

newsletter

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CIVIL LAW

Trusts will be introduced into Hungarian civil law

The New Civil Code, which will enter into force on 15 March 2014, will introduce the trust as one of the nominate contracts of Hungarian civil law. A trust is established by a contract (or by will) in which the settlor transfers the ownership of goods, rights or claims ("trust *res*") to the trustee who will hold those for the benefit of a third-party beneficiary. The concept is based on the notion of trust developed in common law, and is a significant novelty introduced by the New Civil Code. Although the concept of contractual freedom allows the parties to determine the terms and conditions of their contractual relationship, the new legislation contains some mandatory elements for trusts, as briefly presented below.

A trust may be created for a definite or indefinite term but the New Civil Code provides that it ceases to exist after 50 years (i.e. the maximum term of the trust is 50 years). The beneficiary is named by the settlor. The beneficiary can be a third person, the settlor himself or the trustee but the latter may not be the sole beneficiary. The settlor may be the trustee with respect to a part of his property. In this case a unilateral declaration of the settlor, done in the form of an authentic deed, is necessary.

The beneficiary is entitled to claim the trust *res* and its profits from the trustee in accordance with the provisions of the contract. The settlor and the beneficiary may control the trustee's activities but they are not allowed to give orders to the trustee so any orders given will be null and void. However, the settlor may at any time withdraw its commission from the trustee and simultaneously appoint someone else. Trust agreements could be, for example, concluded by parents giving certain stocks to a bank as a trustee with the instruction that it should pay the dividends to their child until the child reaches a certain age.

The trustee, bound by confidentiality, becomes the owner of the trust *res*, with specific obligations: he is obliged to keep a log of the trust *res* and to keep it separate from its own or other property it holds as the trust *res* cannot be claimed by the trustee's creditors and will not become the subject of the trustee's heirs' inheritance. The trustee is entitled to exercise the rights and perform the obligations attached to the trust *res* and must act always in the best interest of the beneficiary. He can also alienate the objects of the trust *res* within the limits set out in the contract. Additionally, he must inform the settlor and the beneficiary, upon request, as to the state of the trust *res* and give an account thereof. On termination of the trust, the trustee must release the trust *res* and produce a final account.

The trustee has contractual liability towards the settlor and the beneficiary. Towards third parties, the trustee is liable to the trust *res* for performing the obligations undertaken in the trust agreement. Nevertheless, the trustee bears unlimited liability with its own assets for claims that cannot be satisfied from the trust *res* when the other party did not know and should not have known that the undertaking of the trustee went beyond the limits of the trust agreement.

As the New Civil Code sets out only the fundamental rules of trusts, further special legislation will be needed concerning the regulatory regime for professional trustees, their registration, trustees' liability insurance, etc.

BANKING LAW

The Hungarian Supreme Court harmonizes the legal position on the validity of foreign currency loan agreements

In Hungary, the number of defaults related to foreign currency loans is growing constantly, leading to an increase in litigation cases with approximately 2,500 such cases currently pending before the Hungarian civil courts. The majority of the claims question the validity of foreign currency loan agreements in whole or in part.

In November 2013, after contradictory judgments were adopted by different courts, the Hungarian Supreme Court initiated the legal uniformity procedure of its Civil Chamber in order to ensure consistency of the judgments. The legal uniformity procedure was launched in connection with seven main legal questions to which the Supreme Court answered on 16 December 2013. The questions and statements raised before the Supreme Court are presented below:

Do foreign currency denominated loans have to be treated as foreign currency loans or forint loans?

The Hungarian Supreme Court declared that the debtor who concludes foreign currency denominated loan agreements took a foreign currency debt in order to apply an interest rate

which was more beneficial (at the time) than the interest rates for loans denominated in Hungarian forints. As a result, the debtor must bear the consequences of the exchange rate fluctuations.

Are foreign currency denominated loan agreements valid agreements?

The Hungarian Supreme Court declared that foreign currency denominated loan agreements cannot be considered as null and void for the sole reason that the debtor is exposed to a foreign exchange rate risk. The Supreme Court highlighted that in any case the cause of invalidity (e.g. the unlawful, immoral, usurious, impossible or false nature of the loan) must exist on the date of conclusion of the agreement, therefore causes occurring at a later date cannot entail the invalidity of the agreement.

What is the extent of financial institutions' statutory information obligation?

According to the Supreme Court, the financial institutions must inform their (potential) clients about the possibility of the exchange rate fluctuation and its influence on the regular payments.

If the foreign currency denominated agreement contains a cause for invalidity, what legal consequence should the courts apply?

According to the Supreme Court, if the foreign currency denominated agreement contains a cause for invalidity, the courts should primarily consider maintaining the contract's validity by eliminating, if possible, the cause for invalidity.

Do the different causes for invalidity entail the total or partial invalidity of the agreement?

If the court considers that a specific provision of the foreign currency denominated loan agreement is invalid, but that the agreement itself can be executed without the invalid provision, the parties remain bound by such agreement without the invalid provision.

What kind of legal instruments are available to the courts if, in a long term contractual relationship, the performance of the contract becomes excessively onerous for one of the contracting parties due to fundamental change of circumstances occurring after the conclusion of the contract?

According to the Supreme Court, the courts may modify contracts in the event of fundamental changes of circumstances after the conclusion of the contract, if the conditions determined by the Hungarian Civil Code are met. These situations must be assessed on a case-by-case basis. This instrument, therefore, cannot be used to remedy the negative consequences of major economic changes on the mass of similar contracts.

Under what circumstances can the conditions allowing unilateral modifications of contracts be regarded as transparent?

The Supreme Court will answer this question after the Court of the European Union adopts its ruling in the preliminary ruling procedure no. C-26/13.

DATA PROTECTION

Hungarian DPA decision provides new guidelines for data processing agreements

The Hungarian Data Protection Association (“NAIH” hereinafter “DPA”) has issued new guidelines for data processing agreements in its latest decision imposing a fine of HUF 1.5 million on PepsiCo for violating data privacy regulations.

In 2012, a Turkish group hacked PepsiCo’s Hungarian domain, and stole the personal data of around 50,000 people taking part in a promotion (such as the name, e-mail address, phone number, place of residence, login and password) and made said data available on the internet for over 9 months. Further to the case description published by NAIH, the hacking was due to gross negligence of PepsiCo and the third party service providers responsible for the promotion, who stored customer data in an unsecured way. The DPA’s investigation also found that the agreement concluded between the data controller and data processor did not appropriately clarify responsibility for the processing of customer data.

In order to prevent similar errors in future cases, the DPA incorporated certain guidelines in its decision on the data processing agreement. The DPA now reclassifies the roles of the parties, taking into consideration the context and purpose of the data processing, while applying the standard definitions (data controller / data processor) recognized under EU law. The significance of this reclassification lies in deciding where liability falls between data controllers and data processors. The DPA therefore requires the parties to specify in their contractual relationship the actual activities to be performed on personal data by each party, and identify the technical measures, and decisions that the service provider can take on its own, without specific agreement or instruction from the data controller. Additionally, the DPA requires detailed cooperation between the parties especially in the event of data security incidents or data theft.

Companies failing to ensure that their data processing agreements comply with the guidelines published by the DPA could face a fine of between HUF 100,000 and HUF 10 million.

LABOUR LAW

Changes to the Labour Code as of 1 January 2014

The amendments to the Labour Code, entered into force as of 1 January 2014, are mainly connected to the allocation of holidays and the flexible working order. They provide stricter rules in terms of holiday planning, as employees are only entitled - based on the agreement concluded with the employer for the following year - to carry forward their untaken holidays granted according to their age (i.e. 10 working days per calendar year maximum).

From the beginning of 2014, employees are free to schedule 100% of their working time under the regime of flexible working order, except for those tasks that can only be accomplished on a specific date or during a specific period. In offering more flexibility to the employee, the new regulation also benefits employers by reducing their administrative burden. Namely, employers are no longer obliged to keep logs on working hours; only the days off shall be recorded. In practice, this also means that employers are relieved from the burden of paying overtime to such employees.

In addition to the above-mentioned amendments, as of 1 January 2014, to improve the tracking of employees on maternity leave, favourable amendments have been introduced in the field of the family aid system. In comparison with the previous family aid regime, those parents who decide to return to work after their child has reached the age of one will no longer lose their entitlement to child nursing aid, resulting in extra income for families. Furthermore, employers may once more count on their employees after one year of childcare absence. This regulation, together with the amendments made to the social tax regulations effective as of 1 January 2014, may result a win-win situation, as employers' social tax release – that is extended for a period up to 5 years – decreases the costs of employment for the employer.

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