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Re-Codification of the Civil Code? Conception for Drafting the New Civil Code

Abstract. The paper may serve as a good practical guidance for a foreign reader to the conception of the new Hungarian Civil Code. After a brief historical review, and description of the drafting process, the paper summarises the principal issues addressed in the Conception of the New Civil Code (“Conception”). These are: the proposed structure is a comprehensive code, covering all ranges of matters that are related to civil law, including commercial law, family matters, labour law, company law, intellectual property and conflict of laws issues. Then the paper describes the most important specific amendment proposals in the various fields covered by the Code: introduction of a preamble, basic principles of the civil law, rules regarding legal entities, property rights, contract law, including liability, and finally in the field of the law on succession.

Keywords: Hungarian Civil Code, civil law, commercial law, family law, labor law, company law, intellectual property, conflict of laws

Exposition

1. In Hungary, Act IV of 1959 is the first Civil Code enacted. Previously, drafts were made in the course of the 19th century: first, partial drafts were framed to regulate specific areas of civil law,¹ then proposals were submitted on the comprehensive codification of civil law.² The most significant of these was submitted as Bill of 1928 on Civil Law, which, albeit was not passed by Parliament as an act, has been applied in judicial practice.

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¹ Partial drafts were made during the second half of the 19th century to regulate specific areas of civil law, e.g., the draft by Pál Hoffmann concerning a general part of civil law completed in 1871 and the draft by Istvan Teleszky concerning law of succession completed in 1887.

² Draft of the First Hungarian General Civil Code of 1900, Committee text of 1913 (second draft), the so-called Parliament text of 1914 (third draft), and finally, the so-called Committee text of 1915 (fourth draft).

Following World War II, Parliament adopted Act IV of 1959 on the Civil Code (Ptk),³ then, its comprehensive amendment was adopted in 1977.⁴

Since the political transformation in 1989–1990, more than 50 amendments of the Civil Code have been passed. Meanwhile, substantial changes ensued in economic and social relations, and consequently, in the area of civil relations. Therefore, in 1998, the Hungarian government decreed “the commencement of the work on the comprehensive modernisation of civil law, and in this scope, of the Civil Code with the objective of framing a modern Civil Code in view, which, as an economic constitution will qualify as the fundamental law governing civil life”.⁵

As pursuant to the decision of the Hungarian government, the draft of the Conception was completed, then adopted as a moot point and submitted to extensive professional and social debate by the government.⁶ The motions concerning the Conception were deliberated by the Editorial Committee and the Chief Codification Committee. The Chief Codification Committee divided the draft into two parts, i.e., the Conception that sets forth the cardinal principles of the new Civil Code and the Programme as the basis of the elaboration of the norm text. The main tendencies of the necessary amendments of the new Civil Code were summarised in a concise manner in the Conception,⁷ whereas, the Programme rendered a more meticulous elaboration of conceptual problems. In 2003, the government adopted the Conception,⁸ and published it in the Hungarian Official Gazette in line with the Programme. Any diversion from the Conception will require authorisation by the government, whereas departure from the Programme is subject to the decision of the Chief Codification Committee.

³ Law Decree XI of 1960 was enacted to regulate the effectiveness and implementation of Act IV of 1959.

⁴ Act IV of 1977, which was implemented as pursuant to Law Decree II of 1978.

⁵ Government Decree no. 1050 of 1998 (IV. 24.) on the Codification of Civil Law as amended by Government Decree no. 1061 of 1999 (V. 28.)

⁶ Government Decree no. 1009 of 2002 (I. 31.)

⁷ The following authors compiled specific parts of the Conception: András Kisfaludy: *General Rules of Liabilities Pertaining to Securities*, Tamás Lábady: *Liability for Extra-Contractual Damages and Insurance Contracts*, Ferenc Petrik: *Volume One on Persons*, András Kőrös: *Volume Second on Family Law*, Tamás Sárközy: *Volume Three on Law of things*, Lajos Vékás: *Introduction*, and, *Volume Four on Law of Obligations (with the exception of Rules Pertaining to Insurance Contracts, Delictual Liability for Damages and Liabilities Pertaining to Securities)*, and, Emília Weiss: *Volume Five on Law of Succession*.

⁸ Government Decree no. 1003 of 2003 (I. 25.)

2. The Conception takes a stand on general substantial issues with respect to drafting the new Civil Code.⁹ These are as follows:

No foreign *models* were adopted for framing the new Civil Code, although, instances of foreign codification, such as the Civil Code of Holland and various international achievements of legislation were taken into consideration, such as the Vienna Convention on International Sale of Goods, UNIDROIT Principles of International Commercial Contracts (1994) and Principles of European Contract Law (Volumes I–II: 1999 and Volume III: 2002). Besides relevant directives of the European Community (considering the requirements of legal harmonisation as pursuant to the European Agreement), rules of civil law currently framed under separate provisions of Hungarian law and significant principles of law established by judicial practice are also designated to be integrated into the new Civil Code.

Since the political transformation in 1990, a different *social model* has emerged that needs to be responded to. According to the Conception, the framing of the new Civil Code will conform to the image of society that evolved in the EU, to the social model of a constitutionally protected market economy shaped by welfare elements.

The new Civil Code is designated to codify civil law on *a national level* and enact the accomplishments of *legislation within the framework of a code*.

The new Civil Code *would be based on a monist principle* and would encompass civil relations of professional entities in the business world and in financial transactions and civil relations of private entities. Among other factors, this is justified by the followings: “in relevant foreign instances of codification, separate codification of contractual rules of commercial transactions may not be considered modern any longer ..., since general contract law has transformed to bear the mark of ‘commercial law’ during the recent 100 years”. In case of the application of the monist principle, parallel regulation could be avoided and current problems of denotation could be eliminated.

Scopes of content of the future Civil Code will be defined as follows:

- *Family law* will be integrated into the new Civil Code,
- The elaboration of the new Civil Code is designated to be in accordance with the comprehensive reform of the *Labour Code*. As a consequence, norms of particular labour agreements as a separate type of agreements may be integrated into the Volume on Contract Law of the new Civil Code, and hence, special norms of labour agreements will be substantiated

⁹ The document on “The Conception of the new Civil Code” is accessible on the homepage of the Ministry of Justice of the Republic of Hungary: <http://www.im.hu/mainpage>.

by the general rules pertaining to contracts as pursuant to the new Civil Code.

- According to the monist conception, rules of *company law* formulated under separate law would be integrated into the scope of special norms pertaining to particular legal entities under the new Civil Code. An advantage of that regulation would be that the scope of legal entities could be regulated under the new Civil Code in full breadth, the scope of general rules pertaining to legal entities could be extended, the repetition of particular rules could be avoided and the character of the norms of the new Civil Code as secondary law would become manifest. (This corresponds to foreign pattern, as well.) The Conception enumerates some instances of counter-arguments *vis-à-vis* the monist standpoint: as pursuant to such regulation, norms of civil law and public law would mingle, the unity of the Act on Business Associations (which should be repealed in case of the purported regulation under the new Civil Code) would cease, furthermore, the cogent character of company law would also encumber its incorporation into the new Civil Code. The viability of the application of the monist conception is debated in special literature and in professional circles. The Chief Codification Committee, following the deliberation on the draft of the Conception, formed the opinion that the relationship between company law and the new Civil Code will be defined following the supplementary review of the Act on Business Associations. Since the viability of the monist solution is under dispute, with all probability the dualistic approach *vis-à-vis* the Conception would be adopted pursuant to the Amendment Act on Business Associations.¹⁰
- The volume of rules on *industrial property rights and copyright law* is not integral to the effective Civil Code, which needs to be maintained on the following grounds: *in re* separate provisions under this branch of law set forth complex norms, they should not be extricated, furthermore, some powers are conferred as pursuant to administrative acts. Finally, the effective settlement is customary and internationally recognised.
- The Conception does not include a proposal for the re-codification of *international private law* and its manner, merely makes reference to scopes of content.

By reason of considerations of volume and content, the new Civil Code would be extended by *a further structural unit*, i.e., the “Volume”. Therefore, the new Civil Code would consist of Volumes, Sections, Titles and Chapters. (The

¹⁰ The deadline for drafting the norm text of the new Civil Code is December, 2005.

numbering of articles would be continuous, whereas, the numbering of Sections within the Volumes, of Titles within the Sections, and of Chapters within the Titles would recurrently start from the beginning.)

As pursuant to the Conception, the Civil Code will simultaneously be adopted by Parliament and take effect.

Concerning the *inner structure* of the new Civil Code, the following proposal has been made:

The objectives of the new Civil Code will be formulated in a concise manner under the Preamble, which will precede the “Volumes” and the “Introductory Provisions”. The fundamental principles of the new Civil Code will be summarised under the “Introductory Provisions”. The new Civil Code, accordance with the Civil Code in force or the Bill on Civil Law of 1928, will not contain a General Section. According to the preamble to the Conception, the General Part would unnecessarily complicate the structure of the law and excessively increase the significance of the rules of legal transactions, furthermore, would encumber the application of the law.

The new Civil Code is going to contain the following Volumes:

Volume One on Persons

Volume Two on Family Law

Volume Three on Law of Things

Volume Four on Law of Obligations

Volume Five on Law of Succession

The significance of the new Civil Code would be guaranteed by the stipulation of a clause, according to which exclusively a separate act could *amend* it expressly designed to do so, as opposed to the effective practice, when the Civil Code is marginally amended by acts adopted on other matters.

3. In the followings, we will outline major proposals for amendment with reference to the Programme:

Preamble: The objective of the act is not normatively based, therefore, it will be formulated under a Preamble, separately from the normative text. Besides emphasising that the Code regulates pecuniary circumstances with respect to the integration of family law, it will highlight that civil relations of entities are also regulated under the new Civil Code.

Introductory Provisions: Fundamental principles that pertain to the whole body of the new Civil Code will be formulated under the Introductory Provisions, however, separate fundamental principles may be laid down within the Volumes,

if necessary. According to the Conception, overlaps of effective fundamental principles will be eliminated and the regulation will be more focused.

The following *fundamental principles* will be upheld under the new Civil Code:

- The principles of *bona fides (good faith) and honesty* will be upheld as requirements with respect to the exercise of civil rights and fulfilment of duties,
- The principle of *nemo suam turpitudinem allegans auditur* will be upheld, since a mainly correct relevant judicial practice has been established in broad scope,
- The new Civil Code will also set forth the principle of the prohibition of the abuse of the law, however, shall not render a definition of the content of this prohibition, but transfer this power to judicial practice,
- Substitution of legally required statements by judicial decisions will qualify as significant intervention into the private autonomy of the parties concerned, therefore, this, as opposed to former practice, would only exceptionally be admissible,
- The new Civil Code will also set forth the currently effective fundamental principle that protection of rights guaranteed by law shall primarily pertain to the powers of courts.¹¹

Volume One on Persons

This Volume will specify rules concerning natural persons and legal entities. According to the Conception, substantial amendments of the regulation concerning *natural persons* will not be made under this Volume.

¹¹ The prescription of requirements of *generally expectable behaviour* and *proper exercise of powers* as fundamental, formally recognised principles is not deemed necessary, since their content corresponds to that of the requirements of *bona fides* and *honesty*.

The principle of *the obligation to co-operate* formerly prescribed as a fundamental principle shall not be a general requirement, therefore, it shall not be set forth under the Introductory Provisions, but under law of obligations.

The principles of *the protection of the fundamental right of the person to property* and of *the right of the person to protection of the law* set forth under the effective Civil Code as fundamental principles do not need to be framed under the new Civil Code, since the protection of these rights are laid down under the Constitution and their formulation under the new Civil Code would be a mere repetition.

Provisions, primarily general provisions concerning *legal entities* and rules concerning the foundation and cessation of legal entities will require significant amendments.

According to the preamble to the Programme, the Hungarian legal system is devoid of basic directive principles pertaining to legal entities. Therefore, the new Civil Code would reasonably stipulate, on the one hand, *general rules* pertaining to legal entities, on the other hand, an entire scope of rules pertaining to the types of legal entities. The determination of general criteria would be essential, since, as expressly pursuant to the new Civil Code, any law beyond its scope could establish a legal entity exclusively on condition that the respective entity complies with the general criteria specified under the new Civil Code. In a given case, the organisational unit of the legal entity may qualify as a legal entity exclusively on grounds of its compliance with the general criteria. Under the new Civil Code, the legal entity of the volume of the property (primary capital) specified by law could be recognised on condition that its administration and representation is secured by a trustee.

A significant amendment of rules pertaining to the establishment, content-based modification and cessation of legal entities will be effected under the new Civil Code. Therefore, legal entities would acquire legal capacity not by establishment, but as pursuant to an act of constitutive force, i.e., *registration*. Furthermore, all modifications would take effect exclusively as pursuant to registration of constitutive force, whereas, the cessation of a legal entity would take effect as pursuant to cancellation from registration. Duties related to keeping the registers would be administered by an office under judicial supervision to be organised by a court.

According to the Conception, during the term between registration and establishment, a so-called *preliminary legal entity* would be operative upon the model of preliminary association.

In the scope of general rules pertaining to the *establishment* and cessation of legal entities, the new Civil Code would regulate that a legal entity may be established as pursuant to an agreement, a deed of foundation or charter (hereinafter: charter), in case the type of legal entity specified under the Civil Code or other law is applicable. Failing a provision to the contrary, the followings will be specified under the charter on a mandatory basis: designation of the founder, the name and seat of the legal entity, the objective of the foundation of the legal entity, the volume of assets designated to the legal entity, the area of economic activity of the entity, the main decision-making and managing body of the legal entity, its legal representative, the manner and extent of acceptance of responsibility for the liabilities of the legal entity. As pursuant to Directive no. 1 of the European Community on Company Law, the determination of the

area of economic activity (objective) of the legal entity under the charter will have no pertinence on the scope of the legal capacity of the legal entity.

The general rules pertaining to the *cessation* of the legal entity will be stipulated according to uniform principles as opposed to the effective Civil Code. Accordingly, cessation of legal entities would ensue in the following instances: *a)* expiration of a specified period or supervention of a specified condition, *b)* dissolution, *c)* fusion or merging, *d)* de-merger or withdrawal, *e)* transformation into another type of legal entity, *f)* liquidation, *g)* declaration of cessation by court. Elements, such as the manner of legal succession, the obligation of the legal successor to accept responsibility and related issues, cessation without a legal successor would be provided for under the new Civil Code.

Business associations that currently do not qualify as legal entities (general partnerships and limited partnerships) *will be defined as legal entities* under the new Civil Code. According to the preamble to the Programme, these, *in re* their legal substance, currently also function as legal entities and their legal capacity corresponds to that of other forms of associations. In case an organisation that does not qualify as a legal entity is conferred legal capacity by law, then such law will specify the representative and managing body of the organisation as a lawful minimum and determine conditions of the assumption of financial obligations by the organisation.

In the scope of the *protection of civil rights of entities*, the most significant proposal for amendment concerns the introduction of the institution of *remuneration for the injury of the entity*. The effective objective legal consequences of the violation of privacy would be upheld, however, the legal institution of the so-called remuneration for the injury of the entity would replace non-financial restitution. This, on the one hand, would imply indirect compensation for the violation of privacy, on the other hand, civil penalty, which would incur indemnification. Remuneration for the injury of the entity could also be adjudged in cases if the violation of privacy did not incur losses for the aggrieved party, however, considering all circumstances, indemnification for the aggrieved party would be reasonably due. On grounds of the extent of the loss and the seriousness of the breach of the law and of imputability, the adjudication of remuneration for the injury of the entity and the determination of its extent would be subject to the discretion of the court. Irrespective of or besides the adjudication of remuneration for the injury of the entity, the court could adjudge compensation for pecuniary losses as pursuant to the rules of liability for damages.

Volume Two on Family Law

According to the Conception, family law will be integrated into the new Civil Code with respect to *peculiarities of relations under family law*. In the area of family law, the legislator will not primarily conform to effective norms of the EU, but to specific provisions of the European Convention on Human Rights pertaining to family law and to adjudication by the Strasbourg Court of Human Rights pertaining to family law, and, in the scope of international treaties, primarily to the Convention on the Rights of the Child of 1989.

The Volume on Family Law would be introduced by special *fundamental principles* that are peculiar to rules of family relations or depart from rules of civil relations.

The following principles regulated under the effective Act on Family Law will be reasonably *upheld* in the new Civil Code: the principle of protection of marriage and family, the principle of guaranteeing equal rights for the spouses and in the child–parent relationship, and, finally, the principles of protection of the child and of the primacy of their interests.

The requirement of harmony between the interest of the family and of the individual, instead of the currently effective requirement of harmony between the interest of society and of the individual would be stipulated as a *new principle*. Some principles and provisions of family law framed under the Convention on the Rights of the Child will be included into the new Civil Code: for instance, that potentially the child should be brought up in his/her own family, or in case no other possibility obtains, in a family.

The *structure* of the Volume on Family Law would conform to the effective framework that consists of the following three main sections on:

1. Marriage
2. Relations
3. Guardianship.

In the scope of regulations concerning marriages, the rules of *law of matrimonial property* will be basically transformed. It can be justified by several factors, one of the most important is that these rules have been adjusted to transformed social–economic conditions to a marginal extent. Therefore, in this scope, content–based amendments and more detailed regulation will be required with special regard to the interest of the protection of the family. These will be harmonised with the broader recognition of the autonomous financial decisions of the spouse engaged in economic activity, with the requirement of the security of transactions, and particularly, with the protection of the interests of creditors.

Volume Three on Law of the Things

Instead of Right of Ownership, the title of this Volume will be Law of the Things, and therein, the following maxims will be proclaimed as *fundamental principles*:

- Rules of Law of the Things may be exclusively formulated under the Civil Code (by reason of the constraint of standard form),
- Rules of Law of the Things may not be disregarded despite the according common wish of the parties concerned,
- Peremptory prohibition of nationalisation by law, which overreaches the scope of appropriation, will be formulated as a fundamental principle,
- Appropriation under terms regulated by law will exclusively be admissible by reason of exceptional and cogent public interest and will be attached to guaranteeing full, immediate and unconditional compensation,
- Restriction of proprietary rights by reason of public interest may be effected exclusively on legal grounds and will be attached to guaranteeing full indemnification if legal conditions obtain.

The Volume on Law of the Things will specify rules pertaining to *res* and rights *in rem*.

Accordingly, the Volume on Law of the Things will specify rules pertaining to blocks of freehold flats, basic rules of land law and substantive rules of civil law pertaining to the registration of estates. According to the Chief Codification Committee, problems related to the registration of estates could be solved if the effective system was replaced by a system of administration implemented by an organisation under the direct supervision of courts. This would adequately guarantee publicity and public authenticity.

The Programme does not propose further specification of the scope of the *notion of res* under the Volume on Law of the Things, but recommends further regulation under the rules pertaining to sales agreements.

State property: As pursuant to the civil law of market economies, the property of all subjects of law is construed as private property, which also pertains to the property of the state: under civil law, the property of the state shall qualify as private property. As a main rule, the property of the state is administered by publicly financed institutions that qualify as autonomous legal entities as pursuant to the rules of budget economy set forth under the Budget Act. In case the administration of government property does not pertain to the authority of any publicly financed institution, such property is administered by the Treasury as a legal representative of the state exercising the powers of the minister responsible for government property. In case the property of the state does not

qualify as government property, but is constituted as venture capital, the state will be liable to utilise it in business associations or non-profit organisations. The scope of the venture capital of the state will be circumscribed under separate law, however, within venture capital, the circumscription of the scope of property to be maintained as long-term state property and of the property designated to be privatised and realised, i.e., transferred to private ownership is deemed to be necessary at the same time.

Exclusive and not-negotiable objects of the property of the state and of local authorities will be defined, whereas, the scope of negotiability will be reduced as pursuant to the new Civil Code. Activities pertaining to the monopoly of the state, which the state may benefit from as pursuant to concession agreements, may exclusively be prescribed by law.

Besides framing the rules of civil law pertaining to the right of ownership, the new Civil Code will set forth norms of *so-called restricted rights pertaining to another res*. In this scope, rights of use and rights of assets will be regulated under separate chapters: personal and predial servitude shall qualify as *rights of use*, whereas, lien shall qualify as *rights of assets*. As pursuant to that proposal, hypothecary law would be reintegrated into substantive law, or at least, pertinent rules under the Volume on Substantive Law and on Contract Law would be divided.

Volume Four on Law of Obligations

Structure: This Volume will consist of six Sections:

1. Section One: will set forth general rules pertaining to liabilities,
 2. Section Two: will set forth general rules pertaining to contracts,
 3. Section Three: will set forth rules pertaining to specific types of contracts,
 4. Section Four: will set forth general rules of liabilities pertaining to securities,
 5. Section Five: will set forth rules pertaining to extra-contractual liability for damages,
 6. Section Six: will set forth rules pertaining to various facts of cases that establish liabilities such as accession of unjust enrichment administration without mandate, promises of reward, other itemised unilateral legal transactions and implied behaviour.
1. *General rules of liabilities* will include regulations concerning the limitation and calculation of deadlines, rules of representation in transactions, rules concerning interest and compensation, norms pertaining to the order of liquidation

of debts of the obligee, rules of multi-civic liabilities and rules pertaining to unilateral legal transactions.¹²

2. Section Two will set forth *general rules pertaining to contracts*. By way of introduction, the Conception stipulates general principles, which will be applied for the purpose of the regulation of contract law.

As pursuant to the new Civil Code, the effective system of regulations will be replaced by an *uniform regulation* pertaining to contractual relations in commercial transactions and between private entities. It may be regarded as a substantive change that the legislator, for the purpose of framing contract law, construes contracts concluded in commercial (business) transactions as a *model* to be followed, instead of traditional contractual relations between private entities.

According to the assumption of the Conception, the parties engaged in financial transactions are capable of enforcing and protecting their interests, therefore, civil law should interfere with contractual relations in the least possible degree. This both entails *recognisance of private autonomy in a broad scope* and supplanting legal possibilities of judicial intervention by the state. (This would be admissible exclusively in exceptional cases and in the interest of the so-called “weaker party” and its possible instances will be expressly defined. Such instances typically obtain in consumer legal relations, relations under labour law and transactions realised as pursuant to the application of general conditions of the conclusion of contracts.) As a traditional means of protection, nullification of prohibited, immoral and usury transactions may be resorted to as a sanction.

As pursuant to the above, the principle of *dispositivity* shall be applied in the scope of rules pertaining to contracts. Cogent rules in a broader scope shall be formulated for the purposes of the regulation of consumer contracts.

According to the Conception, the effective framework of contract law would be upheld with respect to the *inner structure* of the rules of *contract law*.

Special rules pertaining to *consumer contracts* will be specified under the new Civil Code, which mainly implies the adoption of Community Law. Certain norms of consumer contracts will be stipulated under general rules governing contract law, whereas, other norms will be stipulated under the respective type of contracts. This would merely imply further specification of the effective regulation of concepts of the consumer and of consumer contract.¹³

¹² Unilateral legal transactions could include itemised unilateral legal transactions effecting liabilities, such as norms governing promises of reward and assumption of duties for purposes of public interest.

¹³ The concept of the consumer shall be construed as a natural entity concluding a contract beyond its scope of self-employment or business activity. Consumer contract shall

A *fundamental principle* of contract law will be stipulated as *the freedom of the parties to determine the content of the contract*. Furthermore, the principle of the freedom of the parties to decide on *the conclusion of the contract* will be laid down. The parties may be obliged to conclude a contract exclusively under separate law, which may stipulate such obligation in exceptional cases.

The obligation of the parties to co-operate will be set forth as a specific fundamental principle of contract law, which, as a general fundamental principle, will not pertain to the whole body of the new Civil Code.

In the scope of general rules of contract law, the Conception proposes the introduction of *amendments of substance* pertaining to: I. invalidity of contracts, II. indemnification.

I. Rules pertaining to *invalidity* shall be based upon new bases of principle, since the Conception introduces amendments with respect to three elements: a) causes of invalidity, b) nullity, c) the legal consequences of invalidity.

a) According to the Conception, *causes of invalidity* shall be formulated in *an unified system*, whereas, so far as possible, the legal consequences of the conclusion of invalid contracts shall be attached to causes of invalidity.

In the scope of the causes of invalidity, the invalidity of *illegal contracts, which violate law*, has posed a difficulty of construction in judicial practice for a long time. Therefore, the following textual amendment will be deemed reasonable: irrespective of other legal consequences, any contract that violates a rule of law shall be null and void provided that it is either specified under the respective rule of law, or the objective of such rule of law is expressly the prohibition of the provision of the service defined by the parties to the contract or the prohibition of other content of the contract.

According to the Conception, the interest of the elimination of unnecessary legal impediments in business transactions requires the adoption of the principle prevailing in judicial practice that *in re invalid contracts by reason of defect of form*, unless an exception is allowed by law, the defect of form of the legal statement shall be redressed by completion.

be construed as a contract, which has been concluded between the consumer and the entity ("trader") that concludes such contract within its scope of self-employment or business activity as pursuant to Para. d) of Article 685 of the effective Civil Code.

To ensure doctrinal completeness, *coercion* will be introduced as a further cause of invalidity.

The element of “conspicuously considerable difference in value” that obtains between *service and valuable consideration* in the moment of the conclusion of the contract would be upheld as a further cause of invalidity. As pursuant to the new Civil Code, the inclusion of certain elements in specific types of contracts, such as the element of chance, shall constitute an incontestability clause on grounds of invalidity, or, with the exception of consumer contracts, the parties upon the conclusion of specific contracts could waive their right to impugn on grounds of invalidity.

- b) *In pais reference to the invalidity of null and void contracts* will be maintained as admissible, furthermore, the rule, according to which the court deciding on the case shall not take the nullity of contracts into consideration *ex officio* without the according request of the parties concerned, will also be maintained. For further specification of these maxims, the legal principle prevailing in judicial practice, according to which exclusively a legally concerned entity with contentious legal capacity may institute action (objection) for the establishment of invalidity by court, will be formulated under the new Civil Code. The general fundamental principle of *nemo turpitudinem suam allegans auditur* will be specified not only under the Introductory Provisions, but also *in re* invalidity, with the stipulation that the entity incurring the cause of nullity in an imputable manner may not refer to the invalidity of the contract.

The distinction between null and void and voidable contracts will be upheld. The relative ineffectiveness of contracts concluded via violation of the right of the first refusal would be regulated as a new instance of ineffectiveness.

- c) In the scope of *the legal consequences of invalidity*, the rule that completion may not be demanded on grounds of an invalid contract shall be formulated.

Provided that *partial completions have been effected* as pursuant to invalid contracts, the Conception introduces solutions based on new principles that depart from effective rules: the restitution of the *status quo ante* is admissible provided that the conditions preceding the conclusion of the contract *may be restituted in kind*. Based on a claim of ownership, this option is applicable in case of the provision of reversible real value services, whereas, a claim of ownership may not be made for matching payment as valuable consideration by reason of its character. A refund of payment may be ordered by court on the basis of rules pertaining to accession of unjust enrichment.

Financial discrepancies (deriving from costs, profits, damages, etc.) not settled by the restitution of the *status quo ante* shall be adjudicated on the basis of rules pertaining to possession without legal grounds, whereas, rules pertaining to accession of wealth without legal grounds shall be applied as auxiliary rules.

In a given case, conditions preceding the conclusion of the contract *may not be restituted* in kind either by reason of the character of the service, which substantiates genuine irreversibility, or by reason of annihilation, consumption, utilisation, processing or alienation of the service, etc, which substantiates subsequent irreversibility. In such cases, for the settlement of the relations of the contracting parties, the Conception stipulates the application of rules pertaining to accession of unjust enrichment. However, in favour of the party that acceded to unjust enrichment, preferential rules of loss of enrichment shall not be applied by reason of the consideration of bearing responsibility and risk.

The option that on condition the cause of invalidity of the contract may be terminated, *the contract may be pronounced to be valid by court*, will be upheld.

The *legal consequences* of invalid contracts *shall be adjudicated by courts*. As opposed to effective regulations, the Conception proposes that even *in re* nullity of contracts, courts do not make decisions *ex officio*, but exclusively at the request of the parties concerned.

Under the new Civil Code, the sanction of *condemnation in favour of the state* shall be nullified as a legal consequence of invalid contracts and accession of wealth without legal grounds, since their major cases have been eliminated from adjudication.

- II. According to the Conception, on the one hand, rules pertaining to exemption of the party infringing the contract from *liability for damages* will be rendered more rigorous (A), on the other hand, the scope of indemnification will be determined contrary to the effective Civil Code (B).

a) *Exemption of the party infringing the contract from liability for damages*: In this scope, a *more inflexible principle of exemption* established in international trade will be introduced under the new Civil Code by separation of the sanction of indemnification for breach of contract from the condition of the imputability of the party infringing the contract. According to the Programme, in case of contracts concluded in commercial transactions, allocation of consequential damages as pursuant to breach of contracts implies primarily the spread of losses, instead of the repression of individual fault. Therefore, the party infringing the

contract shall not be exempted by reference to compliance with the principle of generally expectable behaviour in the given situation. Exemption would exclusively be substantiated if the party infringing the contract can prove that the damage was incurred by an unavoidable obstacle, which was not predictable in the moment of conclusion of the contract. That principle of exemption shall be applicable to the contributor of the obligee, as *well*.

b) Scopes of indemnification: It needs to be set forth as a starting point, that damages deriving from breach of contract shall be fully indemnified.

In conformity with recognised norms under international commercial law, the standard of rational predictability *as a basis of limitation of the extent of unrealised profits and consequential damages* will be introduced. This implies that the extent of indemnification shall not exceed the extent of losses that the party infringing the contract could or had to foresee in the moment of infringing the contract on the basis of facts and circumstances he could be or had to be aware of as potential consequences of the contract upon concluding the contract. The aggrieved party shall be liable to furnish evidence concerning the extent of damages foreseeable for the party infringing the contract.

Under the new Civil Code, the regulation of contractual liability for damages deriving from breach of contract would be separated from extra-contractual (delictual) liability for damages *with respect to different conditions of exemption*, whereas, under the effective Civil Code, the general rule (on grounds of imputability) pertaining to *delictual and contractual liability for damages* is formulated in a principally uniform manner and their partial elements are regulated accordingly. In the framework of the new Civil Code, it is the condition of liability with respect to exemption that will be separated. The regulation of the manner and extent of indemnification would be upheld as uniform. The norms of the manner and the extent of indemnification would be set forth within the scope of rules pertaining to delictual liability, however, the inclusion of a mere reference to these shall suffice within the rules pertaining to contractual liability.

In view of the demands posed by market competition, *restriction and exclusion of liability for breach of contracts* would be admissible with the exception of consumer contracts.

3. Subsequently to the formulation of general rules pertaining to contracts, the new Civil Code would not set forth norms of delictual liability, but *rules of specific types of contracts* and of liabilities pertaining to securities. It would subsequently stipulate terms of extra-contractual damages, and finally, other elements that establish *liabilities*.

Rules formulated under particular parts of most types of contracts call for modernisation primarily by reason of the requirements of commercial transactions, and accordingly, rules pertaining to certain types of contracts under the Civil Code do not respond to the requirements of the business world, therefore, they require modernisation, as well. Various commercial contracts are not integral to the effective Civil Code, therefore, these contracts need to be integrated into the new Civil Code. The sequence of types of agreements will be determined on grounds of their financial import, however, the *dare, facere, praestare* character of services shall also be taken into consideration.

4. General substantive rules pertaining to securities will be summarised under the new Civil Code, which will define securities in a normative manner and circumscribe their content-based criteria, furthermore, it will set forth procedural rules of legitimation, rules of the transfer of securities, of the restriction of raising objections and substantive rules of the rescission of securities. These elements will also be regulated with respect to dematerialised securities.

5. According to the Conception, rules pertaining to liability for extra-contractual damages will be divided into two parts, i.e., the general and the particular part.

The general part would establish the universally recognised framework of delictual liability, rules of law of liability with peremptory effect and pertinent sanctions (provisions concerning the manner and extent of indemnification). Increasing the rigour of the general rule pertaining to liability for extra-contractual damages is not deemed to be necessary.

According to the Conception, *the particular part* would establish the framework of special liability and indemnification and specify the respective particular rules.

By reason of the inconsistencies prevailing in judicial practice, the rule that incurring damages is prohibited by law will be formulated under *the general part* of the new Civil Code. Accordingly, all forms of incurring damages shall be illegal, unless a rule of law provides otherwise. By reason of *the stipulation of a general prohibition of incurring damages*, the instances of the admissibility of incurring damages and the causes that exclude unlawfulness should be expressly specified. In the scope of *the specification of causes that exclude unlawfulness*, the rule, according to which indemnification shall be due in instances of incurring damages permitted by law, will be formulated with peremptory effect. Exemption is admissible exceptionally and in *favour* of public interest exclusively as pursuant to a provision of law.

The manner and extent of indemnification: As pursuant to Para. 4 of Art. 355 of the effective Civil Code, four types of damages are distinguished: *a)* depreciation, *b)* unrealised profits, *c)* non-pecuniary damages, *d)* expenses required for the elimination or reduction of financial losses.

- a)* According to annotations and judicial practice, the concept of *depreciation* of the property of the aggrieved party is defined as loss as pursuant to changes incurred in *res*. This interpretation should be extended to *non-in-rem* pecuniary damages (e.g., losses proceeding from loss of rights or claims).
- b)* The category of *unrealised profits* contains several elements of uncertainty, therefore, its scope should be circumscribed within limitations of predictability, as that is manifest in standard judicial practice. According to the proposal, under the new Civil Code, the party incurring damages shall be exclusively accountable for unrealised profits that could be reasonably foreseen as a consequence of a given activity under normal circumstances. As a *conditio sine qua non* of the establishment of liability for damages, the aggrieved party would be liable to prove that the probability of real risk obtained.
- c)* Regulation of *non-pecuniary damages* is not deemed necessary under the new Civil Code, in view of the fact that the introduction of remuneration for the injury of the entity as a civil sanction of the violation of privacy is on the agenda, which would qualify as compensation for non-pecuniary damages.
- d)* The category of *expenses required for the elimination or reduction of financial losses* affecting the aggrieved party should be supplemented by a limitation of content developed in the course of judicial practice with the purport that exclusively reasonable and expedient expenditure and costs could be claimed as damages.

Besides upholding the principle of full indemnification, the new Civil Code should primarily provide for *the manner of pecuniary indemnification*. The options of restitution *in integrum* and indemnity in kind would be admissible as marginal manners of compensation, which may be ordered by court at the express request of the aggrieved party and if the conditions set forth by effective provisions obtain.

The particular part, within the scope of special instances, will specify rules pertaining to civil liability currently set forth under separate provisions. Among these, the following clauses are deemed to be most important:

- *Problems of liability for damages under labour law:* In case particular labour agreements are regulated in the framework of the new Civil Code, then liability for damages by the employee and the employer will also be regulated

therein, either within the scope of rules of particular labour agreements or under rules pertaining to delictual liability.

- *Liability of public officials*: Under the new Civil Code, the specification of special rules pertaining to the liability of (head) officials of *business* associations, of co-operatives and of various partnerships that obtains for the association (co-operative, partnership) will be subject to the discretion of the legislator.
- Act X of 1993 on *Product Liability* will be re-enacted under the part of the new Civil Code regulating delictual liability.
- *Absolute liability*: Subsequently to the harmonisation of different rules, rules pertaining to liability for damages incurred by the application of nuclear energy and the *provisions* on amends for damages as pursuant to Act CXVI of 1996 on Nuclear Energy will be incorporated into the new Civil Code. In case the clause on absolute liability is integrated into the new Civil Code, these provisions will introduce the part on delictual liability.
- As a fact of the case of *autonomous liability*, causal liability for damages will be established in case of *endangering, polluting or otherwise harming the environment or nature*. Thereby, rules of liability currently set forth under separate law would be defined in a unified manner under the new Civil Code with the application of the doctrine of the European Community pertaining to causality and allocation of damages. The admissibility of the institution of action by the public prosecutor in favour of public interest and condemnation in favour of the Fund for Protection of the Environment could be prescribed separately.
- *Liability for hazardous activities*: The effective rule would be upheld with the adoption of the amendment elaborated in judicial practice that in case the instrumentality of the aggrieved party can be established, upon the determination of the extent of instrumentality, the degree of risk of the operation should be evaluated.
- *Damage done by game or incurred in the course of hunting, damages caused to game*: Provisions on damage done by game or incurred in the course of hunting and on damage caused by killing game currently regulated under separate provisions will be integrated into the effective Civil Code. Under the new Civil Code, as a replacement of the liability clause for hazardous operation, the regulation of acceptance of responsibility for damage done by game would reasonably prescribe stricter liability of the party with hunting licence. The party with hunting licence would exclusively be exempted from liability on condition that the damage was incurred by the imputable fault of the aggrieved party.
- *Damages incurred by the employee and the substitute*: Under the new Civil Code, the effect of operative provisions that establish the liability of the

employer (and co-operative) for damages will be extended to all legal entities in cases when the (head) official or member (in the context of its position) incurs damages to a third party. It needs to be stipulated that if an employee, substitute or member incurs damages by deliberate criminal act or misdemeanor, s/he will (potentially jointly with the employer or the legal entity) be directly liable to the aggrieved party.

- *State Liability for damages*: Effective rules pertaining to damages incurred in the scope of exercise of administrative power will be amended according to maxims established by judicial practice. Therefore, *liability for damages incurred by the state, the local government or their institutions* shall exclusively, if damages are incurred in the scope of the exercise of public authority, i.e., of the activity or negligence of the public authority. Rules pertaining to liability for *damages incurred in the scope of exercise of judicial power* will be formulated under a separate scope of actual circumstances with respect to the regulations of the EU. Under a relevant clause, the new Civil Code should stipulate as pursuant to the effective Act on the Rules of Procedure, that the state, irrespective of imputability, will be liable for grievances incurred by the violation of the right to due process of law and to its conclusion within a reasonable period. The regulation of claims for damages by reason of unlawful arrest or detention will be reasonably provided for under this clause. In the scope of the regulation of judicial liability, the stipulation that wrong decisions in their content made in particular cases shall not substantiate liability for damages by the state will be introduced as a peremptory non-liability clause. Liability for damages incurred by the state via legislation could be established with the limitation that the state shall be liable exclusively for damages incurred by particular acts that are substantiated by statutes pronounced *ex post facto* unconstitutional.

6. Section Six: will set forth rules pertaining to various facts of cases that establish liabilities such as accession of wealth without legal grounds, administration of affairs without order, promises of reward, other itemised unilateral legal transactions and implied behaviour.

Volume Five on Law of Succession

According to the Programme, commitment to tradition and conventions have greater significance under law of succession than in other branches of civil law. According to the Conception, “the objective of drafting a new Civil Code may

not be construed as the replacement of rules responding to contemporary social–economic relations by necessarily new regulations”. Accordingly, the Conception proposes the introduction of minor and no fundamental amendments in the area of the law of succession. Therefore, with minor amendments, lineal inheritance as a specific Hungarian institution and the legal share of inheritance would be upheld.

The society of Hungarian lawyers is further intrigued by both the Conception and the Programme: their maxims are analysed, assumptions are debated.¹⁴ The elaboration of the norm text of the new Civil Code has commenced as pursuant to the decision of the government.¹⁵

¹⁴ This was demonstrated as a moment in the course of professional debates by the Conference on Codification of Civil Law held at the Eötvös Loránd University of Sciences in November, 2003, which dealt with significant institutions of civil law in the context of the Conception and the Programme of the Civil Code. Reputed invited lecturers explicated their views on the following subjects: Pál Solt and János Zlinszky delivered lectures on strict liability, András Kisfaludy and Tamás Sárközy held forth on general rules pertaining to legal entities and on the powers of business associations. György Boytha lectured on non-financial indemnification and remuneration for the injury of the entity, and finally, Attila Harmathy and Lajos Vékás expounded the legal consequences of invalid contracts.

¹⁵ Governmental Decree no. 1003 of 2003 (I. 25).