenses insurance or funeral insurance. The peculiarity of the indemnity insurance is that the insurer does not provide its service by paying a monetary amount, but it can also provide it in kind: for example, in the framework of the *assistance-insurance* the insurer may, if the customer's car fails abroad, organize the transport of the car home, passengers' accommodation and return travel to home.

The *main principle* of indemnity insurances is the *prohibition of over-insurance.* The coverage shall not exceed the value of the damages, because that would be *over-insurance.*

The so-called *exclusion* applies, when the insurer exhaustively set out the cases *which don't fall into the insured risk, so those do not constitute an insurance event*, therefore, the insurance service not provided. In contrast, the *exemption* from liability is if the *insurance event occurs*, but the reasons for which *cannot be expected* from the insurer to fulfil.

2. The *liability insurance* is an *indemnity insurance*, in which the *insurance company undertakes* to *reimburse the customer for any damages and any grievance fees, which are due by duty to a third person for property and personal damages to compensate. I*n connection with many *activities* the *legislation requires the mandatory liability insurance*, where the *victims protection* justifies this. (e.g., vehicle operation, health services, law, notarial activities)

The insurance company shall *refuse payment obligation* if the damages have been caused *unlawfully, either wilfully or by gross negligence by the customer or a person belonging to their interest.*

The insurance provider *fulfils their payment duty not to the insured but directly to the injured party*. This rule takes into account the *best interest of the injured party*: *eliminates* the possibility that the *insured expend the insurance amount for something else*. However*, the injured party's claim may not assert directly against the insurance company* but *can demand the delivery of fulfilment from the insured* and *in the base of the legal relationship of liability the insured may demand from the insurer* to deliver the service for the injured party.

3. The *fixed-sum insurance* can be taken to *ensure the human risks*. These risks cannot *be expressed financially*, therefore the *parties are free* to determine the amount of insurance. This freedom is implicitly not only within framework of one contract but *applies for several contracts* as well: the client may take *any number of insurances* for a specific insurance interest or risk and *may demand the full sum insured on each of them* if the insurance event occurs.

In connection with *fixed-sum policies, the written consent of the insured person* shall be required for *concluding or amending the contract* if he himself does not conclude it. If an insurance contract is *concluded without the approval of the insured person*, the section in which the beneficiary is named shall be *null and void,* in such a case, the *insured person or his heir* shall be construed as the beneficiary. It is reasonable to assume that the insurance is in the interest of the insured person if the beneficiary is himself or in case of his death his heir.

4. The Civil Code divides *life insurances* into two subcategories: *term life insurance and ordinary life insurance*. In case of *term life insurance (death insurance)* the insurer fulfils payment to the beneficiary only if the *death of the insured occurs during the term* of the insurance. If at the time of the conclusion of the insurance term the insured is still alive, the insurance concludes without payment. The ordinary life insurance is characterized by the *expiration service and cash surrender value:* only these insurances have *residual rights*.

The *beneficiary* is the person to whom *in case of a fixed-sum insurance* the *insurance sum is payable*. The beneficiary is the person named in the contract or a holder of a bearer policy. Not only the heir of the insured person can be the beneficiary but the insured person as well, due to the ordinary life insurances have the possibility to pay the insurance sum in the life of the insured person, therefore the insured heir is only the beneficiary in case of the death of the beneficiary. The insurance sum does not constitute as part of the inheritance if the beneficiary is the heir of the insured.

5. Accident insurance means the insured risk is the insured person's accidental death, health impairment or disability resulting from an accident. The insured person only a natural person can be and the insured risk cannot include damages from accident that are purely financial damage.

6. The *health insurance* contracts can be *indemnity insurance and fixed-sum* insurance or the combination of those. Insurances aimed at *restoration or retention of health, or insurance to compensate for the indirect disadvantages caused by the loss of health* can be demarked. Within the *indemnity insurances* the *health insurances for subsequent reimbursement and health insurance for health services* can be distinguished.

XVIII

BENKE, JÓZSEF

CONTRACTS FOR MAINTENANCE AND LIFE-ANNUITY

1. Services directly *for maintenance* and *for annuities for maintenance* are *peculiar institutions*, therefore these are *subject to special legal regulations* concerning many questions such e.g. as:

- *Set-off is permitted* only against claims for *maintenance overpayments* [Section 6:51 § 1].
- The creditor is *not obliged to accept performance offered by third parties* because the *service is bound here to a specific person* [Section 6:57 § 1];
- The claim for maintenance and annuities is *bound to the person of the obligor*, therefore the *assignment* of such claims is *null and void*.
- Service *provided and used for subsistence cannot be reclaimed* by title of *unjust enrichment* [Section 6:581].
- In the case of *negotiorum gestio*, the *intervention is considered appropriate* to fulfil the obligation to provide *maintenance even against the will of the person obliged to provide it* [Section 6:584 § 2].
- If *several descendants succeed together*, *each heir shall add the value of advancements they received from the decedent during his lifetime to the value of the estate*. However, *maintenance provided to descendants being in need of support cannot be treated as advancements even it was expressed by the testator* [Section 7:56 §§ 1 and 3];
- The *value of maintenance given to a spouse or domestic partner and descendants do not pertain to the basis of a compulsory share of inheritance* [Section 7:81 § 1 point d].

2. *a)* The *contract for maintenance*, regarding the *object of the service*, is *peculiar as compared to other contracts*:

- because this service is *special and individual*, and,
- because, albeit some elements of this service indeed *occur in many other contracts*, this contract *unifies these elements in a very specific way*.

The *main specificities and characters* of maintenance contracts and the services thereof are as follows:

- the contract necessitates a *strong confidentiality* between the partners and a *close co-operation* thereby;
- the service is *mutually and especially bound to the personality of the debtor*;
- the *alimentary service* has a character of *supplying, feeding, maintaining*;
- the service is *alike annuity*;
- the *irreversibility* of the service (there is *no way for an in integrum restitution*);
- the *long lasting* and *durably continuous* character of the service;
- the contract's *enhanced risks*.

b) Maintenance obligation can be *based on law*, too. The *factual grounds* of such *ex lege* duties may be: termination of matrimonial relationship or divorce, and the lack of ability of self-support [Section 4:29 § 1]; termination of civil partnership [Section 4:86 § 1]; family relationship of lineal descents [Sections 4:96 § 1; 4:194 and 196); to the minor by the sibling of legal age [Section 4:197); to blood children, stepchildren and foster children, in the same line; and to the biological parent and stepparent and foster parent, in the same line [Sections 4:198–200).

c) Under a *maintenance contract* to be *concluded in writing*, the *person owing maintenance* undertakes *to provide care to the person to whom maintenance is owed and to ensure the sufficient living conditions*, and the *maintenance creditor* undertakes *to provide compensation*. *Maintenance includes housing* and *home*, *sufficient nutrition and clothing*, *care*, in the case of *illness*, *nursing and health care*, in case of *death*, a *proper burial*.

d) The termination of the contract:

- upon the *maintenance creditor's death*,
- upon the *death of the obligor*, the obligation *devolves to the heirs* according to the *regulations governing liability for the debts of a decedent*, *if the support provided up to the death does not cover the consideration*,
- if the contract provides maintenance *to more than one person*, in case of the death of one of them, the *surviving party has the right* to demand the *continuation of indivisible services*, including those *required to maintain prevailing living conditions*, and a *commensurate part of divisible services*.

e) If the obligor *receives ownership to a real estate property* in exchange for maintenance and *fails to provide adequate security for his obligations* when requested, a *right to maintenance shall be registered in the real estate register on the transferred property as encumbrance* at the maintenance creditor's request. If the obligor breaches the contract, the maintenance creditor *may seek satisfaction from the security* or *from the real estate property*, *if* the mentioned *encumbrance has been registered*.

f) Amending and terminating maintenance contracts:

- The *court alters* the contract *at the request of either party*, *in consideration of the interests of both parties*, if *sustaining the contract, as it is, appears unreasonable*, especially if the *parties' relationship has deteriorated*.
- If *maintenance in kind has become impossible as consequence of the conduct or circumstances of one of the parties*, *either* party is entitled to request the court *to transform the contract into a life-annuity contract* either *permanently* or *until the aforesaid circumstances are changed*.
- If such modification *fails to facilitate the object of the contract*, *either* party is entitled to request the court to *terminate* the contract.
- The *court is not bound by the parties' request* but *may not order a consequence that is protested by both parties*.

g) Gratuitous type of maintenance: *Unless otherwise suggested by the circumstances*, *no consideration is due* for maintenance services based on a contract *concluded by close relatives*. Such contract is terminated also upon the *death* of the *person owing maintenance*.

3. *a)* Under a *life-annuity contract* the *annuity provider* undertakes *to provide a specific sum of money or other fungible property to the annuitant periodically*, and the *annuitant* undertakes *to provide compensation*. The annuity *shall be paid monthly, in advance*. The *annuitant is not entitled to bring action to demand any payments that are 6 months overdue* and *have not been enforced without substantial reason* (*naturalis obligatio*).

b) Life-annuity contracts' *characters differs from* that of maintenance contract as follows:

- *confidential* and *personal* characters exist but are *not decisive*;
- *irreversibility* of services is *much lower*;
- the *method of alimentation* (annuity) *profoundly* differs;
- *aleatoric character* because of *higher risks* is present as well.

c) An *annuity-obligation can be based* either on *life-annuity* contract, or on *agreements as to succession*, or on *life insurance* and *accident insurance* contracts, and on the *amendment of maintenance to life-annuity* contract.

Annuity-obligations may also be *based on law*, typically in case of some *certain damages* such as the ones that emerge as *recurrent future losses* [Section 6:527 § 2]; *decrease of working capacities* and *loss of income* [Section 6:528); *death of a maintenance provider* and the *loss of maintenance* [Section 6:529 § 1].

XIX

FABÓ, TIBOR

CIVIL LAW PARTNERSHIP

1. Characteristics, Legal Definition, Notional Elements of Civil Law Partnerships (CLPs)

1. According to the Laws of Hungary either natural or legal persons have the right to achieve their common goals by entering into such relationship the result of which will be a separate legal subject (business companies, associations, foundations) or just concluding a civil law partnership agreement which does not result a separate legal personality for the partnership. In course of the operation of the CLP not the partnership itself but the members of it will be the subjects of all rights and obligations resulted by the said operation. There is no need neither legal opportunity for any authority registration in the interest of forming this type of cooperation. A verbal, written agreement or implied conduct of the members itself is necessary and enough to constitute the partnership.

2. "Under a civil law partnership agreement the parties (hereinafter: members) undertake to cooperate in order to achieve their common goals and to make capital contributions necessary for achieving said common goals, and to bear the risks of their activities collectively." [Section 6:498). It follows that the existence of four joint conditions are inevitable for the birth and existence of a CLP: *common goals, cooperation, capital contribution, and common risk bearing*. As to the goals the Civil Code does not provide any definition. Neither business goals are excluded but CLP is hardly a proper form for regular business activity since the existence and operation of it—in lack of any authority registration—is not transparent enough for the business partners. By operating a CLP, the purpose of the members is rather harmonizing their activity for example appearing in different tenders, public procurements or just joining their efforts for carrying on sport, cultural or other social activity without operating and association. Each member shall provide capital contribution according to their agreement (in lack of it the proportions shall be equal). The member who fails to provide the contribution agreed upon in the contract can be sued by either of the other members for performance as contracted. This behaviour of the member would result even the exclusion of this member.

2. The Operation of CLPs: Administration and Representation

Administration means the internal decision-making in the questions concerning the achievement of the common goals. Members shall be entitled to manage the partnership's affairs collectively. Members may also provide that authorization for management is granted to a certain member or members. Non-members shall not be granted management rights. Management shall be carried out personally [Section 6:503). *Representation* means making legal declarations necessary for achieving the goals of the CLP towards third parties. Members may grant authorization in the partnership agreement to either of the members to represent the other members in dealings with third parties. While administration is strongly connected to the membership the right of representation can be provided non-members, too.

3. External Relations

Among the external relations one of the most important issues is *the obligations of the members to fulfil their commitments arising from contracts concluded in the interest of realizing the goals of the CLP*. There is no express rule establishing joint and several liabilities of the members. The form of liability depends on the rules of multi-party obligations (6:28-29. §). The other important question is whether the creditor of a CLP member, in respect of his claim, shall have the right to acquire those assets which the member of the CLP fulfilled as his capital contribution for the purposes of the CLP. The *contribution* is in fact the property of the member and not that of the CLP, but it *cannot serve directly the purposes of satisfying the claims of the*

creditors of any member. The creditor can lay claim *when the CLP agreement is terminated*, and the members made the settlement of final accounts. The creditor shall file to have this share attached, and by doing it he shall be entitled to exercise the right of termination that is customarily due to the member [S. 6:508 §§ 1-3].

4. Termination of CLP and/or Its Membership; Settlement

1. The CLP is not more than a contractual relationship which connects, unifies its members without resulting a separated legal subject (legal person). It should be a consequence of this characteristic of the CLP that in case of secession of any member because of any reason the company shall be ended. However, the Civil Code provides the opportunity of avoiding this consequence in certain situations. The reasons of termination the agreement and the membership as well can be as follows:

- *termination by notice with a three months' notice period,*
- *termination by notice without notice period because of substantial reason,*
- *death or dissolution of a member.*

All the above cases lead to the termination of the membership. *Exclusion of a member* is an additional reason of terminating just the membership and not the agreement. Reasons mentioned under *first and second issue above* shall unavoidably lead to the termination of the CLP, too.

As general rule, the *death* (*dissolution*) of a member also leads to the termination of the CLP but surviving members may decide to carry on the agreement without the deceased or dissolved member.

The *legal effect of exclusion* is not the termination of the CLP but the termination of the membership of those members whose behaviour or circumstances attributable to him are available to base the right of any other member to terminate the agreement with immediate effect.

2. If the partnership agreement is terminated or the membership is terminated accounts shall be settled among the members or the excluded member and the others or the successor(s) of the dead (dissolved) member and the other members.

XX

FABÓ, TIBOR

CIVIL PARTNERSHIP

1. Recognized Couple Relations in Hungarian Law

There are three recognized—in the same time emotional and property—relationships between two humans by the Hungarian Civil Law:

- M*arriage*, which is a *relationship between one man and one woman* according to Family Law rules of *Civil Code* (Book Four). Marriage shall be considered contracted if a man and a woman together appear before the registrar in person and declare their intention to marry. No two persons having the same sex can establish marital relationship.
- *Registered partnership*, which can be established *between two persons having the same sex* according to the rules of Act XXIX of 2009. This relationship provides similar legal status like marriage with some exceptions, only. The condition of establishing this partnership is the registration by the registrar in person. In lack of registration the couple of two persons having the same sex can be recognized as civil partnership, only.
- *Civil partnership*, which can be established *between two persons having either the different or same sex* according to the provisions of Civil Code [Sections 6:514–517).

2. Characteristics of the Civil Partnership; Establishment and Termination

Civil Code defines civil partnership as it "means when two persons are *living together outside of wedlock in an emotional and financial community in the same household* [Section 6:514 § 1; hereinafter: „*cohabitation*"), provided that neither of them is engaged in wedlock or partnership with another person, registered or otherwise, and that they are not related in direct line, and they are not siblings." This is a contractual relationship which does not result any marital relationship. Civil partnership is just a matter of facts ("*de facto*" relationship) mentioned in the above cited provision. Registration of this relationship is not necessary, but the couple can apply for entering their relationship into a register managed by a Notary Public. This way they can be *partners certified by registration*. Civil partnership shall terminate upon the couple's marriage or their entry into registered partnership, or when their relationship is terminated.

3. Property relations of the civil partnership

There are *two opportunities* for the partners to manage their property relations:

- Concluding a *partnership contract* which shall be considered valid if executed in an authentic instrument or in a private document countersigned by an attorney. It may contain any provision relating to property rights, which could apply to married couples under contract or in accordance with the Civil Code.
- *Rely on the provisions of Civil Code Section 6:516*. This way the partners shall be considered independent in their property acquisitions during their cohabitation. If cohabitation is terminated, either partner may request the division of property jointly acquired during the period of cohabitation in proportion to their contribution. Work done in the household and in child raising, and in the other partner's enterprise shall be construed as contributing to acquisition. If this ratio cannot be determined, it shall be considered equal, unless this would constitute inequitable financial loss in respect of either of the partners.

The partners may also enter into an agreement regarding further use of their common home following the termination of their partnership.

XXI

NOCHTA, TIBOR

THE PRINCIPLES OF LAW OF TORTS

1. General Provisions and Common Rules on Liability for Damages

1. *The tort law is not the same as liability for damages*, the compensation for damages is a *wider* obligation. The compensation obligation is a liability penalty if unlawful conduct caused the damage, whether this behaviour is a non-performance in either non-contractual delictum, and in the latter case imputability adds to the unlawfulness. The tort law has fundamentally cogent norms, pluralist, legislation of private law without creating a homogeneous legal regime.

2. The private law science distinguishes the *private law obligatio*n, from the liability. The obligation means on the part of the law *commanded behaviour* towards the entitled one without sanctions, defenceless as a *pure legal requirement, while the liability means the totality of sanctions*, *pressure tools against person and property*, *with which the law enforces to its command.* Among the rules of the civil law there is *several obligation and norm without sanctions*; for instance, the declaration of the good faith and fair procedure requirements.

The obligation to pay compensation is a kind of civil law sanction system that has a character of liability. The *role may be of primary* importance because the claim for property is based directly on an act of unlawful and attributable damages but, in addition to other private law consequences, it may also be applied as *supplement*, of course, also in case of liability conditions. Where a private law infringement results in damages, the consequence will only be to establish liability for damages if it is proven.

3. *The goals and principles of liability for damages*. The obligation to pay damages, as sanction charge, created as a *burden on the tortfeasor,* which always assumes a *legal basis established by the aggrieved party*. *If the legal basis of the damages is missing, then the damage shall be the responsibility of the subject (casum sentit dominus).* The aim of the liability for damages is *prevention and reparation*. The *full compensation principle* should work in parallel with the *prohibition of damage profiteering* because ultimately that is what has a prevention-disciplinarian effect. In the event of damage profiteering the claim for the *granting the surplus (profit) is not a claim for damages*, but an issue of enrichment, and in that case, it is part of the *unjust enrichment.*

4. The basic forms of liability:

– *personal and financial liability*: In the first case with its person (e. g. gratification) in the latter case, in civil law typically a person is liable with its assets (liability).
– *objective and subjective liability*: objective liability is the liability, which is independent of the tortfeasor knowledge, fault, while the subjective liability, the fault-based liability means that the standard of the specific situation would be the normally expected behaviour.
– *direct and contributory liability:* in the case of direct liability the obligation and liability coincidence, the same person is liable and obliged. In case of the contributory liability the contributory obligor's liability, namely liable together with the tortfeasor (joint and several liability) but it may be underlying when the claim cannot be collected from the debtor, therefore the underlying responsible steps up. (e. g. the simple guarantor).
– *unlimited and limited liability*: the liability of the civil law in general is unlimited, which can be direct, too (such as the liability of the civil society members), and underlying (for example, liability of the members of the general partnership company is underlying). There is a space in private law for the limited liability, as *truncated obligation,* in which cases the liability is limited to *specified property or assets* (such as the *pro viribus or cum viribus* liability, as well as the liability of the member of a Ltd).
– Additional liability forms know by the civil law:
  - *custodia liability* until *vis maior*
  - *del credere liability*: e. g. the non-performance on the side of the consignee
  - *result liability*: e. g. the liability of the contractor

- *absolute liability*: in which *exculpation is not tolerated,* damage installation originating from *risk installation.*

5. *The separation of contractual and delinquent liabilities*: the private law liability is the dual, i. e., it became separated to the *non-performance (contractual)* and the *non-contractual tort liability (delinquent). In the case of contracts*, responsibility for regulation is in fact a *risk sharing and risk installation. The contractor cannot save himself, by verifying that there is a lack of imputability*, as it is sufficient with *the non-contractual liability (delinquent).*

The two liability-situations are different due to the different interests of the tortfeasor and that of the aggrieved party. While with the contractual legal relations the parties at the time of concluding the contract have the possibility to better calculate the possible risk damages and accordingly convert the contractual commitments, in the meantime, the non-contractual damage is usually unexpected, the between tortfeasor and the aggrieved party damage obligation generated typically by the unlawful damage.

In case of a delinquent liability, before the damaging behaviour between the tortfeasor and the aggrieved party only an absolute structure legal relationship exists, and the violation of the abstaining prohibition norm creates the relative structure damage obligation. In case of a contractual liability, however, a relative structure legal relationship existed prior to the tort, namely a contract, which sets out the rights and obligations of the parties. With delinquent liability the *general prohibition on tort suffers (neminem laedere principle) and what makes the behaviour (any behaviour) unlawful is exactly the damage attached to it. In case of the contractual liability* however, the *damaging behaviour is the non-performance of the obliged behaviour in the contract*, which is undertaken voluntarily after considering the risks and circumstances of the contract.

2. Liability for Damages (Contractual) Caused by Non-Performance

1. *The conditions for exculpation from liability for damage caused by non-performance* are set forth in Civil Code based on international examples and require the *simultaneous (cumulative) existence of three conditions:*

- First the Civil Code requires for exculpation from liability for damage caused by non-performance, that the *circumstances of the non-performance is outside of the control of the defaulting party;* outside of control means a circumstance that the defaulting party cannot influence, it is not either similar in content nor function with the category of "*interest"* used several times in the Civil Code: the "interest" has a risk allocation function without liability in law.
- The second condition of exculpation according to the Civil Code *is the fact that to the defaulting party the circumstances outside of his control is -objectively- not foreseeable at the time of the conclusion of the contract,* forceeability according to the general human experience objectively taken after a careful and prudent procedure; an additional condition is that the given fact was, in the general experience, objectively probable to cause the damage.
- The third of those cumulative conditions is that *it was not to be expected that the parties to avoid the circumstances hindering the contractual performance* or to avert the damages; this condition of the exculpation requires the *imputability* criteria of the Civil Code, the *foreseeability of the obstacle* is required by the Civil Code to be *inspected at the time of the conclusion* of the contract.

The Civil Code accepts *exculpation* proof system: the burden of proof is on the *defaulting party* for all three exculpation conditions.

2. *Under the principle of the right to full compensation and the extent of liability*: The Civil Code in both liability cases *initiates from the principle of full compensation.* This principle applies without limitation to the damages *directly by the services* due to the non-performance. The defaulting party is liable for the damage therefore shall perform full compensation for the damage in the service (*adhesive damage) justified costs* required for the contractual performance, of the hedge purchase (or hedge selling costs) etc. with these damages, as a possible consequence of non-performance, the defaulting party always shall calculate in the event of non-performance.

The financial losses and pecuniary advantage lost (*lucrum cessans*) caused by the non-performance in the assets of the aggrieved party is part of the full compensation. The damages should, as far as possible, bring the aggrieved party into a position as would have been the case in the case of a contractual performance. The application of the foreseeability clause means, that the consequential damage and lost

profit recoverable shall not exceed the damage, which the defaulting party had foreseen or anticipated at the time of the conclusion of the contract in the base of the facts and circumstances which he knew or ought to know as a possible consequence of the non-performance at that date.

3. Liability for damages in case of gratuitous contracts: the fact of gratuitousness justifies the mitigation of liability. The obligor of the free contract is liable for the damages if, the damage is caused by wilful conduct or failing to comply with the relevant disclosure obligations relating the service. For the damage caused in the assets of the aggrieved party the liability is more rigorous, in relation to these damages the standard is the imputability of the exculpation.

4. *In case of liability for subcontractors and agents*, under the Civil Code a *subcontractor or agent* is, who is requisitioned in order to perform the contractual obligation. According to the Civil Code, *any person who employs another person to perform his obligations or exercise his rights shall be liable for the conduct of that person as if he himself had carried out the obligation or exercised the right.* If the obligor has *not been authorized* to employ other persons, then his *liability is more stringent:* he shall be liable even for damages that would not have occurred without the employment of such person.

5. *The relationship between contractual and non-contractual liability for damages.* The rules of the *non-contractual liability* for damages applies to the aggrieved party's *loss prevention, damage mitigation,* to the liability of the *joint tortfeasors* and to the method of *compensation* with that the *contractual damage mitigation cannot be remitted based on fairness.*

In case of the existence of several liability compensation system, it may happen that a fact of a compensation could be settled in more liability system *(liability cumulation).* According to the *non-cumul principle*, the *Civil Code excludes cumulation of claims and the aggrieved party's claim* for damages can only be enforced against the tortfeasor under the rules of *liability for damages caused by non-performance.* The rule that excludes parallel claims for damages is also a *dispositive norm* that the parties may agree with.

3. The Characteristics and Common Rules of Non-Contractual Liability

1. *The unlawful tort is a general law delictum.* Except a few exemption where *the damage makes the conduct unlawful,* i. e. *t is not necessary to reference special standards of illegality* [Section 6:518on the Civil Code]. The *unlawfulness of the tort does not therefore need to be specifically demonstrated,* the *lack of unlawfulness* is what is required to be proven.

2. *According to the general rule of liability:* "*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 his conduct was not actionable.*" Consequently, the liability for non-contractual damages has four cumulative conditions:

- *Unlawfulness of behaviour*
- *Occurrence of damage*
- *No causal relationship shall be deemed to exist in respect of any damage that the tortfeasor could not and should not have foreseen.*
- *Failing to prove the lack of imputability, i. e. the tortfeasor is unable to prove that during injurious conduct he acted, as in the given situation would normally be expected.*
- 3. *The torts shall not be considered unlawful*, if the tortfeasor has committed the tort (t*he conditions excluding the unlawfulness):*
- *with the consent of the aggrieved party*
- *against the assailant in order to prevent an unlawful assault or a threat suggesting an unlawful* direct assault, if the tortfeasor did not use excessive measures to avert the assault
- *in an emergency, to the extent deemed proportionate, or*
- *by way of a lawful conduct, and such conduct does not violate the legally protected interests of others, or if the tortfeasor is required by law to provide compensation.*
- 4. Under the principle of the right to full compensation the tortfeasor shall cover:
- *any depreciation in value of the property of the aggrieved party*
- *any pecuniary advantage lost; and*
- *the costs necessary for the mitigation or elimination of the financial losses sustained by the aggrieved party.*

5. *For the extent of liability,* in accordance with regulations and jurisprudence, the victim's obligation is to prove the occurrence and extent of the damage. *Damage profiteering is not allowed.* The amount of compensation shall be reduced by any financial advantage of the aggrieved party resulting from the tort, unless this is deemed redundant having regard to the circumstances of the case.

The Civil Code ensures that *in cases of exceptional circumstances, the court may award compensation in an amount lower than the amount of the total loss*. This cannot, of course, be the subject of a judgement of a judge. In judicial discretion has an important role *of performance, degree of imputability, social aspects, the nature and extent of the damage.*

6. *Common rules of delictual liability for damages* are the following:

– *In the event of the presence of imminent danger*, the endangered person shall be entitled to request the court, as it follows from the circumstances of the case:
  - *to restrain the person imposing such danger from continuing such conduct;*
  - *to order the person imposing such danger to take sufficient preventive measures;*
  - *to order the person imposing such danger to provide sufficient guarantee.*
– *In case of joint tortfeasors,* the basis of the joint and several liability is the damage caused jointly.
– *The aggrieved party shall be subject to the obligation of damage control and the obligation of prevention and mitigation of damages*. In the event of any actionable non-performance of those obligations, the tortfeasor shall not be obliged to provide compensation. Liability for damages shall be borne by the *tortfeasor and the aggrieved party consistent with the degree of their culpability,* or—if this cannot be determined—*in proportion to their respective involvement.* If the degree of involvement cannot be verified either, the tortfeasors and the aggrieved party shall *cover the damages equally. The aggrieved party shall be liable for any omission by the persons for whose conduct he is responsible.*
– *The contractual freedom allows the mitigation of liability for damages, but any contract term limiting or excluding liability for intentional tort or for causing damages* resulting in *loss of life, or harm to physical integrity or health shall be null and void.*
– *In the method of compensation,* the *compensation in cash* is the general and primary. The auxiliary, secondary *compensation in nature* is justified if the *nature of the damage*, *the substitutability, reason and expedience require so.* In determining the mode of compensation, the court shall *not be bound by the aggrieved party's request,* however, court *shall not* order any mode of compensation such that *is objected to by all parties.*
– If the extent of damage cannot be precisely calculated, the person responsible for causing the damage shall be compelled to pay a *general indemnification* that would be sufficient for compensating the aggrieved party.
– *Dueness of compensation*: the time of the damage does not always coincide with the time of the tort. When the damage occurs, the *statute of limitations immediately begins.* A further consequence is that from the time when the occurrence of the damage, *interest shall be paid for the delay in compensation payment.*

4. Specific Cases of Liability

4.1. Liability for Highly Dangerous Activities: Hazardous Operations

According to the Civil code: "A person who pursues an activity that is considered highly dangerous shall be liable for any damage caused thereby. Where such person is able to prove that the damage occurred due to an unavoidable cause that falls beyond the realm of highly dangerous activities, he shall be relieved from liability." These provisions on liability for hazardous operations shall also apply to persons who cause damage to other persons through activities that endanger the human environment. Any exclusion or limitation of liability shall be null and void; this prohibition shall not apply to damage caused to a tangible thing.

The hazardous activity operator: The person on whose behalf the hazardous operation is carried out shall be recognized as the pursuer of a highly dangerous activity. Where hazardous operations are carried out on behalf of more than one person, they shall be treated as joint tortfeasors.

If the damage is caused by more persons' highly dangerous activity together, the conditions of liability are different in external and internal relations. In the relation *between the joint tortfeasors and the third aggrieved party (external)* there i*s an (objective) liability without joint and several imputability, in the relation between tortfeasors (internal)* the *general rules* of liability shall be applied.

No compensation shall be provided for any damage insofar as it *originates from an activity attributable to the aggrieved party (own fault).* In the spreading of losses, the highly dangerous nature of the activity shall be taken into consideration to the burden of the operator. In case of hazardous operation there is an application for *spreading of damages* the operator shall not be subject to full liability toward the aggrieved party if the person has contributed to the *occurrence of the damage, in proportion of his contribution*. The period of limitation for claiming damages in connection with liability for hazardous operations shall be *three years*.

Where damage is *caused by one hazardous operation to another*, the operators shall be liable to provide compensation as *commensurate according to attributability*. If the damage is caused by a person other than the operator, the operator shall be liable to provide compensation as commensurate according to the attributability of the de facto tortfeasor. *f the cause of damage is not attributable to either party*, compensation shall be provided by the party whose highly dangerous activity is *responsible for the malfunction* that contributed to causing the damage. If the cause of mutual damage is a malfunction that occurred in the scope of both parties' highly dangerous activity, or if such malfunction cannot be attributed to one of the parties, *each party shall, where individual responsibility cannot be established, bear liability for his own loss.*

4.2. Liability for the Acts of Another

Liability for the acts of employees: If an employee causes damage to third parties in connection with his employment, liability in relation to the injured person lies with the employer. Liability of the employee or the member and the employer or the legal person shall be joint and several if the damage was caused intentionally. Three conditions must be met to determine the employer's liability for damages:

- *The tortfeasor is the employee* of the employer
- The employer is held liable *if the employees' liability would be determined based on the general rule of the liability of damages, the burden of proof of exculpation is on the employer.*
- The damage is *in connection with the tortfeasor's employment.*

2. *Liability for the actions of senior executive of a legal person: The legal person* shall be liable for damages caused *to third parties* by the executive officer *in that capacity*. Liability for any damage caused by the executive officer *intentionally* lies with the executive officer and the legal person *jointly and severally* [Section 3:24 (2) on the Civil Code]. Based on the *attribution principle* the senior executive conducting in the duties and powers of the legal person *is attributed as the conduct of the legal person.*

3. *Liability for the actions of agents*: If an agent causes damage to third parties *in connection with his assignment,* liability in relation to the injured person lies with the principal and the agent *jointly and severally*. The principal's diligent procedure is realized when he *informed* the agent of all circumstances relating the assignment, which is *essential* for the agent to administer the activity *without causing damage.* The diligence of *supervision* shall be *investigated* only in case when the supervision *is necessary, and the principal has an opportunity to carry it out.*

The principal shall be relieved of liability if he is able to prove that he has not acted wrongfully in terms of choosing, instructing, and supervising his agent.

In respect of *permanent agency*, the injured party shall be titled to enforce his claim according to the regulations governing the liability for damages caused by employees.

4.3. Liability for the actions of Non-Punishable persons

1. Non-punishable person is a*ny person whose discretionary ability is limited to an extent whereby such person is unable to comprehend the consequences of his actions leading to the damage shall not be held liable for the damage he has caused.* The Civil Code *does not define* the non-punishable persons nor the age limit, therefore the *court shall in each case measure,* whether tortfeasor is a non-punishable person. The non-punishable is not liable but in

his stead the *custodian* is liable. The person *having custody* of the non-punishable person at the time the damage was caused shall also be regarded as a *custodian*. The liability is *not liability for another person but liability in wrongfully providing care and in exercising custody* which enabled the tort of the non-punishable person. The custodian shall be *relieved of liability if able to prove that he has not acted wrongfully in providing care and in exercising custody*.

2. Compensation on grounds of *fairness*: If a tortfeasor has *no custodian or the liability of the custodian cannot be established, under special circumstances the non-punishable tortfeasor can be ordered to provide total or partial compensation, if it is clearly warranted by the circumstances of the case and the financial conditions of the parties.*

3. *Actionable conduct*: *A* non-punishable *tortfeasor may not allege his mental incapacity or impairment if such condition was inflicted by the person himself.*

4. Liability for the *actionable conduct of minors:* If damage has been caused by a minor who is *punishable, and who has an appointed custodian*, and the injured party is able to prove that the custodian has knowingly breached his obligations, the custodian as well as the tortfeasor shall be *subject to joint and several liability.*

4.4. Liability for the Actions of Public Authorities

1. The Civil Code for the liability for the actions of public authorities regulates the liability of *administrative authorities*, *courts*, *public prosecutors, notaries public and court bailiffs.*

2. Liability for damages caused within the scope of *administrative jurisdiction* shall be established only if the damage results from actions or *omissions* in the *exercise of public authority*, and if the damage cannot be *abated by common remedies* or by way of *judicial review proceedings of administrative actions.* If the damage was arising from the *incorrect application of law, the basis of the liability could only be an abruptly severe interpretation or implementation of law*. Liability for damages caused within the scope of administrative jurisdiction lies with the *legal person exercising public authority.* If the person exercising public authority is not a legal entity, liability for damages shall lie with the *administrative body having legal personality*, on whose behalf the relevant administrative body operates.

3. *The provisions on liability for damages caused within the scope of administrative jurisdiction* shall apply mutatis mutandis to liability for the actions of courts and public prosecutors, with the proviso that claims shall be enforced against the court or the Prosecutor General in connection with liability for the *actions of courts and public prosecutors*, respectively. If the acting court is *not a legal entity,* the claim shall be *enforced against the court whose president exercises overall employer's rights over the judges of the court having no legal personality*. A claim may be lodged only if *common remedies have been exhausted.*

4.5. Product Liability

1. Liability for damage caused by *defective products* lies with the *manufacturer* of such products. *The product liability breaks the enclosed double structure obligation and allows the injured party to claim instead of the contractual liability rules, non-contractual directly against the manufacturer, creating a direct link between the consumer and manufacturer and from the aspect of liability ignores the obligor, the distributor.* Any *limitation or exclusion* of the manufacturer's liability towards the injured party shall be *null and void.* The injured party may claim his right to compensation within a *three-year* limitation period.

2. The *product*: Product means any *movable property, electricity, hardware, the software, medicine, etc.*

3. *Damage caused by defective products:*

- *any damage incurred by the death, bodily injury or any impairment in the health of a person caused by a defective product;*
- *any damage caused by a defective product to other objects valued in excess of five hundred Euros as converted to Forints, if such object is for private use or private consumption according to its intended purpose and if generally used for such purpose by the injured party as well.*

4. *Manufacturer*: *producer of a finished or semi-finished product, or raw material,* furthermore the person who depicts himself as the manufacturer of the *product by the indication of his name, trademark or some other distinguishing mark on the product, or importer. If the manufacturer of a product cannot be identified, all distributors of*

*such product shall be regarded as manufacturers until such distributors reveal to the injured party the identity of the manufacture*r.

5. *Defective product:* A product shall be considered defective if it *fails to provide a level of safety generally expected*, with special regard to the *purpose of the product and the way in which it can be reasonably expected to be used,* the information provided in connection with the product, the *date of the sale of the product*, and the current state of *scientific and technological achievements*. A product shall not be considered defective solely in the base that *subsequently a product providing a higher level of safety* will be placed on the market. he burden of proof of defect lies with the *injured party*.

6. *The manufacturer shall be relieved of liability if able to prove that:*

- he did not *place the product on the market*;
- the product was *not produced for retail purposes,*
- the product *was in perfect condition at the time when it was placed on the market*, and the cause of the defect developed subsequently;
- at the time the product was placed on the market the *defect could not have been discovered according to the current state of scientific and technological achievements;* or
- the defect in the product was *caused by the application of a statutory or regulatory provision*.

4.6. Liability for Building Damages

1. Based on the Liability for building damages provisions of Civil Code primarily the liability of those *persons should be determined who have interest of damage prevention and forfending.* These persons typically are the owner, user, or any other *interested person, who gains economic advantage by using the building*. These provisions shall *not affect the right of the responsible party* to *demand compensation from the person otherwise responsible for the damage.*

2. To the extent of building damages three liability belongs:

- damage caused to other persons by *parts of the building t*hat have fallen off or by any other *deficiency* in the building,
- Liability for *falling objects posted on the building,*
- Liability for damage caused by *fallen, thrown or dumped objects.*

3. The *owner of a building shall be liable* for damage caused to other persons by parts of the building that have fallen off or by any other deficiency in the building, *unless the owner is able to prove* that the *regulations pertaining to construction and maintenance have not been violated* and that he *has not acted wrongfully* in the course of construction and maintenance with respect to the *prevention of damage.*

4. The provision set out previously shall be *applied to liability for damages caused by any object falling off a building*, with exception that the person in *whose interest the object has been installed* on the exterior of a building shall be *jointly and severally liable* with the owner of the building. The object placed on the building shall not be a *component*, but a specific accessory, e. g., advertising signs, sign, flag, lighting equipment, decoration.

5. Liability for damages caused by objects that are thrown out, dropped, or poured out from a dwelling, or *other rental premises lies with the tenant or other user of the dwelling or premises*. f the tenant or user *identifies* the person who *caused* the damage, he shall bear *liability as a surety.* The tenant or user shall be relieved of liability if he proves that the person who caused the damage was on the *premises unlawfully.*

4.7. Liability for Damage Caused by Animals

Damage cause by farming operations: Any person who keeps animals shall be liable for damages caused by the animals to other persons, *unless he is able to prove that he has not acted wrongfully in the keeping of animals. The keeper of a dangerous animal shall be held liable in accordance with the provisions on liability for hazardous operations.*

Liability for damage caused by wild game: Liability for damages caused by huntable animals lies with the *authorized hunter* on whose hunting ground the *damage took place.* If the damage was caused in a place other

than a hunting ground, liability lies with the authorized hunter from whose *hunting ground the animal arrived.* he authorized hunter shall be *relieved from liability if he can prove that the damage is the result of an unavoidable cause beyond his control.* he period of limitation for claiming damages shall be *three years.*

5. Indemnification

For the *damages caused legally*, the tortfeasor is *obliged* to *compensate* if the *legislation expressively orders.* The rules regarding the *content and method of compensation* shall be properly applied. The Civil Code enforces compensation in the following instances:

- The owner shall permit access to his land for compensation if it is necessary for doing *works of public interest* [Section 5:25 on the Civil Code].
- *The owner shall have access to the neighbouring land for compensation* if it is necessary for the *construction, demolition, reconstruction or maintenance* of a building located on his land.
- Owners shall be *entitled to demand compensation from persons in an emergency* [Section 5:26 on the Civil Code].
- If the owner had a *house built beyond the boundary line of his land in good faith*, *the neighbour shall be entitled to demand to pay compensation for damages for the use of the part of land occupied* and for the depreciation in value caused therewith [Section 5:28 on the Civil Code].
- In the event of *withdrawal or termination by the customer*, the customer shall *pay compensation to the contractor for damages*, with the proviso that the *amount of compensation may not exceed the contract price* [Section 6:249 on the Civil Code].

XXII

BENKE, JÓZSEF

THE "OTHER" FACTS ESTABLISHING OBLIGATION

1. Facts Establishing Obligation "Other" Than Contracts, Torts, Securities etc.

"Other facts establishing obligation" are facts, which are others than contracts and torts. These facts can be found not only in the Sixth Book on the Law of Obligations but in many other places all around the Civil Code. These can be classified as follows:

- the parties of *legal relationships for settlement* and that of *compensation claims* such as e.g.
  - final statement of account on the assets managed by the guardian of a minor or the curator of a person of legal age [Sections 2:37; 4:243–244],
  - compensation claims between community and separate marital property [Section 4:59],
  - wrongful possession [Section 5:9],
  - facts establishing neighbourhood rights [Sections 5:24–25];
- *special cases of unjust ("ungrounded") enrichments* (not equal with unjustified enrichment!) such as:
  - surrendering the financial advantage acquired through infringement of rights to the person whose personality rights have been violated [Section 2:51 § 1 e],
  - the enrichment of the spouse by making a gain in consequence of a form of legal obligation where the other spouse participated in [Section 4:51],
  - the termination of the right of acquiring ownership of fruits, produces, or progenies of another's thing before acquiring ownership of such advantages [Section 5:50 § 2],
  - construction works not being treated as annexation [Section 5:68 § 2],
  - compensation for increments in value of the thing achieved by extraordinary repairs or renovations carried out by the usufructuary at his/her own expense [Section 5:150];
- *liabilities and responsibilities established by laws outside the law of obligations* such as e.g.:
  - some peculiar species of liability for damages,
  - indemnification prescribed by laws such as e.g. damaging in case of emergency [Section 5:26], encroachment (viz. when the owner has a house built beyond the boundary line of his/her land; cf. Sections 5:28–29), expropriation [Section 5:43; and the Act CXXIII of 2007 on expropriation], use for public purposes (5:27), composites and compounds (viz. if the objects of several persons are merged or combined in a way that the separation thereof cannot be accomplished or can be accomplished at an unreasonably high cost; cf. 5:66),
  - compensation for the violence of rights of personality [Section 2:52);
- some *nominate contracts* such e.g. as:
  - contract for establishing a legal person [Section 3:4 § 1],
  - marriage contracts [Sections 4:34 § 1 and 4:63–68];
  - agreements as to succession [Section 7:48];
- *entitlements for maintenance by law* as e.g.:
  - maintenance of former spouse [Section 4:29],
  - maintenance of former civil partner [Section 4:86],
  - maintenance of minor or adult children [Sections 4:213 and 4:219],
  - maintenance of relatives [Section 4:194];
- *special relationships of inheritance law similarly as obligations* such as:
  - waiver of succession [Section 7:7],
  - demandable devise [Section 7:33],

- agreement on expected inheritance [Section 7:54],
- compulsory share of inheritance [Sections 7:75sqq],

– facts establishing obligations which *are enumerated in the Sixth Book upon the law of obligations* and which *are not contracts, torts, and securities*:
  - *unjust(ified) enrichment* [Sections 6:579–582],
  - *negotiorum gestio* [Sections 6:583–586],
  - *implicit conduct* [Section 6:587];
  - *offering rewards* [Section 6:588] and *public commitments* [Sections 6:589–592].

This textbook summarises in details *unjustified enrichment*, *negotiorum gestio* and *implicit conduct*.

2. Unjust(ified) Enrichment

1. The basic rules of the institution of unjust(ified) enrichment is laid down in the Civil Code as follows [Title XXXII Sections 6:579–582]:

– according to the general clause of unjust enrichment [Section 6:579]: „*any person who acquires any financial advantage without any legal title at the expense of another shall be obliged to return this advantage*";
– the *general obligation to return the advantage is called restitution*; there are some *exceptions to it*:
  - any person who has lost the financial advantage before they are reclaimed shall not be obliged to return them [Section 6:579 § 2],
  - if the financial advantage is provided and used for subsistence, it cannot be reclaimed on the grounds of unjust enrichment [Section 6:581];
– there also are some *exceptions to these exceptions*, in the case of which the *general obligation of restitution applies regardless of the fact that the advantage was lost or it was provided and used for subsistence*; i.e. the *following unlawful acquirers shall be obliged to return the financial advantage in any case*:
  - who *obtained* the advantage *by a criminal act*;
  - who *obtained* the advantage *by acting in bad faith*;
  - who *lost* the advantage *by acting contrary to the Principle of Expectability* regulated in the Section 1:4 declaring that "*unless otherwise provided for by the Civil Code, persons shall act in private law relationships as it is generally expected in the specific situation*";
– if a financial advantage *cannot be returned in kind*, its *value shall be compensated* [Section 6:580];
– those ones who *has jointly been unjust enriched* shall be *jointly and severally obliged* to return the object or value of the unjust enrichment [Section 6:581].

2. The principles of unjust enrichment shall also be applied in several other cases such as e.g. to the following compensations for:

– the proceeds and interests gained by the one party of an invalid or ineffective contract, who did not perform his/her service, or received the service gratuitous [Section 6:115 § 1];
– the proceeds and interests gained by the one party of an invalid or ineffective contract, if these were not returned through *in integrum restitution* [Sections 6:119 § 2; 6:115 § 1];
– the delivery of any works in progress, which are not yet finished, if the performance of a contract for services becomes impossible [Section 6:248 § 2];
– the expenses emerged in case of *negotiorum gestio* if intervention was inappropriate [6:585 § 3];
– the necessary expenses of a wrongful possessor acting in bad faith [Section 5:10 § 2].

3. The *basic elements and contents* of the *legal relationship based on unjust enrichment* are as follows.

The *subjects of the legal relationship* are, on the one hand, the *enriched party* who acquired a financial advantage without any legal title at the expense of another, and, on the other hand, the *enriching party*, at the expense of whom the enriched party acquired the financial advantage. There are other relevant legal notions with respect to the special standings of subjects such as:

– an *enriched party of bad faith* is the one who *has* or, *by acting in accordance with the Principle of Expectability, ought to have knowledge* about the fact that he/she *cannot have the financial advantage*;
– the *enriched party who has lost the advantage by acting contrary to the Principle of Expectability* is the one,

who *has not acted as it is generally expected in the specific situation of losing the object or value of advantage.*

4. The conditions giving rise to the determination of the facts of unjust enrichment are as follows:

- the enriched party *demonstrably acquires a financial advantage*;
- this financial advantage is acquired by him/her *at the expenses of another*;
- the enrichment *has no appropriate legal ground*.

5. The *financial advantage acquired by the enriched one with no legal basis* is a fundamental notional element of unjust enrichment. It is, however, *irrelevant*, how the *enriching party was impoverished*. Therefore, there is *no unjust enrichment*, if the party was not enriched by the decrease of property of the other party; this rather brings up the *liability for damages*. The value of the financial advantage *does not necessarily correspond to* the value of the other party's harm of interest.

6. The phrase of "*at the expense of another*" *does not necessarily mean* a *financial* expense, but this notion incorporates every kind of harm of interests, typically such as:

- a *disposition with another's asset without a legal title* can produce an unjust enrichment *regardless of the unlawfulness* of this conduct (liability for damages may occur);
- *infringement of natural persons' rights relating to personality* or that of *legal persons' similar inherent rights*.

7. The *lack of the legal basis* shall be considered with respect to the *applicable laws* and *the general value judgement of society*. According to this, legal basis lacks if the enrichment cannot be based on a valid legal title or an appropriate moral ground. Unjust enrichment occurs when the acquired financial advantage *has never had any legal basis* or *it failed afterwards*. Thus, *unjust enrichment has two major classes of cases*:

- *undue services* such as undue payment, false performing surpluses, double performance, false addressing, false transfer, services performed in the base of an invalid or ineffective contract;
- *services on lost ground*, e.g. the obligor performs after the termination of contract or performs one-sided after the counter-service of his/her service became impossible.

8. The obligation of restitution is a general duty, although there are many exceptions to it. The restitution becomes due in the following moments:

- in the case of an *enriched party of good faith*, it becomes due when he/she *cannot be further considered to be in good faith*;
- in the case of an *enriched party of bad faith*, it becomes due *by the time of perfection of the enrichment's acquisition*;
- if the *enrichment was terminated by an action being inappropriate to the Principle of Expectability*, it becomes due *at the time of the loss* of enrichment;
- if the *enrichment was acquired through a criminal act*, without any exceptions, it becomes due *by the time of perfection of the enrichment's acquisition*.

The *extent of obligation of restitution* incorporates the following three major questions:

- the problem of the *acquisition of the enrichment's interim profits* which is regulated by the rules of *unlawful possession*;
- the question of the *due date of the enrichment's interim interests*:
  - if the *enrichment is money* and there is *no replacement value of the object of enrichment*, the interest becomes due *by the time of perfection of the enrichment's acquisition*,
  - if the *enrichment is originally not money but its replacement value is money*, the interest becomes due *by the time of perfection of the replacement value's acquisition*;
- the question of *restitution of the enriched party's interim costs and expenses emerged while possessing the object of the enrichment*, which is also regulated by the rules of *unlawful possession*.

9. *Losing the object of the enrichment* is the most important fact which *precludes restitution* in two major groups of cases:

- when the financial advantage *discharges from the property of the enriched party*, and *there is no replacement value* entering into his/her/its property *until the reclamation* of the enrichment;
- when the enriched party *acquires a replacement value but loses it until reclamation*.

As a *fact, occasion,* or *conduct*, the *loss of the enrichment's* original object or replacement value *cannot be exhaustively defined*:

- as the *conduct or behaviour of the enriched party*, it shall be considered that an enriched party of good

faith has the right of free disposition with the object of enrichment until its reclamation: he/she may *use it, utilise it, use it up, destroy it, waste it, lose it, transfer it, abandon it, derelict it* (except the case of immovables, which cannot legally be derelicted) etc.;
- as an *occasion*, it shall be considered that the object of the enrichment may be perished by *vis maior* (*force majeure*), *accident*, or by *another's conduct* or *fact*.

10. A *joint unjust enrichment* establishes *joint and several obligation*. Its *prerequisite* is that *every element* of the matters of facts of unjust enrichment *shall exist together* in case of *every enriched party*. In some cases, *joint unjust enrichment occurs by law*:
- the joint unjust enrichment of *spouses*, *civil partners* or *registered partners*;
- the joint unjust enrichment of *civil law partnerships* (cf. Section 6:498) and that of *general partnerships* (cf. Sections 3:138sqq);
- the joint unjust enrichment of *the general partners of a limited partnership* (cf. Sections 3:154sqq);
- the joint unjust enrichment by the *unlawful acquisition by co-finders* (see Section 5:54 § 2].

3. Negotiorum Gestio, Otherwise as Spontaneous Voluntary Agency

1. The *negotiorum gestio is a spontaneous voluntary agency*. It establishes a *very special obligation*, because it is based on a matter of fact which *erects a contract-similar obligation without concluding a contract*. Its notion is defined by Civil Code as follows: "*Any person acting in a matter on behalf of another person without being authorized thereto by agency or otherwise shall be obliged to handle the matter as required by the interest and probable intent of the person in whose favour he/she has intervened*." (see in Section 6:583).

In typical cases, unauthorised agents intervene in another's matter *voluntarily* and *by knowing the lack of authorisation*, but there are other cases, too, in which the unauthorised agent *erroneously thinks that he/she has the righteous private law or other authorisation*:
- the agent intervenes *on the ground of an invalid agency contract*, or
- the *agency contract is valid*, but the agent *exceeds the its scope*.

2. The *principles of negotiorum gestio shall subsidiary apply to the legal position* of the followings:
- the wrongful possessor [Section 5:9 § 3],
- the depositary if the depositor refuses to receive the deposited thing [Section 6:364 § 6),
- the ones who are entitled to withdraw performance [Section 6:139 § 3],
- the obligor in delay of acceptance who shall bound the thing [Section 6:156 § 3].

3. The *subjects* of the private law relationship of negotiorum gestio are as follows:
- the one *acting in a matter on behalf of another with no authorisation* is called *unauthorised agent* or otherwise *negotiorum gestor*.
- the other *in whose favour* and *by the interest and probable intent of whom* the negotiorum gestor *has intervened* is called the "*master of the matter*" otherwise *dominus negotii*.

4. The *classification of the intervention to appropriate and inappropriate intervention* decides the legal standing i.e. the rights and obligations of the unauthorised agent and that of the master of the matter. Therefore, *the decisive matter is not the success but the appropriateness of the intervention*. However, there are some rights and obligations of the parties, which are *independent of such qualification of the intervention*.

Civil Code Section 6:584 says that "Intervention in another's matter without authority shall be considered *appropriate* if it is *in conformity with the interest and presumed intent of the master of the matter*, *especially* if it *saves him/her from damage, loss or injury of any kind*." In some cases, intervention is qualified to *appropriate* even it was done *against the will of the master of the matter*, viz.:
- in order to *avert life threatening*: against the will of the person *whose life is endangered*,
- to *prevent* or *avert extensive potential hazards*: against the will of the *owner*,
- to *fulfil the obligation of maintenance*: against the will of the one who is *obliged to perform such service*.

5. The *obligations of the unauthorised agent* are as follows:
- obliged to *handle the matter* as required by the *interest and probable intent of the matter's master*;
- obliged to *immediately inform* the master of the matter about the *intervention* or *its necessity*;
- otherwise, negotiorum gestor is *subject to the same obligations as an agent* (cf. Sections 6:273sqq);

- if the intervention was *appropriate* but *at the same it caused damages*, the negotiorum gestor is *liable for these damages* according to the rules of the *general non-contractual* (i.e. *delictual*) *liability for damages*, therefore, the *liability can be excused* if the agent proves that he/she *has acted as it was generally expectable in that given situation*;
- if the intervention was *inappropriate*, the unauthorized agent is *liable for all damages that would not have occurred without this intervention*.

6. The *appropriateness* of the intervention *decisively define* the *rights of the unauthorised agent*:

- if the intervention was *appropriate*, the unauthorised agent is *entitled to the rights of an agent*, irrespective of the successfulness of the intervention:
  - *is entitled to demand remuneration*, which is *due* at the time of the agency's *ending*;
  - *for securing the claims for expenses and remuneration*, he/she becomes to be *entitled to statutory lien on the assets of the master of the matter that comes into his/her possession in consequence of the intervention*;
- if the intervention was *inappropriate*, the unauthorised agent:
  - is *not entitled to demand remuneration*;
  - is entitled only to *demand reimbursement* for his/her *expenses* only in accordance with the regulations governing *unjust enrichment* (if the intervention has produced *no enrichment* of the master of the matter, the unauthorised agent can get *no reimbursement*!).

4. Implicit Conduct

1. This institution is similarly as the *promissory estoppel* of the *Anglo-Saxon legal systems*. Our Civil Code says (6:587): "The court *may impose* the person *on paying the damages in full* or *in part* whose *intended conduct has induced by sufficient reasons and grounds another person of good faith to act in a manner that has brought harm to this person through no fault of his own.*". Therefore, there are *six cumulative conditions* to be fulfilled:

- the *one party's intended conduct*,
- the *other party of good faith*,
- the *explicitness or sufficiency of the inducement's reasons*,
- the *other party's acting was induced by the one party's conduct*,
- the *other party's harm was caused by his/her own conduct*,
- which conduct was caused *through no fault of his/her own*.

2. The one party's conduct is specific since it is *neither lawful nor unlawful* but it is *disorderly and anomalous*. This *disorder* is the *legal basis* for establishing an obligation but not a liability for damages. This rule is the *fine correction* of the *general principle* that *persons are obliged to bear the results of their own conducts*. The fact that implicit conducts erect obligation *motivates for more precautiousness* in the own conducts, therefore this law *serves property and market safety*.

3. The disposition of the norm is pretty peculiar as well, since the Civil Code gives full discretion to the courts for deciding whether *imposing or not imposing* the one party on paying the damages *at all*, and whether *imposing* the one party on paying the damages *totally or only partially*, viz.: "The court *may impose on paying the damages in full* or *in part*". This is a *discretion of wide extent*, and the reason for that lies in the *principle* that *persons are obliged to bear the results of their own conducts*, and this *obligation can be outsourced* only in *very exceptional cases*.

FABÓ, TIBOR

FUNDAMENTALS OF LAW OF SUCCESSION

Contents:

1. FUNDAMENTAL DEFINITIONS

1. *Definition of succession and heir; ipso iure succession*. Succession in general refers to those legal changes when all or certain rights and/or obligations of a subject of law vest in another subject (singular or universal succession). Succession in Law of Succession covers those situations where the estate of a person devolves upon an heir in its entirety after the testator's death. In this term succession means universal succession, only. Consequently, heir is legal successor who inherits rights and obligations, too: the estate of the testator vest in him/her as whole. The death of the testator itself results the succession (ipso iure succession) without any additional requirements (e. g. acceptation of the inheritance). The right to inheritance shall not lapse.

2. *Inheritable Estate*. The testator in his/her life was subject of several types of rights and obligations among which not all but those rights and obligations constitute the inheritance, only which belongs to the scope of civil law and in which the law provides the opportunity of succession [e.g. Beneficial Interest (otherwise known as Usufruct) or Use Right, right for maintenance ends with the death of the right holder, restitution for the violation of personality is a personal, not inheritable right of the violated person). Debts raised in the base of Tax Law are also out of the scope of inheritable estates although in the base of Tax Law usually the heir shall be liable for bearing those.

3. *Legal Titles of Succession*: Will, Intestate Succession. Succession may take place by will or by the rules of intestate succession. Should the testator leave a valid testamentary disposition (will, agreements as to succession, testamentary gift) the way of succession shall follow the intent of the testator. Intestate succession shall prevail in lack of or in case of invalidity or annulment of testamentary disposition or concerning those estates that are not mentioned in the testamentary disposition.

In the Civil Code– near the general rules of intestate succession—there are worldwide unique, special provisions on lineal succession which are applicable if the legal heir is not a descendant of the decedent, and the inheritance involves property that has come down to the decedent from an ancestor by inheritance or gift.

4. *The Scope of Heirs in General; Inheritableness. Conditions of Succession*. All entities having legal capacity may be heirs by testamentary disposition of the testator. The scope of intestate heirs is restricted: they

can come out of the relatives, the bereaved, only and in lack of any other intestate heirs the State shall be the necessary legal successor. The State, as a legal heir, shall not be entitled to disclaim an inheritance.

It is only one of the issues who can be heir in general. There is another substantive issue as well whether the heir having legal capacity and belonging to the scope of intestate heirs can inherit the specific estate of the specific decedent. This capacity is the inheritableness of the persons which depends on the circumstances prescribed by the law. Lack of inheritableness occurs when the heir is debarred from succession [Section 7:4] or other legal limitations preclude the heir acquiring the estate of the testator (e.g. limitation or exclusion of inheriting soil).

Summing up of the above-mentioned statements the necessary conditions of succession are as follows: death of the testator; inheritable estates; heir having inheritableness

5. *Debarment from Succession*. Causes of debarment are fully listed by the Code. The detailed provisions of the specific causes can be found in different parts of Law of Succession. A person shall be debarred from succession under the following circumstances:

- if the person did not survive the testator
- if the person is undeserved of the inheritance (unworthiness);
- if he has been excluded from the inheritance or disinherited by the decedent;
- if he has waived his/her right to the inheritance;
- if he has disclaimed the inheritance.

Persons who died in the same accident or in any similar incident shall be considered debarred in terms of consecutive succession irrespective of the time of their death. Unworthiness is more than a moral judgement since it covers very serious behaviours like attempting to take the decedent's life or the life of the legal heir with the intention of receiving a part of the inheritance [Section 7:6]. In terms of waiver of succession any legal heir shall be entitled to renounce his right to succession—in whole or in part—in a written agreement concluded with the testator. The personal effects and the scope of waiver is up to the intent of the parties. In lack of their expressed declarations the Code provides the rules concerning these two issues [Sections 7:8–9]. Detailed rules of exclusion can be found in the rules of succession by will [Section 7:29]. Disinheritance is regulated among the provisions of compulsory share [Section 7:77–79], while disclaimer of inheritance belongs to the rules of acquisition of inheritance [Section 7:89-90]. The point of every debarment rules is that the person involved shall be fully or partly disregarded from the point of view of succession.

2. Succession by Testamentary Disposition (Will and Agreement As To Succession)

2.1. Freedom of Testamentary Disposition; Limits of Freedom

During the period of feudalism testator's freedom as to dispose of his/her property was strictly restricted. As a result of the civil revolutions the bourgeois civil law entitled the civilians to freely dispose of their property not only in their life but at time of death by their will. Disposition may concern either the full or a certain part of the property. Nevertheless, specific provisions of the law *limit* this freedom by way of the rules of *validity of the wills* and by providing *compulsory share* for certain heirs even if the testator did not want to dispose in favour of them.

2.2. Types of Testamentary Dispositions

As an overall category testamentary disposition may mean *wills, agreements as to succession*—which influence the course of succession by way of nominating the heir or excluding, disinheriting specific persons or picking up certain objects from the property because of providing device for a beneficiary—and *testamentary gifts*. The latter influences the inheritable estate since the gift will not be the part of it provided the person who receives the gift outlives the donor.

Substantive features of (written) wills are as follows:

- contains the testator's disposition of his/her property to take effect after his death, and

– it manifestly appears to have been made out by the testator.

Having these characteristics, the instrument shall be deemed as *existing* will but for the validity of that it shall comply with other conditions as well.

2.3. Types and Basic Rules of Wills

Law of Succession recognizes the following types of wills: *private (personally drafted) wills* in *written* or *oral (nuncupative)* form, and *notarial wills* drafted before a notary public. Written private wills can be either a so-called *holographic* (*written from beginning to end by handwriting of the testator employing normal writing*) or an *allograph* (written at least partly or whole by somebody else).

For the validity of holographic wills there is no need for witnesses. Allograph wills are valid only if two witnesses—complying with the relevant legal requirements—attest that the testator identified by them subscribed the testament in the contemporaneous presence of them or, if it was signed previously, the testator declares the signature to be his/her own before two witnesses in their contemporaneous presence, and if the will is also signed in both cases by the witnesses, indicating their capacity as such. A will can be validly made only in a *language* that the testator understands, and that he is able to write if written by the testator in his/her own handwriting, or that he is able to read if written by others. Allograph wills need *continuous numbering* and *signatures of the testator and the witnesses in every separate pages* if the will consist of several separate pages.

Both types of wills can be *deposited with a notary public* and if it is made personally there is *no need for witnesses* even if the will is allograph. The written wills shall be considered valid from a formal point of view if the *date when it was drafted* is clearly indicated. *Nuncupative wills* are exceptional. Those can be made by persons who are in an extraordinary life-threatening situation where making a written will is not within their reach. A notarial will drafted before a notary public shall comply with the formal validity requirements of notarial deeds. Any expression of testamentary disposition requires *personally made legal statements* of the testator. There is *no room for representation*. Any will—with exception of spouses—which contains the testamentary disposition of more than one person (*joint will*) shall be invalid.

2.4. Capacity of Expressing Testamentary Dispositions

Expressing testamentary dispositions in form of wills, agreements as to succession or testamentary gifts requires *the legal competency of the testator* for making valid legal statements in case of his/her death, that is to say, *testamentary capacity*. Persons of full age usually have this capacity (in lack of limitations or preclusions by the law or by a court ruling on guardianship) end they can make valid testamentary dispositions. Even if the person has this capacity the testamentary disposition of *blind* or *illiterate persons*, or persons who are *incapable of reading or subscribing* their names shall be considered valid only if *made in writing in the form of a notarial will*. The testamentary disposition of a *minor of limited legal capacity* or a *person whose legal capacity has been partially limited* in respect of making legal statements relating to property shall be considered valid only if made *in the form of a notarial will*. The consent of their legal representatives, or the approval of the guardian authority shall not be required for the wills of such persons to be valid. Nevertheless, for *validity of a contract of inheritance and testamentary gifts* this consent, or approval is necessary.

2.5. Contents of Wills

Coming from the substantive features of wills the only *compulsory requirement* as to the content of the will the *testator's disposition of his/her property to take effect after his/her death*. It does not mean that the testator shall nominate heir in any case although it is typical part of the wills. Excluding or disinheriting somebody itself can be enough for complying with this condition. It is also up to the testators what part of the estate or which objects from the property he is going to assign to the heir. In case of doubt the ratio of several heirs shall be equal. *Nominating heir* shall be originated *directly from the testator*. Nobody else can be authorized to make it instead of him. Near the heir the testator may nominate *alternate heir* who will substitute the heir in case of debarment of the originally nominated person. Nominating so-called

substitute heir is generally invalid. Substitute heir is such a person who would follow in succession the prior heir such a way that the prior heir acquires the property and in case of some event or a date, the substitute hair will replace the previous heir in respect of the inheritance or a part thereof. Together with nomination of heir other typical part of the will are *specific (in rem) or obligatory legacy* when the testator directly assigns a property to a specific person without nominating him as heir or obliges the heir to fulfil a property obligation at the expense of his/her share in favour of the named person. Testator may put *conditions in the will* but any condition that is manifestly in contradiction to good morals, unintelligible, impossible, or contradictory shall be invalid.

2.6. Invalidity and Annulment of Wills

1. *Characteristics of Invalidity and Annulment. Invalidity and annulment of wills is conditional* even if there are reasons and circumstances which—according to the Code—shall lead to invalidity or annulment. Without a legal statement (contest) of an entitled person neither the notary public nor the court may take account of the circumstance available for causing invalidity or annulment. A *contest* may be filed by a person who, as the result of invalidity or annulment, would himself inherit or would be exempted from an obligation or other burden to which he is bound by virtue of the testamentary disposition. As a result of Act CXXII of 2013—on Transactions in Agricultural and Forestry Land succession of soil is restricted and all testamentary dispositions which would result prohibited succession of the soil shall be deemed void even if there were no any contest. Notary public and the court shall take account of this invalidity ex officio. The right to inheritance shall not lapse, an intestate or nominated heir may claim his/her inheritance against an intestate heir without any time limitation but the right of *contest shall lapse after five years* from the time of the opening of the succession. Neither an intestate nor other heir nominated in a will may file successful contest when the term of limitation expired. This is a substantive *theoretical and doctrinal difference between invalidity and annulment* that the cause of invalidity shall appear at the time of the raise of the will while causes of annulment appear following the coming into existence of it.

2. *Causes of Invalidity.* There are several provisions in the Code establishing different causes of invalidity which we can sort as follows and just illustrate by mentioning some examples.

- *lack or limitation of legal capacity* of testator (e.g. will of minor under the age of fourteen or between fourteen and eighteen but made in from of private will)
- *defects of the intent* of the testator (e.g. the testator was mistaken concerning the content of his/her statements or did not want to make a statement of such content at all)
- mistake in expression of testamentary intent (e.g. allograph will without witnesses, oral will without the necessary conditions, joint will)
- invalid content (nominating substitute heir, when it is not allowed, assignment to the witness of the will or the notary public who drafted the will)

3. *General and Special Causes of Annulment.* Annulment means that an otherwise valid will is not available for giving rise to the target of the will because of a later appeared circumstance. There are general or special circumstances of this nature, depending on the type of will.

4. *General cause of annulment* is *revocation* of the will by the testator according to the rules governing the making of the will. Revocation is also a testamentary disposition which refers to the intent of the testator who changed his/her mind comparing with his/her earlier will. Revocation can happen *by way of expressed declaration* or by way of *drafting new will*. Those parts of the previous will which are not in contradiction with that of the new one shall remain in force.

5. *Special rules* govern the annulment of *holographic* wills, joint wills, wills deposited with notary public and *nuncupative* wills. *A holographic will* shall become inoperative either the testator, having testamentary capacity, or another person with his/her consent *destroyed* it. If a *holographic* will has remained in the testator's possession but has not been found, it shall, until proven to the contrary, be presumed that the testator has destroyed it. Neither a *public* nor a *holographic* will shall cease to have effect if the document containing the will is destroyed for reasons beyond the control of the testator or if it cannot be found, except if the testator acquiesces to destruction. The *joint will of spouses* shall become inoperative

- if their matrimonial relationship ceases after making the will, and it is not reconciled before the

time of the opening of the succession,
- if one or both testators have a child born after the will is made, except if the will provides otherwise.

A personal *will deposited with a notary public* shall become inoperative if it is withdrawn by the testator. A *nuncupative will* shall become inoperative if the testator had the opportunity to draft a written will without any difficulty during a period of thirty consecutive days following the cessation of the situation underlying the making of the nuncupative will.

6. *Partial Invalidity and Partial Annulment of Wills*. Some causes necessarily result the invalidity or annulment of the entire will (e.g. lack of legal capacity or will destroyed by the testator). On the base of other causes either invalidity or annulment can be partial, only (nominating substitute heir in a prohibited way or drafting a partly different new will without revoking the previous one). If any disposition from among the several dispositions of a will is invalid or inoperative, the other dispositions shall remain valid or effective. If the testator provides otherwise or the continuance of certain parts of the will is in contradiction to the presumed intent of the testator, the entire will shall be invalid or null.

2.7. Agreements As To Succession

1. *Legal Nature of the Agreement*. Agreements of these type are on the one hand testamentary dispositions from the point of view of the testator on the other hand contracts conveying mutual services having property value. *Service* of the testator shall be *nomination of the other party as his/her heir* of his/her entire estate or a specific part thereof, or in respect of certain property. *Services* to be provided by the person nominated as heir to the testator him/herself—or to a third person specified in the agreement—shall be *maintenance, annuity or care*. While the *testator shall have the right to make any testamentary disposition* in the agreement as to succession (e.g. nomination of others to heir in respect of other parts of his/her property, exclusion or disinheritance of other potential heirs), these type of *dispositions of the other party shall be invalid* since it would come up against the prohibition of joint will.

2. *Validity of the Agreement*. The *provisions on private wills* shall apply to the validity of these agreements with exception that the formal requirements of wills written by other persons shall apply to such agreements even if they are drafted in the handwriting of one of the parties. The *consent of the legal representatives* or the *approval of the guardian authority* shall be required for their agreement as to succession to be valid *if the testamentary capacity* of him/her *is limited* (a minor of limited legal capacity or a person whose legal capacity has been partially limited in respect of making legal statements relating to property).

3. Intestate Succession

3.1. General Way of Intestate Succession

1. *Scope of Intestate Heirs in General*. In practice the most frequent way of succession is intestate succession which prevails when there is no testamentary disposition, or it is partly or entirely invalid or null or the valid and effective testamentary disposition does not concern all the property of the testator. Rules of intestate succession prefers those persons who are in cousinly or matrimonial/registered partnership relation with the deceased. In lack of any of them finally the State shall be the intestate heir. Among the intestate heirs, the law sets up order, and the heirs in this row follow each other in inheritance in case of debarment of the heir next in line. Cousinly relation is basically a consanguinity relationship (lineal or collateral) but adoption also establishes cousinly relationship from legal point of view even if there is no ill and blood between the adopted person and the adoptive parents. Matrimonial and registered partnership relations shall be validly established and at the time of the death of the deceased still existing real connection between the parties. The spouse/surviving partner shall be debarred from intestate succession if they were separated at the time of the death of deceased and it is manifestly evident from the circumstances that there was no reasonable expectation of reconciliation.

2. *Inheritance by Descendants*. The child of a decedent shall be the primary legal heir. Two or more children shall succeed in equal shares. In the place of a child or a more distant descendant debarred from

succession, the children of a debarred person shall succeed in equal shares. If several descendants succeed together, the purpose of the law is to provide equal shares to descendants being on same level of succession. It can happen that the decedent assigned estates as a gift for certain descendants which estates are not the part of the inheritance anymore therefore one or more descendants could get more than others taking account the earlier gifts if the inheritance will be divided in equal shares. To avoid this "injustice" each heir shall add to the value of the estate the value of advancements they received from the decedent during his lifetime

- if the decedent expressly stipulated such advancements to be included in the heir's share of the estate or
- the circumstances suggest that the bequest was made under the obligation of inclusion.

Restoring previous gifts (advancements) this way the cumulated value shall be divided among the heirs according to the order of intestate succession and the value of such advancements restored by each heir shall be deducted. From the existing estates the heir who earlier received advancement shall be entitled for the difference, only. If the heir received more advancements, than his/her calculated share he/she shall be considered satisfied from the inheritance to be divided, but he/she shall not be compelled to refund any excess. Applying these rules neither heir shall give or refund any value to any other heirs since restoring this gift means calculation, only, in the interest of determining how the existing estates shall be divided among the descendants. Should the calculated share be smaller than the compulsory share of the heir these rules are not available for managing this issue, but the rules of compulsory share shall be applied.

3. *Status of the Spouse in Intestate Inheritance*. The spouse of the decedent shall be taken into account in three ways: *descendants and spouse inherit simultaneously, spouse and parent(s) of the decedent inherit simultaneously, just the spouse inherits*.

*a) Inheritance by Spouse and Descendants Simultaneously. W*hen descendants and the spouse of the decedent as well survived the decedent all of them shall be intestate heirs, but the way and object of their inheritance differs. The estate remaining after the decedent shall be divided into two groups:

- *family dwelling* used by the spouse together with the testator, including *furnishings and appliances* will be the *property of the descendants* according to their legal shares encumbered by the *life estate* (*usufructus for life*) *of the spouse*,
- *all other objects* of the estate which shall be *divided among the descendants and the spouse* such a way like the spouse would be the child of the decedent.

In the latter case calculating with two children and with the spouse the mentioned part of estate will be the property of them in equal (1/3-1/3) ratio. Instead of a child share, the spouse may be granted estate for life in respect of the entire estate as a result of the agreement of heirs. Life estate shall provide the accustomed residential circumstances for spouse following the death of the decedent therefore there is no room for limitation or redemption by request of descendants. Spouse itself shall be entitled for claiming *redemption of life estate* as a result of which instead of life estate he/she will receive *one child share*—in kind or in money—from the estate to be redeemed.

b) Inheritance by Spouse and Parent(s) of Decedent Simultaneously. Here again the estate remaining after the decedent shall be divided into two groups. Provided that:

- there is no descendant, or
- if the descendant debarred from succession and
- spouse and parent(s) of the decedent also survived the decedent's spouse shall inherit the *family dwelling* used together with the decedent, including *furnishings and appliances*.

Half of all *other estates* shall be inherited by the decedent's spouse. The other half shall be inherited by the decedent's parents in equal shares. If a parent is debarred from succession, the other parent and the decedent's spouse shall succeed in equal shares. Concerning those objects of estate, the origin of which is lineal the rules of linear succession shall be applied.

c) Inheritance by Spouse Alone. If there is no descendant or parent, or if they are excluded from succession, the surviving spouse shall receive the entire estate. Concerning those objects of estate, the origin of which is lineal the rules of linear succession shall be applied.

4. *Inheritance of Lineage and Their Descendants (Collaterals).* If neither descendants nor spouse of the

decedent inherit, succession will take place among the lineage and collateral heirs. Parents, grandparents, grate-grandparents and their descendants consecutively shall be heirs.

The parents of the decedent shall succeed in equal shares. In the place of a parent debarred from succession, the descendants of such parent shall succeed in the same manner, in which descendants of a child succeed in the stead of the child. If a parent debarred from succession has no descendant, or if the descendant is excluded from succession, the other parent alone or his descendants shall succeed.

The grandparents of the decedent shall become legal heirs in equal shares if there are no descendants, spouse, parents, or descendants of parents, or if they are excluded from succession. In the place of a grandparent debarred from succession, the descendants of such grandparent shall succeed in the same manner as the descendants of the parent succeed in the stead of that parent.

The great-grandparents of the decedent shall become legal heirs in equal shares if there are no grandparents and descendants of grandparents, or if they are excluded from succession. In the place of a great-grandparent debarred from succession, the descendants of such great-grandparent shall succeed in the same manner, in which the descendants of the grandparent succeed in the stead of that grandparent. A little bit simplifying the complicated and detailed rules we can summarize the additional rules shortly as follows: if the debarred grandparents, great-grandparents have no descendants the other grandparent or great-grandparent shall succeed.

5. *Inheritance by Distant Relatives.* If neither the great-grandparents, nor their descendants inherit the distant relatives shall be the heirs, only in equal shares. Their descendants may not be heirs in case of debarment of the distant relatives.

3.2. Special Way of Intestate Succession: Lineal Succession

Lineal succession is a special Hungarian legal institution the purpose of which is to avoid such succession when a property originated form lineage would be inherited by heir(s) out of the relatives of the decedent (e.g. spouse and later his/her relatives could inherit the property which the decedent inherited or received as a gift from his/her father, mother, grandfather, grandmother…). Instead of general rules of intestate succession the rules of lineal succession shall prevail, if

- the legal heir is not a descendant of the decedent,
- there is lineal property in the estate,
- there is such heir who is entitled to inherit the lineal property.

As general rule applies, any property that has come down to the decedent from an ancestor by inheritance or gift shall be deemed as lineal property. A parent shall succeed to property that has come down to the decedent from him/her or one of his/her ancestors. Descendants of a debarred parent shall succeed in his/her place according to the general provisions on intestate succession. If the parent who is entitled to succeed to a lineal property and the parental descendant are both debarred, the grandparent, and if the grandparent is also debarred, a more distant ancestor of the decedent shall inherit the property that has come down to the decedent from him/her or from one of his ancestors. The spouses shall be entitled to life estate on lineal property which life estate can be subject of redemption. If there is no lineal heir, lineal property shall be treated the same as the decedent's other property.

3.3. Succession of the State (Escheat)

In the absence of other legal heirs, the estate shall revert to the State which shall not be entitled to disclaim an inheritance.

4. Compulsory Share of Inheritance

1. *Legal Nature of Compulsory Share*. Hungarian Law of Succession provides compulsory share to *descendants, spouse, and parents* of a testator if such person is a legal heir of the testator or would be one in the absence of a testamentary disposition at the time of the death of decedent and they could not receive anything from the estate or their acquired share from estate does not reach the legally provide extent of

their compulsory share. This situation may appear if the testator nominated other person(s) as heir or because of gifts the estate is not enough for the purposes of compulsory share. Should the compulsory share suffer injury the entitled person shall have the right for his share *as a creditor of the estate* (not *in rem* but *obligatory claim* the period of limitation of that shall be five years). Compulsory share usually is due *in money* (in certain exceptional cases in kind) without any limitation or encumbrance.

2. *Debarment from Compulsory Share: Disinheritance*. A person entitled to a compulsory share can be divested from this share by way of disinheritance, only, which requires the express disposition of the testator in a valid and effective testamentary disposition expressly indicating the legally accepted reason of that. Such grounds for disinheritance can be found in Section 7:78 of the Code (e.g. person has committed a crime to the injury of the testator or has seriously violated his legal obligation to support the testator or lives by immoral standards).

3. *Extent of Compulsory Share of Inheritance*. For determining the due value of compulsory share, a complicated calculation shall be made the first step of which is to determine the basis of this share. The basis involves two elements: the *net value of an estate*, and the *net value, at the time of advancement*, of the advancement granted by the testator *inter vivos*. Having the amount of these two elements, we can calculate the extent of compulsory share. The person entitled to a compulsory share shall be entitled to one third of what is due to a legal heir as calculated in the base of the compulsory share. If the spouse as intestate heir would be entitled for life estate his/her compulsory share shall be a limited extent of life estate that provides for his/her needs, in consideration of the property he/she has inherited.

4. *Responsibility for Satisfaction of a Compulsory Share*. There are two groups of persons responsible for compulsory share: persons having a share of the estate, and persons receiving advancements from a testator within ten years prior to his death. Responsibility for satisfaction of a compulsory share primarily falls on persons having a share of the estate while others shall be responsible for that part of the compulsory share that cannot be satisfied from the estate, irrespective of the chronological order in which the advancements were received.

5. Legal Effects of Succession

1. *Acquisition of Inheritance*. Succession shall open upon the death of the testator when the heir shall acquire an estate, or his/her rightful share or certain objects from an estate, without acceptance or other legal act (*ipso iure succession*). If the heir does not want his share from the estate, he/she shall be entitled to disclaim an inheritance after the time of the opening of the succession. Disclaimer shall affect the entire share of the heir but in certain cases there is room for separately disclaim the inheritance of a farmland.

2. *Legal Status of Heirs*. Should there be two or more heirs they shall be jointly entitled to the property of an estate before the division of the succession. The general provisions of co-ownership shall apply to the community of them which community shall cease upon the division of the succession. Their responsibility for estate debts shall be joint and several but limited liability.

3. *Estate Debts and Their Satisfaction*. *Responsibility for Estate Debts*. Estate debts are entirely listed by the Code as follows:

- costs of a proper burial for the testator;
- applicable costs of acquiring, securing, and handling an estate (hereinafter referred to as „estate costs"), as well as the costs of probate proceedings;
- the testator's debts;
- obligations based on the compulsory share;
- liabilities based on legacies and devises.

This specification is substantive because of two viewpoints:

- these and only these debts shall be qualified as estate debts
- the specification determines the rank of the debts which rank shall be followed in course of satisfying the debts.

Heirs shall be responsible to creditors for estate debts. Their responsibility *is limited by two ways*.

- At first, they shall be liable with the objects and proceeds of the estate (*cum viribus liability*).

– If the objects or proceeds of an estate are not in the heir's possession at the time the claims are enforced, the heir's other property shall also be appropriated up to the value of their inheritance to cover the claims (*pro viribus liability*).

Not only heirs but the *legatee* who has received satisfaction at the expense of another estate creditor *shall be liable* to that creditor if the creditor has not been able to obtain satisfaction from the heir. Liability of the legatee shall be in accordance with the regulations governing unjust enrichment.

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