

**EÖTVÖS LORÁND UNIVERSITY
FACULTY OF LAW
DOCTORAL SCHOOL OF LAW**

Czirfusz György

**The contract for the sale of good and lack of conformity in Hungarian and
Slovakian law**

**Doctoral dissertation
Theses**

Supervisor:

**Dr. András Kisfaludi
university professor**

**Budapest
2017**

Table of contents

Table of contents	2
1. Summary of the proposed research project	3
2. Summary of the completed examinations, analyses and methods of research	5
3. Summary of the research results, their application and the possibilities for further application	7
3.1. The clash between the dualist and monist approach in Slovakian civil law scholarship.....	7
3.2. The provisional structure of lack of conformity in performance, or the roots of the in-store sale of goods	10
3.3. The functional and substantive aspects of the implementation of the Directive on the sale of consumer goods.....	12
3.4. The method of dissolution of impractical limitations regarding claims arising out of warranties and the commercial guarantee	15
3.5. The economic interest protected by commercial guarantee	16
3.6. Questions of interpretation of the statutes of limitations regarding notification of lack of conformity in Slovakian law.....	18
3.7. The inconsistencies of the provisions on enforcement.....	19
3.8. The problem of the reverse burden of proof in consumer contracts	20
3.9. The connection between the obligation to give notice and the obligation to examine in terms of time.....	20
3.10. Reassessment of the statute of limitations causing a forfeiture of rights	21
3.11. Statute of limitations for judicial enforcement.....	23
3.12. The history of the new provisions on liability for contractual damages in Hungarian contract law and its lessons for the Slovakian civil codification.....	24
3.13. The relation between damages and warranty claims regarding damages in the subject matter of the service.....	30
List of published articles in the respective field of research	32

1. Summary of the proposed research project

This dissertation aims to present the tools for enforcement of claims arising out of the lack of physical conformity in contracts for the sale of goods, such as warranties, commercial guarantee and damages. Given the practical limitations in size, this research thesis does not include the examination of the rules on product guarantee. The main goal is to provide a critical analysis: the purpose of this dissertation is to examine the legal constructs in question in Hungarian and Slovakian law through the test of suitability and to articulate useful and constructive proposals as well as comments as the result of this analysis. The first question is about the proper scope of the test of suitability. What sort of goals should these legal concepts aspire to reach? The criterion of suitability regarding the problems examined in this dissertation means that the protection provided by the instruments available to the aggrieved party must be sufficient to be able to remedy the losses resulting from the breach of contract. To reach this goal, it is crucial for the statute to assign the liability for breach of contract to the contracting party whose zone of risk the occurrence of the wrong belongs to. The examination of this latter problem requires the thorough analysis and knowledge of the rules of liability regarding the legal concept in question. Naturally, the examination cannot stop at the presentation of the legal rules and provisions, as they are given actual meaning and substance through judicial application and interpretation. The statutory provisions together with the jurisprudence can show the way to the actual knowledge of the law, as following the path trodden by these two sources leads to the real understanding of the statute. The dissertation also aims to consider of the provisions of the relevant fields of law, to understand the legislative intent, to compare them with the requirements of our modern times even in cases where the legal literature and jurisprudence does not perceive any irregularities. The goal is to take a stand on the applicability of the legal rules in practice, to list the problems of interpretation regarding the examined legal constructs, and finally, as the main point of comparative research, to articulate a critical evaluation based on the results of civil scholarly work and the jurisprudence. During the recodification of the civil codes in question the most remarkable of the influencing intellectual guidelines was the concept of consumer protection that deserves and requires emphasized attention. The relevancy of this problem is aggravated by the legislative development of the new civil codes, as the places for the

civil instruments protecting consumers needed to be found in these codes currently under the drafting process. Inevitably, this dissertation also searched for the answer to the question whether the creation of a comprehensive, unified code is the means for future legislation in the early 21st century.

Slovakian law is especially rich in statutory provisions and dogmatic axioms that are nowhere to be found in the legal literature. It is safe to assume that the analysis of several crucial problems has evaded the attention of the Slovakian legal academia, which renders some of the provisions of the new Slovakian civil code currently under drafting worthy of further consideration. The comparative method provides support for the discovery, discussion and resolution of these problems, with special regard to the fact that the achievements of foreign and international jurisprudence in the field of contract law are particularly fit to apply to domestic situations (hence the high level of legal harmonization in this field), as the essence of the concept of contract is able to overarch the limitations of national laws. This is further backed by the ever increasing volume of international stream of the sale of goods. The conclusions of this dissertation are thus based on thorough research, through which an attempt to draft the network relations of the relevant legal constructs was made in order to show their impact in their natural milieu as well as in relation of other legal concepts.

2. Summary of the completed examinations, analyses and methods of research

The subject matter of the research determined its methodology. Right from the start the aim was to frame proposals with the aim of improvement and comments for the future regarding the examined legal instruments. To achieve this goal, the historical and comparative methods proved to be ideal, while the growth in the degree of rationality of the redrafted system of rules are best served by the economic analysis of law.

The historical method enlightens the path that has lead up to the current state of statutory law. This intellectual journey cannot be regarded as existent for its own sake for the following reasons. It is a commonly accepted premise that the legal statutes are the mirror-images of the economic, social and political circumstances at the time of their conception and as such, they cannot always keep up with the rapid pace of the social and political changes. The historical method helps to determine the future of a statute or a legal concept. It frequently occurs that the legal scholarship accepts and does not dispute the justification of the statutory system of an instrument and that there are no existing tensions between the statutory norms created in the past and the requirements of the present. The critical approach of the historical method examines the changes in circumstances from the time of the conception of the statute and it determines whether legislative intervention is justified based on the results of the research. For this reason the examined legal concepts and statutory provisions are subjected to historical analysis and the conclusions of this research will serve as a basis for our critical observations.

The application of the comparative method is induced by the possibility of utilization of the achievements reached by foreign and international scholarship in the domestic legal system. One end of the scope of this dissertation's research is composed by the Slovakian trade law and civil law provisions, while the opposite end encompasses the Hungarian civil law rules (including the analysis of the former civil code). These are supplemented by the research on the contract of international sale of goods.¹ The examination of the convention is unavoidable for several reasons. On the one hand, it is organically the part of both the Hungarian and Slovakian law (both countries are signatory parties), and on the other hand, the convention could provide

¹ The United Nations Convention on Contracts for the International Sale of Goods.

valuable guidelines for both the Hungarian and the Slovakian civil law for the reconsideration of the rules on the liability for breach of contract. It is not a coincidence that the scholarly results arising out of the drafting and adoption of the convention were specifically considered by the drafters of the new Hungarian civil code.

The economic analysis of law helps to express the cost-impact of civil law institutions in a numerical manner. Its main advantage is that its methodological toolkit provides an adequate starting point for the analysis of the questions regarding the contracts' risk-assessing function. The practical settlement of the consequences of contractual breach requires the party in whose zone of risk the given irregularity occurred to bear the liability. In order to be able to create the detailed provisions of this legal concept, it is absolutely crucial to evaluate the costs emerging from the practical application of the rules, as it is the breaching party that must bear the costs of the termination of a non-compliant situation. This dogmatic basis can only be served by a system of sanctions, that considers both parties' interests and gives way to the full effect of the principle of reasonableness. This requirement is based on two pillars: on one hand, it determines the substantive limits of the breach of contract (for instance the duration of the liability regarding warranties), while on the other hand it takes a stand concerning the question of sanctions as well (for instance with setting up limitations regarding warranty claims that also consider cost-effectiveness). The methods of the economic analysis of law are suitable to show the impracticalities of legal provisions (for example in Slovakian contract law in the field of compulsory commercial guarantee).

3. Summary of the research results, their application and the possibilities for further application

During the examination of the subject matter of the dissertation, a long-ago emerged suspicion became confirmed: a critical opinion with the intent of improvement can be formulated from the landscape of the Hungarian civil law. It is held that the clashes in Hungarian legal scholarship, the thoroughly founded dogmatic positions, the jurisprudence giving priority to economy over statutory provisions and the results of scholarship achieved in line with judicial practice are all features worthy of consideration for the Slovakian civil codification currently in progress. The scholarly integrity of a code that considers the natural demands of commerce, which is also consistent and based on a uniform, clear and concise terminology is beyond doubt, and it is also unquestionable that to achieve this goal the drafters of the new Slovakian civil code will have to show a great amount of conceptual bravery. Opposition against long accepted, undisputed dogmatic guidelines (an example to which in the legal literature is the work of Ján Lazar) triggers the resistance and rejection of the entire professional community. With the passage of time, these scholarly-professional efforts are usually justified by the harmony of deliberate rules and jurisprudence. In the followings a summary of the ideas that reflect useful academic achievements and are worthy of attention for the drafting process of the new Slovakian civil code are going to be presented.

3.1. The clash between the dualist and monist approach in Slovakian civil law scholarship

The Hungarian civil law scholarship has already proved with convincing arguments that the monist approach of private law (meaning that it cannot be bifurcated based on its subject matter) is completely suitable for the uniform regulation of commercial transactions as well as transactions outside the professional and commercial work of merchants. At the dawn of the last century, Béni Grosschmid realized that the separate regulation based on the professional capacity of merchants is not grounded on the internal features of law, but rather on external circumstances and

historical peculiarities.² Examples for the suitability of the monist approach are the provisions of the current Swiss, Italian, Dutch and Hungarian civil codes. Now, it is an historical fact that a commercialization of civil law codes took in the past decades. This phenomenon was manifested in two ways: first, the legal instruments formerly regulated in commercial codes started to appear in the civil codes, and second, the traditionally civil legal concepts themselves also began to show signs of commercial features.³ Despite all these, the scholarship of Slovakian private law made this realization rather late, moreover, sources still frequently use and cite the dualist approach as the law of the developed Western jurisdictions (France, Austria and Germany) and perceive it as a sustainable approach.⁴ This position is unsupported by this dissertation: it is very likely that the authors of these commentaries disregarded the fact that the separate commercial codes lived on as a consequence of historical traditions in these countries,⁵ and that the substantive degradation of commercial codes was a clear tendency as early as the 2000s – the time of publication of these commentaries.

Although the Slovakian (or more precisely: Czechoslovakian) commercial code was not adopted at the time of the last days of feudalism, it still fits Grosschmid's ideas presented above: the Slovakian Commercial Code (Act of 513/1991 on the Commercial Code) is the result of internal anomalies and its conception stems from the independence of economic law. In Czechoslovakian law, the private law rules of production and commercial transactions were sorted into three codes, based on the independence of economic law. The regulation of commercial transactions consisted of the rules of the civil code currently still in effect (Act of 40/1964 on the Civil Code) as well as the Economic Code (Act of 109/1964 on the Economic Code) that also functioned as a tool for direct economic control regulating

2 Béni Grosschmid: On the separation of commercial law. In: *Magánjogi tanulmányok (Essays on Private Law)*, Vol. 1., published by Politzer Zsigmond and Son, 1901. p. 719-725.

3 István Kemes: Requirements of the economic contracts and codification of the new Civil Code, 2001/1. p. 10; Lajos Vékás: Theoretical questions of the new Civil Code, HVG-ORAC Lap- és Könyvkiadó Kft., 2001. p. 61, 68.; Lajos Vékás: *Parerga*, HVG-ORAC Lap- és Könyvkiadó Kft., 2008. p. 260.

4 Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 24.

5 It needs to be pointed out that this fact has been mentioned only once in Slovakian legal literature: Ján Lazar – K niektorým koncepčným otázkam rekodifikácie súkromného práva /On certain conceptual questions of the recodification of private law/. *Justičná revue*, 2001/1., p. 10.

the national-economic plans of socialist organizations, and the Code of International Commerce (Act of 101/1963 on international commercial relations – Code of International Commerce). After the transition, it was a comfortable and obvious choice to build the system of commercial law and code on the provisions of the Code of International Commerce which came with the benefit of not having to consider the special requirements of commerce during the reform of the Slovakian civil code. In our opinion, the dualist system of the Slovakian private law cannot be regarded as a consistent solution. The former Czechoslovakian and the current Slovakian dualist private law systems do not contain any coherent and consistent provision either from a substantive or a structural aspect. The commercial code enumerates the types of contracts on a low level of abstraction⁶ which is aggravated by the fact that the civil code's substantive limits were ignored during its conception.⁷ This dissertation aims to list the problems of applicability arising out of this situation.

It can be stated that a private law built on a single uniform civil code was more easily accomplished in countries where the independence of economic law (meaning the justification for separate rules on personal transactions and commercial production⁸) was denied before the transition,⁹ as the civil codes of these countries possessed a unified and wide concept as well as abstract terminology. Even the Slovakian legal scholarship (though only through the sole personality of legal scholar Ján Lazar) realized towards the end of the last century that „those Eastern- and Central-European countries going through the process of transformation that refused to recognize the separateness and justification of economic law in the 60's and refused to adopt an Economic Code while interpreting the concept of private law in a wide manner, were in a much better position (such as the Hungarian civil code of

6 Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 1., IURA EDITION, spol. s r. o., 2010. p. 35.; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 1., IURIS LIBRI, spol. s r. o., 2014. p. 37.

7 Denisa Dulaková – Anton Dulak – Monika Jurčová: *Zmluvy o prevode vlastníctva. Kúpna a zámenná zmluva, spotrebiteľská kúpna zmluva, darovacia zmluva. Komentár /Contracts of property transfer. Contracts for the sale of goods, exchange contracts, consumer contracts and gifts – A Commentary/*, C. H. Beck, 2011. p. 96.; Ján Lazar: *K niektorým koncepčným otázkam rekodifikácie súkromného práva /On certain conceptual questions of the recodification of private law/* *Justičná revue*, 2001/1., p. 8-9., Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 1., IURIS LIBRI, spol. s r. o., 2014. p. 64.

8 At the time of direct economic control based on national-economic plans the regulation of contractual relations of the socialist producing organizations became separated from the contract rules governing transactions between private persons as in this system, the transactions between economic entities was not accompanied by any monetary transfer. In: Lajos Vékás: *The developmental nodes of the contractual system*, Akadémiai Kiadó, 1977. p. 104-138.

9 Lajos Vékás: *The new Civil Code*, *Jogtudományi Közlöny*, 2013/5. p. 227.

1959 or the Polish civil code of 1964)”.¹⁰ According to his opinion – which argument is also backed by the Hungarian civil code of 1959 – in the jurisdictions where an independent economic law was not recognized, it was enough to make a few minor amendments to the civil codes, as these sources of law already regulated a wide range of property transactions and they were drafted with an abstract terminology. In Hungary, it was sufficient to adopt a new statute on business corporations and co-operatives as well as one on the trade register, the relations between parties of professional business transactions did not get to be governed by rules outside the civil code.

With the passage of time the monist approach became prevalent in the Slovakian legal thinking as well, which we have to agree with: according to our opinion a consistent civil code with sufficiently abstract terminology and proper substantive boundaries is suitable to regulate the entirety of property transactions. In our opinion, the time of separate commercial codes has passed; the parties of professional business transactions do not pose any special requirements that could not be fulfilled by a civil code described above. Uniform regulation has the advantage of terminating the grave problems of legal applicability caused by the dualist approach.

3.2. The provisional structure of lack of conformity in performance, or the roots of the in-store sale of goods

Although it is true that the Slovakian legal scholarship noticed the relationship between the conception of the commercial code and the emerging independent economic law after World War II, in our opinion, it managed to ignore an old concept that contributed to the continuance of an outdated legal construct. The middle part of the current Slovakian civil code of 1964 consisted of the rules on the so-called personal property and the satisfaction of private persons’ needs, and given its paternalistic approach, it made the contract for the in-store sale of goods a subtype of the sale contracts, which continues to exist to this day. The main part of the rules on consumer contracts include the general rules on lack of conformity and the specific lack of conformity rules for sale of goods contracts. As a result of this legislative move, the Slovakian civil code regulates lack of conformity on three different levels

¹⁰ Ján Lazar: K niektorým koncepčným otázkam rekodifikácie súkromného práva /On certain conceptual questions of the recodification of private law/. *Justičná revue*, 2001/1. p. 7.

which need to be applied simultaneously, going from the specific towards the general rules. The structural complexity of the statute and its substantive inconsistencies resulted in numerous problems of interpretation for which the legal scholarship refuses to offer any solutions (this dissertation gives an overview of the different scholarly arguments regarding this situation). Concerning these circumstances we hold that even though Slovakian private law is aware of the nexus between the early independence of economic law and the prevalence of the dualist approach in the period after the transition, it still failed to realize the faulty nature of the contract-type encompassing the narrow ground between the economic law and the international commercial law. Lajos Vékás commented on the Czechoslovakian civil code way before the transition that it „not only disrupts contract typology to separate the contracts for citizens and socialist organizations and creates independent contractual systems in the Civil Code and the Economic Code, but it also dissolves the traditional notions about the classification of contracts between citizens: regarding the sale of goods, it creates different types of contracts based on the status of the contracting parties, separating in-store sales and sales between citizens, while in the case of business contracts it duplicates the rules based on the subject matter of the transaction, isolating new types of contracts for manufacturing new products, for repair and for alterations”.¹¹ He also noted that the restoration of the unity of the contractual system would be a greater challenge in the case of the Czechoslovakian model, than with the Hungarian system of plan-contracting.¹²

Despite all these dogmatic arguments, the Slovakian civil code currently under drafting sees the justification of this conception in the need to secure a heightened protection for consumers. As for our opinion, we completely disagree with this position which is dogmatically misguided and untenable. There are no arguments to be found to support the continuance of a separate in-store sales contract (the main part of which would continue to consist of the rules on warranty liability in the future). Besides the structural and substantive inconsistencies of the current Slovakian civil code, the commercial code also contains a specific contract for the sale of goods, the majority of the rules of which also deal with claims and damages caused by the lack

11 Lajos Vékás: The developmental nodes of the contractual system, Akadémiai Kiadó, 1977. p. 137.

12 Lajos Vékás: The developmental nodes of the contractual system, Akadémiai Kiadó, 1977. p. 136-138.

of conformity. This means that the unity of the present-day Slovakian private law is divided among its subjects as well.

Our final comment regarding the statutory structure notes that the rules on lack of conformity should be withdrawn from the sphere of the regulation of specific contracts. The separation of lack of conformity rules from the general rules is only justified when their natural surroundings are provided by specific contracts. Abstract and generally applicable contract rules (complemented with the thoroughly integrated specific regulations on consumer protection) serve transparency and clear and consistent terminology better than any other solution. In the next chapter we aim to show the tension between the old and outdated traditions and the new requirements of European law.

3.3. The functional and substantive aspects of the implementation of the Directive on the sale of consumer goods¹³

The outdated structural unity of the Slovakian in-store sale of goods contract mostly stems from the issues of the implementation of the Directive on the sale of consumer goods. Apart from the Hungarian literature¹⁴ explaining the methodology of the organic implementation of directives into the national legal system, both the former and the current Hungarian civil code could serve as an example for the drafting the Slovakian civil code. It can be stated that the scholarly results related to the implementation of directives did not find their way into the stream of Slovakian legislation during the reconsideration of the civil code due to historical reasons. While choosing the appropriate method of implementation, the reasonable level of consumer protection must be kept in mind as the goal. From the aspect of formalities, the least ambitious method for the legislation is the implementation of the Directive's rules in separate statutes or in a separate structural unit of the civil code. The undeniable advantage of this method (which is also served by the European legislation emphasizing the relevancy of consumer protection) is that the basic principles of private autonomy, dispositivity and *pacta sunt servanda* are not violated at least from

13 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

14 For example: Lajos Vékás: The implementation of the Directive on the sale of consumer goods into Hungarian private law, *Magyar Jog*, 2000/11, p. 646-660.; Lajos Vékás: Theoretical questions of the new Civil Code, *HVG-ORAC Lap- és Könyvkiadó Kft.*, 2001, p. 75-135.

a formal aspect,¹⁵ however, it rips into two parts the uniform statutory background. The integration of the Directive's contents into the already existing legal framework puts the biggest burden on the legislation. As a consequence of choosing this method of implementation, the rules on consumer protection appear as specific rules, which complement and amend the general provisions. In our opinion, this latter implementation method constitutes the real solution to ensure the consumers' actual and effective protection, as the meaning of the rules incorporated in a single unit can be easily revealed even by non-lawyers. This solution was correctly chosen by both the new and the old civil code of 1959, as the special rules on the presumption on lack of conformity and the longer statutes of limitations were incorporated into the general rules on lack of conformity.

During the implementation of the Directive's rules, the reasonable level of protection to the consumer must be assessed. This question is relevant as the legislator is allowed to diverge from the contents of the Directive to the consumer's benefit. It also needs to be examined whether it is justified to expand the rules of the Directive to transactions other than the sale of consumer goods. To decide this dilemma, the economic analysis of law could be helpful as the price of the heightened level of legal protection is easily determinable and the fact that this price will be paid by the consumers themselves needs to be taken into consideration as well. According to our opinion, the minimum-requirements of the Directive provide a sufficient level of protection to consumers, thus the elevation of the standard above this threshold is unnecessary. This argument is backed by the provisions of the Slovakian civil code that fall outside the scope of reasonability, the list of which contains the following elements among others:

- The compulsory commercial guarantee is independent from the value in question and the subject matter of the transaction (compulsory commercial guarantee does not extend to perishable and used goods, although there is no unequivocal stance on this issue in the legal literature);
- The period of compulsory commercial guarantee (24 months) is unreasonably long;

15 Lajos Vékás: Theoretical questions of the new Hungarian civil code, HVG-ORAC Lap- és Könyvkiadó Kft, 2001, p. 76-77.; Lajos Vékás: The implementation of the Directive on the sale of consumer goods into Hungarian private law, Magyar Jog, 2000/11, p. 646-660.

- The burden of proof is reversed during the whole period of the compulsory commercial guarantee, thus the Directive's 6-month long presumption of lack of conformity essentially loses its effect in this regard;
- The 6-month long presumption of lack of conformity is not limited to the sale of consumer goods (moreover, the existence of the presumption in this regard is irrelevant);
- Regarding the compulsory commercial guarantee, the time for notice of the defect is unreasonably long: from the time of the defect's discovery, there is a 6 months long period to give notice, the violation of which provision triggers subjective liability for damages (the dissertation mentions that the majority of the Slovakian literature on private law does not impute any relevancy to this statute of limitations);
- In Slovakian law, judicial enforcement is subjective, it is subject to prescription which is separate from the statute of limitations for the enforcement of claims. The time for the commencement of judicial enforcement can be as long as five years in merchant and consumer contracts.

The reason behind the 6 months long period of time to give notice is the idea that the aggrieved party could have an actual opportunity to remedy the defect.¹⁶ From our part we do not find this argument correct. On one hand, during this long period, the continued use can produce further defects and damages, the remedy of which would be more likely to be demanded from the aggrieved party (even though these defects obviously do not belong to the other party's zone of risk). On the other hand, the argument behind the reduction of this time limitation is that proving the facts becomes more problematic with the passage of time. Based on our conclusion, the 2 months long period stated in the Directive constitutes ample time to give notice even in the case of consumer contracts, with special regard to the circumstance that the Directive regards this period as sufficient for international transactions as well, where enforcement of claims is hindered by obstacles of differences in language and

¹⁶ Imrich Fekete: *Občiansky zákonník – Komentár /Civil Code – Commentary/*, Ing. Miroslav Mračko – EPOS, 2007. p. 551., Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 464.

geographic distances.¹⁷ It must also be taken into consideration that the lapse of the period of time open to give notice does not trigger a waiver of rights. For non-consumer contracts a shorter period for claim enforcement should be adopted. In our view, after becoming aware of the defect, the rightholder does not need any more time to enforce his claim, and if he is unable to comply with these rules for excusable reasons, than the applicable correctional provisions provide the aggrieved party with sufficient protection of his interests.

3.4. The method of dissolution of impractical limitations regarding claims arising out of warranties and the commercial guarantee

The rules on claims arising out of warranties and the commercial guarantee of the Slovakian civil code contain unreasonable limitations, as evidenced by the followings:

- Unless the parties agree otherwise, the buyer can only demand a reduction of the sales price or withdrawal of the contract for the sale of goods; as a consequence
- In case of lack of conformity in a sales contract, contrary to the general rules on warranties, the buyer does not have a right to return, repair the good or to supplement the missing amount even when the defect could be addressed by one of these remedies;
- In case the defect is irreparable in a way that it does not hinder the good's proper use, the consumer is not entitled to demand a return and exchange;
- the system of claims regarding the general lack of conformity rules does not allow the rightholder to demand a return and exchange in cases where the irreparable defect hinders the proper use and enjoyment of the good, even though it is possible in cases that fall outside this category;
- in the case of lack of conformity in a consumer contract the situation is exactly the opposite: the consumer has the option to demand a return and exchange when the defect is irreparable and it excludes the proper use of the good, but not in other instances.

¹⁷ See: Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, paragraph (20).

In our opinion, the remedy of these deficiencies of private law (besides the necessary structural changes) is one of the main tasks of Slovakian civil law codification. It is stated in the dissertation that the modification of the new code's rules on warranties and commercial guarantee claims according to the nature of the defect is a misguided step. In our view, the new rules should aim to address the remedy of the impairment of interest caused by the defect. However, at the same time, the statutory regulation of the impossibility and proportionality tests would be suitable to ensure flexible discretion and a possibility to balance out the parties' interests. With this, the special rules regarding the rights and obligations of parties in cases of deliberately defective or used goods in a consumer contract could become obsolete.

3.5. The economic interest protected by commercial guarantee

The Slovakian private law literature and jurisprudence fail to examine the connection between the heightened level of standard of care of the commercial guarantee and the reversed burden of proof, namely whether the concept of commercial guarantee makes it easier to seek remedy by other legal constructs for the loss of value caused by a defect. The Hungarian literature and jurisprudence has been unsteady regarding this question in the past few years. Legal literature from the time before the new civil code stated that the liability-enhancing effect of the commercial guarantee impacts all instruments that aim to remedy the loss caused by defect (including not only the statutes of limitations, but also the burden of proof and the standard of care).¹⁸ This same idea was reflected in (the later repealed) Section 5. the Supreme Court's 1/2004. (XII. 2.) PK decision on certain aspects of lack of conformity, according to the reasoning of which „it cannot occur that even though the fact of lack of conformity is confirmed, the rightholder cannot prove it from the point of view of the caused damage”. The commercial guarantee's obligor could only escape liability for damages due to lack of conformity if he proved that the cause of

18 Gyula Eörsi – György Gellért (eds.): An explanation of the Hungarian Civil Code, Közgazdasági és Jogi Könyvkiadó, 1981, p. 1227-1228.; György Gellért (ed.): An explanation of the Hungarian Civil Code, Közgazdasági és Jogi Könyvkiadó, 1992, p. 629.; György Gellért (ed.): An explanation of the Hungarian Civil Code, Vol. 1. Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2007, p. 936.; András Osztovics (ed.): An explanation of the Hungarian Civil Code, OPTEN Informatikai Kft., 2011, p. 769.; Ferenc Petrik (ed.): Warranties, commercial guarantee and consumer protection, Közgazdasági és Jogi Könyvkiadó, 1995, p. 154.; Istán Zsembery: Warranties, compulsory commercial guarantee and damages, Magyar Jogi és KülföldiJogi Szemle, 1975/12., p. 725-726.

the defect emerged after his performance. The recommendation 1/2004. (VI. 17.) on certain aspects of the interpretation of lack of conformity of the Civil Collegium of the Regional Court of Appeal of Szeged also contains a similar statement. Nevertheless, the jurisprudence has not been consistent and continuous, as Section 5. of the decision mentioned above was amended by the Supreme Courts decision of 1/2012 (VI. 21.) PK on certain questions of the interpretation of the rules on lack of conformity.¹⁹ Based on the Curia's advisory opinion, the commercial guarantee's subject is the service, which means that the obligor guarantees the conformity of the service. However, the damages caused by the lack of conformity fall outside the scope of the economic interest protected by the commercial guarantee, thus the rules of commercial guarantee do not extend to damages (unless the contracting parties agree otherwise or there is a statutory obligation). The new Hungarian civil code refused to follow the path set by the highest judicial forum: it states that any person who guarantees performance of a contract or is required by law to provide guarantee shall assume liability for lack of conformity during the guarantee period under the conditions set out in the guarantee statement or in the relevant legislation /Section 6:171. paragraph (1)/. Unless there is specific legislation or the parties' agreement states the contrary, the commercial guarantee's heightened level of liability, meaning the reversed burden of proof applies to the damages and contractual penalties as well. The reasoning of the amendment evokes the judgment BH 2012.99: „A situation cannot occur, in which case the obligor fails to rebut the presumption of lack of conformity, and due to the reverse burden of proof regarding damages, the obligee is unable to prove the fact of defective performance.”²⁰

19 Sections 1-11. and 15. of the decision 1/2012. PK are still applicable to the new civil code as well, based on the Curia's decision of 1/2014. PJE.

20 Lajos Vékás: The Civil Code with explanations, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2013. p. 637, as well as: Lajos Vékás – Péter Gárdos (eds.): Commentary to the Civil Code, Vol. 2. Wolters Kluwer Kft., 2014, p. 1601-1602. The author voices a contrary opinion in one of his earlier essays: Lajos Vékás: The implementation of the Directive on the sale of consumer goods into Hungarian private law, Magyar Jog, 2000/11, p. 655. In this essay Vékás draws attention to István Kemenes's article which describes a contrary position: István Kemenes: The reconsideration of certain aspects of warranties, guarantee and damages, Magyar Jog, 1992/1. p. 14., István Kemenes: Requirements of the economic contracts and codification of the new Civil Code, 2001/1. p. 13-22.

3.6. Questions of interpretation of the statutes of limitations regarding notification of lack of conformity in Slovakian law

The Slovakian legal literature has not yet made a uniform stance regarding the statutes of limitations, and there has been no scholarly dispute about this issue either. The statements made about the statute of limitations for timely notification regarding the general rules on lack of conformity cannot be considered to be thoroughly deliberated, as the phrases such as „stated to avoid confusion” and „without any severe consequences” are incompatible with the terminology of the civil law consequences and sanctions.²¹ The literature is not even consistent regarding the interpretation of the issue of the due date for unjustified delay: certain commentators do not take a position regarding this question,²² while others regard it as a date set „in order to avoid confusion” the lapse of which does not result in any loss of rights.²³ In our opinion the Slovakian civil code’s provisions on lack of conformity and notification (Sections 504 and 505 on the general rules on lack of conformity and Section 559 on the sale of goods) do not constitute *lex imperfecta*. Although the legal consequences of late notification cannot be found among the rules on the obligation of timely notice, based on the provisions on compensation for damages in the Slovakian civil code it can be stated that the late notice also triggers liability for damages.²⁴ Section 420 paragraph (1) of the Slovakian Civil Code clearly expresses that „every person is liable for the damages caused by the violation of his legal obligations”. The

21 Dulaková, Denisa – Dulak, Anton – Jurčová, Monika: *Zmluvy o prevode vlastníctva. Kúpna a zámenná zmluva, spotrebiteľská kúpna zmluva, darovacia zmluva. Komentár /Contracts of property transfer. Contracts for the sale of goods, exchange contracts, consumer contracts and gifts – A Commentary/*, C. H. Beck, 2011. p. 142.; Imrich Fekete: *Občiansky zákonník – Komentár /Civil Code – Commentary/*, Ing. Miroslav Mračko – EPOS, 2007. p. 551.; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2., IURA EDITION, spol. s r. o., 2010. p. 36.; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2. IURIS LIBRI, spol. s r. o., 2014. p. 38.; Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 463.; Peter Vojčík (ed.): *Občiansky zákonník – stručný komentár /Civil Code – Concise commentary/*, IURA EDITION, spol. s r. o., 2008. p. 637.

22 Imrich Fekete: *Občiansky zákonník – Komentár /Civil Code - Commentary/*. Ing. Miroslav Mračko – EPOS, 2007., Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2. IURA EDITION, spol. s r. o., 2010., Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2. IURIS LIBRI, spol. s r. o., 2014., Peter Vojčík (ed.): *Občiansky zákonník – stručný komentár /Civil Code – Concise commentary/*. IURA EDITION, spol. s r. o., 2008.

23 Marek Števček (ed.): *Občiansky zákonník II. § 451-880. Komentár /Civil Code II. 451-880. §. Commentary/*, C. H. Beck, 2015. p. 2109.

24 This conclusion has been reached only once by legal scholars: Marek Števček, (ed.): *Občiansky zákonník II. § 451-880. Komentár /Civil Code II. 451-880. §. Commentary/*, C. H. Beck, 2015. p. 1740.

civil code's obligation to notification is an obligation as well, thus if the aggrieved party violates this obligation by giving a late notice, he becomes liable for the damages he caused by his delay. The unclear nature of the statute of limitations of the notification obligation and the fact that the assessment of the consequences of late notice evades the majority of the literature and jurisprudence justifies the legislative reconsideration of the issue.

3.7. The inconsistencies of the provisions on enforcement

Another example of the inconsistency of the Slovakian private law is the enforcement of warranty claims. Although the literature holds a unanimous position regarding that the notice of the defect has to include the description of the defects or the way of their appearance,²⁵ the common opinion is more diverse about the issue of the due date for the enforcement of the chosen warranty right. The literature explaining the general rules on lack of conformity evokes the judicial practice which makes it compulsory to the aggrieved party to name the chosen warranty right at the same time he gives notice of the defect.²⁶ We cannot agree with this conclusion, considering the lack of statutory provisions. In our opinion the authors of legal literature do not support their conclusions with the relevant jurisprudence. Section 504 of the Slovakian Civil Code regarding the general rules on lack of conformity only contains that lapse of warranty rights is triggered by the lack of notification, thus this provision does not prescribe enforcement. Besides, Section 599 on the sale of goods states that the lapse of warranty rights is only caused by the missing of the last 24 months long period. The correct approach in our view is best reflected by the

25 Supreme Court of the Czech Socialist Republic, Civil Chamber no. Cpj 39/88. recommendation; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2., IURA EDITION, spol. s r. o., 2010. p. 36.; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2. IURIS LIBRI, spol. s r. o., 2014. p. 38.; Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 463.; Peter Vojčík (ed.): *Občiansky zákonník – stručný komentár /Civil Code – Concise commentary/*, IURA EDITION, spol. s r.o., 2008. p. 637.

26 Supreme Court of the Czech Socialist Republic, Civil Chamber no. Cpj 57/75 recommendation; Supreme Court of the Czech Socialist Republic, Civil Chamber no. Cpj 42/77 recommendation; Supreme Court of the Czech Socialist Republic, Civil Chamber no. Cpj 40/82 recommendation; Supreme Court of the Czech Socialist Republic, Civil Chamber no. Cpj 39/88 recommendation; Imrich Fekete: *Občiansky zákonník – Komentár /Civil Code – Commentary/*, Ing. Miroslav Mračko – EPOS, 2007. p. 552.; Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 463.; Peter Vojčík (ed.): *Občiansky zákonník – stručný komentár /Civil Code – Concise commentary/*, IURA EDITION, spol. s r.o., 2008. p. 637.

decision 33 Cdo 1830/2014. of the Supreme Court of the Czech Republic.²⁷ The warranty rights need to be enforced during the period set among the rules of the sales contract /Slovakian Civil Code Section 626. paragraph (1)/. In our opinion it would be reasonable to force the aggrieved party to name his chosen warranty right together with the notification of the defect during the period open for the notification. The reasonable assessment of risks arising out of the contract bolsters this interpretation as well: there is no rational reason to be found that could support the uncertain legal situation for years that could arise from the date of notification. In Slovakian civil law the period open for enforcement commences at the time of the notification about the defect and its length is determined by the various statutes of limitations. We discuss this issue in this dissertation in the chapter critiquing the two-stage method. The inconsistent civil law norms, the immature positions of legal literature and the faint jurisprudence on the issue all contribute to the dire need for a firm statutory legislation of the rules on enforcement of warranty rights.

3.8. The problem of the reverse burden of proof in consumer contracts

Regarding the issue of burden of proof, there is no differentiation based on the status of the consumer and the dogmatics do not examine the dilemma of protected economic interest so much so that it is impossible to find even a hypothetical dealing with the subject. In our opinion it should be the mission of the the new civil code under drafting to give an answer on the legislative level to the question of whether the heightened protection embodied in the presumption of lack of conformity impacts the legal consequences that fall outside the scope of the warranty rights.

3.9. The connection between the obligation to give notice and the obligation to examine in terms of time

Neither the Hungarian, nor the Slovakian civil law literature discusses the dilemma whether it should be justified to create a statutory connection between the period for notification and the period for the examination of the good. The contract law provisions in question set the starting date of the notification period to the

²⁷ Marek Števíček (ed.): *Občiansky zákonník II. § 451-880. Komentár /Civil Code II. 451-880. §. Commentary/*, C. H. Beck, 2015. p. 1740.

moment when the defect in the good is actually discovered /Section 307. of the old, 1959 Civil Code, Section 6:162. of the new Civil Code, Sections 505. and 559. of the Slovakian Civil Code/. As a result of this, if the defect could have been discovered earlier but due to the aggrieved party's negligent or late examination it was not, then the period for notification still opens up at the time of the actual discovery. In this case, the obligor is even deprived of any claims for damages. In our view, it would better serve the reasonable assessment of risk between the contracting parties if the period for notification would start once the period open for the examination of the good has already expired (or once the examination itself has taken place), and as far as other defects outside the scope of this situation are concerned (including those defects that do not necessitate any examination, which certify the good's quality or fall under commercial guarantee) the date of the actual discovery would become the determinative date for the notification period. Based on our conclusion, the obligee's negligence in examining the goods will not impair the obligor's interests. It is in the interest of the obligor to prove that the obligee could have discovered the defect at an earlier time, thus the burden of proof should be assumed by the obligee in this situation meaning that it should be the obligor's task to bring about enough evidence if he objects to the lapse of the notification period. The legal consequence for untimely notice would be a rightful claim for damages.

3.10. Reassessment of the statute of limitations causing a forfeiture of rights

It can be considered as common knowledge that the idea behind the application of statutes of limitations that cause the forfeiture of rights in the realm of warranties is concerned by the obligor's interests, given that the obligee's rights lapse with the expiration of the statute of limitations. These sort of deadlines are also justified by the fact that gathering proof and the process of evidence get significantly more problematic with the passage of time. However, practice has slowly eroded the system of the statute of limitations resulting in the expiration of rights in Hungarian law. The problems of application stem from the fact that neither the quality requirements for services available in the course of everyday business, nor the actual goods cannot be classified into a few groups based on their life-expectancy. These issues were attempted to be resolved by the decision of I. PGED. It is due to the unreasonable statutes of limitations that „the jurisprudence aimed to realize the

reparative function of the warranty rights in the realm of damages, basically overstepping the boundaries created by the due dates of warranty claims”.²⁸ The new Hungarian civil code solves the problem of these institutional anomalies by eliminating the system of statute of limitations causing forfeiture.²⁹ The statutorily fixed compulsory fitness-periods thus become statutes of limitations, as the lapse of these periods essentially eliminates the possibility for lack of conformity. Even though it is still possible to prove that the defect or its cause existed at a certain point in time, after the termination of the compulsory period of fitness lack of conformity could not occur from a legal point of view. The idea of adapting the statute of limitations of warranty rights to the professionally justified life-expectancy periods of the services and goods has already appeared earlier in the legal scholarly literature.³⁰ We agree with the position that „the length of the period for the statute of limitations for warranty rights is not an issue of principles and dogmatics, but rather a practical question, which should be solved by considering aspects of policy and feasibility.”³¹ The new Hungarian civil code - with regards to the idea of reasonable assessment of risk between the contracting parties – deals on the statutory level with the issue of raise in the value of the service if the warranty claims of repair or return and exchange are asserted after a significant time of the warranty period has already run. This raise

28 Lajos Vékás (ed.): *The Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2013. p. 630.; Lajos Vékás – Péter Gárdos (ed.): *Commentary to the new Civil Code*, Wolters Kluwer Kft., 2014. p. 1587.; see also: Lajos Vékás (ed.): *Expert Proposal to the Draft of the new Civil Code*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2008. p. 830.; Lajos Vékás (ed.): *Committee Proposal to the new Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2012. p. 406.

29 With regards to the reconsideration of the statutes of limitations of warranties, see: István Kemenes: *The reconsideration of certain aspects of warranties, guarantees and damages*. *Magyar jog*, 1992/1, p. 13-22.; István Kemenes: *Requirements of the economic contracts and codification of the new Civil Code*, 2001/1, p. 9-31. The author also argues against the justification of statutes of limitations of warranties and according to his opinion, the main standard in enforcement should be the period of the professional life-expectancy of the good.

30 The idea that „the warranty time (either as prescription or as statute of limitations) and the time period for commercial guarantee is inherently technological in nature and it should be determined by considering the relating economic and economical aspects, and not according to other, more traditional theoretical considerations” has already appeared in the literature about the Hungarian civil code years earlier. In: György Csillag: *Why six months?* *Magyar Jog*, 1977/9, p. 881. Further essays discussing the concept of time limits for claim enforcement for instance: János Baranyai: *On the modernization of warranty institutions*, *Magyar Jog*, 1976/8. p. 678-688; Gyula Eörsi: *Comments on the modernization of warranty institutions*, *Magyar Jog*, 1976/11, p-961-964.; László Móry: *Comments on the regulation of warranty rights*, *Magyar Jog*, 1977/8, p. 708-713.

31 Béla Kemenes: *Codificational issue regarding the modernization of warranty rules in the Civil Code*. *Állam- és Jogtudomány*, 1973/2., p. 221. This author also argues against the limitation of warranty rights by statutes of limitations resulting in lapse of rights: *id.* at p. 222-223.

in the value falls outside the scope of risk of the obligor which originally only includes the requirement that the service or good possess a professionally reasonable life-expectancy for utilization. It can be stated that the Slovakian legal literature does not regard the existence and issue of the statutes of limitations problematic, nor has the jurisprudence produced any new practice dealing with this question. In our opinion however, the achievements of the Hungarian legal scholarship could serve as an illuminating example for the current codification of the Slovakian civil law.

3.11. Statute of limitations for judicial enforcement

The last relevant element in the process of the enforcement of warranty claims is judicial enforcement in case the obligor refuses to comply with the obligees demands. Regarding this issue the question arises how long the time gap could and should be between the notice of the defect and the judicial enforcement. The Slovakian civil and commercial codes take a firm stand on the side of the two-stage solution, which means that the right of judicial enforcement constitutes a subjective right, subject to prescription. The new Slovakian civil code envisions to keep this legal construct in the future as well. We found the approach adopted by the Slovakian private law an unreasonable one. In our view, in case of the obligor's non-compliant behavior the obligee should be constrained to enforce his rights in a judicial forum in a relatively short period of time, as the several years long „grace period” can hardly be justified by any arguments. The path chosen by the Hungarian civil law seems to be the correct one, meaning that the period for judicial enforcement should also be the period for the enforcement of warranty claims against the obligor and not any longer.³² We agree with the former position of the Hungarian legal scholarship which concludes that the two-stage method is unsatisfactory and dogmatically disputable.³³

32 Judit Bártfai – Erika Bozzay – Ágnes Kertész – Lajos Wallacher: The new provisions on warranty rights and commercial guarantee (Harmonization of consumer protection rules in civil law and civil procedure), HVG-ORAC Lap-és Könyvkiadó Kft., 2004. p. 29.

33 Béla Kemenes: Codificational issue regarding the modernization of warranty rules in the Civil Code. *Állam- és Jogtudomány*, 1973/2., p. 232.; Béla Kemenes: Warranty claims and their enforcement with specific regard to sales transactions by citizens, *Jogtudományi Közlöny*, 1973/3, p. 132.

3.12. The history of the new provisions on liability for contractual damages in Hungarian contract law and its lessons for the Slovakian civil codification

Due to the anomalies of the system of statutes of limitations for warranty rights in the former Hungarian civil code, efforts were made in order to make claimants to invoke the rules on contractual damages for the compensation of any economic loss caused by the defect of the good, instead of the rules on warranty liability.³⁴ The statutory basis for this „detour” was provided by Section 310. of the Civil Code of 1959 and its background principle was worked out by the legal scholarship: the institutions of damages and warranties essentially serve the same goal regarding the compensation for any losses that occurred in the subject matter of the service (the differences between the two legal constructs lie in the standard of liability and the named categories of impairment of interests).³⁵ Nevertheless, the jurisprudence has opened the way to damages claims (BH 1986.60., I. PGED Section III., with regard to limitations in economic cases: Supreme Court recommendation No. GK 41.³⁶). The difference between the statutory level of liability for damages and

34 The discussion dealing with the concurrency of damages and warranty claims is not new, see: János Baranyai: On the modernization of warranty institutions, *Magyar Jog*, 1976/8. p. 678-688 and the scholarly reply: Gyula Eörsi: Comments on the modernization of warranty institutions, *Jogtudományi Közlöny*, 1973/3, p. 132.

35 István Kemenes: Requirements of the economic contracts and codification of the new Civil Code, 2001/1, p. 15; István Kemenes: Warranties and (or) damages for defect in the service. *Magyar Jog*, 1985/1.; p. 53. As a supplement, the author opines that the concept of warranties is an institution that emerged out of and became independent from damages. A contrary opinion, stating that warranty is an independent legal construct can be found in: Péter Miskolczi Bodnár: Warranties and contractual damages, *Magyar Jog*, 1988/10, p. 874. According to this author, all damage claims arising out of lack of conformity can be enforced regardless of the warranty statutes of limitations, including the damages in the subject matter of the service. Based on the view of the former author, damages can only be claimed for consequential loss during the warranty period due to the defect of the service. For compensation of damages in the subject matter of the service, the warranty rights should be enforced. This way of thinking is in connection with the idea that the concept of warranties is an objective, independent institution, and the two legal constructs are not alternative to each other, but warranty rights are special rights compared to damages. Warranties are to be enforced first on a stricter level of liability, within a shorter period determined by a statute of limitations. The damages accruing in the subject matter of the service can only be enforced through a damages claim after the expiration of the warranty period and only if the defect became apparent after the lapse of the statute of limitations. Consequential damages can be claimed throughout the whole warranty period. Péter Miskolczi Bodnár however expressed the opposing view that if the lack of conformity is imputable at the same time, this circumstance enables the aggrieved party to avoid the limitations of the warranty claim system. According to him, this argument also opens the floor to the enforcement of damages claims for loss in the subject matter of the service by claiming damages after the expiration of the warranty period (id. p. 876.)

36 The Supreme Court decision of 2/2006. (V. 22.) PK on the revision of the devices of the principles organization of jurisprudence found the recommendation GK. 41. outdated and obsolete and as such it declared the recommendation not to be followed in the future. Point 14 of the Curia's decision 1/2012 (VI. 21.) PK on certain aspects of legal application and interpretation of the lack of conformity upheld the rules embodied in Point III. of I. PGED. The Civil Law Chamber of the Curia

warranties caused the party aggrieved by the lack of conformity to evoke his warranty rights, however, jurisprudence rendered the situation a little more nuanced. The fact that by claiming damages the complications of the entire system of statutes of limitations could be avoided weighed in the favor of damages. Also, the fact that the only limitation in the way for the enforcement of damages was the prescription of the claims urged the obligee to follow this judicial path. According to the legal literature, the benefits of damages was counterbalanced by warranty claims in a way that the loss of value occurring up to the point of the assessment of the claim could not have been taken into consideration, while in case of adjudicating a damages claim, this sort of value decrease played a significant role.³⁷ The legal practice of liability for damages arising out of a breach of contract originated from the basic concept of the risk-assessing function of contracts. Contracting is a way of assuming risk:³⁸ the contracting parties are liable for damages emerging in their respective spheres of risk and due to this theoretical basis, jurisprudence interpreted the requirements for exculpation from liability for contractual damages in a more stringent manner compared to tort damages. In order for the party at fault to be exempted from the consequences of the breach, he needed to prove the occurrence of unavoidable circumstances beyond his control.³⁹ The idea to heighten the liability for contractual damages to the level of objectivity has already made an appearance in the mid-20th

does not regard points 12-14. of the mentioned PK-decision as valid given the differing new provisions of the new Civil Code (see: 1/2014. PJE decision of the Curia).

37 István Kemenes: The reconsideration of certain aspects of warranties, guarantee and damages. *Magyar jog*, 1992/1, p. 16.; István Kemenes: Requirements of the economic contracts and codification of the new Civil Code, 2001/1, p. 17.

38 Lajos Vékás: The foreseeability clause in contractual damages claims. *Magyar Jog*, 2002/9, p. 513.; Lajos Vékás: *Parerga, HVG-ORAC Lap- és Könyvkiadó Kft.*, 2008. p. 272., 289.

39 István Kemenes: The reconsideration of certain aspects of warranties, guarantee and damages. *Magyar jog*, 1992/1, p. 21.; István Kemenes: Requirements of the economic contracts and codification of the new Civil Code, 2001/1, p. 15.; Lajos Vékás: *Parerga, HVG-ORAC Lap- és Könyvkiadó Kft.*, 2008. p. 290.; Lajos Vékás (ed.): *Expert Proposal to the Draft of the new Civil Code*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2008. p. 809.; Lajos Vékás: *Review and constructive remarks to the proposal draft of the new Civil Code*. *Magyar jog*, 2008./9, p. 583.; Lajos Vékás (ed.): *Committee Proposal to the new Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2012. p. 396.; Lajos Vékás (ed.): *The Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2013. p. 605.; Lajos Vékás: *The new Civil Code*. *Jogtudományi Közlöny*, 2013/5, p. 236.; Lajos Vékás – Péter Gárdos (eds.): *Commentary to the Civil Code*, Wolters Kluwer Kft., 2014. p. 1534. It has to be stated that the roots of the principle of culpability reach back to the natural law ideology of the 17th century. The principle of „no liability without culpability” has become a prevalent concept in the civil law statutes. This mentioned principle also met the requirements of the liberal economic policy of the industrial revolution, as liability could be excluded when it would have encumbered the economic and technological development. However, the sudden increase in the number of industrial accidents in the 19th century questioned the unconditional application of the culpability principle. (Ernts von Caemmerer: *The principle of culpability – from the perspective of comparative law*. *Magyar Jog*, 1979/5, p. 463.).

century legal literature.⁴⁰ Due to the tendency of liability for damages caused by breach of contract getting more and more strict, the attempt to remedy the loss of value accrued in the subject matter of service by claiming damages did not constitute an unreasonable risk for the aggrieved party.

The new Hungarian Civil Code's provisions on the issue have been built up based on the lessons drawn from jurisprudence.⁴¹ Their starting point is the premise that liability for damages caused by a breach of contract and liability for damages that accrued outside a contract (essentially: torts) cannot be regulated in a uniform matter, as the assessment of the standards of care and the level of liability necessitate the utilization of different methods, besides, the issue about the measurement of lost profits and consequential damages also warrants the differentiated regulation. Another reason for the separation of the rules on liability was the circumstance that the Hungarian legal literature did not manage to settle the issue on whether the breaching party's subjective circumstances should be considered into the assessment of

40 For the theoretical dispute that took place in the journal *Magyar Jog*, see (in the order of publication): Ödön Zoltán: The liability for contractual damages in the draft of the Civil Code, 1957/10, p. 281-284.; Gyula Eörsi: The liability system of the Civil Code draft, *Magyar jog*, 1957/11, p. 310-312.; Ödön Zoltán: Again about the liability system of the Civil Code draft, *Magyar jog*, 1958/4, p. 109-112.; also: Ödön Zoltán: The new provisions on liability for damages caused by lack of conformity and warranties, *Jogtudományi Közlöny*, 1971/9, p. 480: as an argument in favor of the modification of the damages liability for lack of conformity into an objective liability system, the author mentions that the stricter liability better motivates the seller to perform with conformity, and that it is more fair to the buyer, as the risk of loss will not be placed on him. Nevertheless, the author does not recommend to create an objective liability structure for damages due to lack of conformity, as this measure would tear the uniform liability system into two and it would also bring about the disappearance of the distinction between the statutory warranties and the commercial guarantee. An argument in favor of the maintenance of the subjective liability system is the requirement of expected behavior which enables to find flexible solutions, as it makes it possible to adequately evaluate all the circumstances of the emergence of the damages, by thus helping the institution of damages to effectively fulfill its social function. Arguments in favor of the objectivization of the liability for damages caused by lack of conformity can be found in: Béla Kemenes: The buyer's, consumer's, user's claim for costs and damages in case of lack of conformity *de lege ferenda*, *Magyar jog és külföldi jogi szemle*, 1973/2, p. 19-23. According to the author's proposal, after the expiration of the statutes of limitations for warranty claims and the commercial guarantee, the stricter liability for damages due to lack of conformity would be replaced by the rules of general civil liability.

41 Lajos Vékás: *Parerga*, HVG-ORAC Lap- és Könyvkiadó Kft., 2008. p. 272., 289-290.; Lajos Vékás (ed.): *Expert Proposal to the Draft of the new Civil Code*, *CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft.*, 2008. p. 809.; Lajos Vékás: *Review and constructive remarks to the proposal draft of the new Civil Code*. *Magyar jog*, 2008/9, p. 583.; Lajos Vékás (ed.): *Committee Proposal to the new Civil Code with comments*, *CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft.*, 2012. p. 396.; Lajos Vékás (ed.): *The Civil Code with comments*, *CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft.*, 2013. p. 604.; Vékás Lajos: *The new Civil Code*. *Jogtudományi Közlöny*, 2013/5, p. 236.; Lajos Vékás – Péter Gárdos (eds.): *Commentary to the Civil Code*, Wolters Kluwer Kft., 2014. p. 1534.

attributability.⁴² The new civil code regulates the liability for contractual breach separately from tort liability and based on an objective standard.⁴³ In order to be exempt from liability, the co-existence of the following three conditions have to be proved by the breaching party:

- a damaging circumstance beyond the breaching party's control;
- the damaging circumstance beyond the breaching party's control should be objectively unforeseeable;
- at the time of the execution of the contract, it is not reasonable for the breaching party to avoid the damaging circumstance or to prevent the damage.

A circumstance is beyond the party's control if he cannot exercise any influence over it⁴⁴ (the cases of force majeure include for example: natural disasters, certain social-political events, acts of authority, grave malfunctions, market changes).

It was the Hungarian legal scholarship that discovered the connection between the categories of damages to be compensated and the different standards of care owed to the obligee. The rigor of the objective liability scheme, while taking into consideration the fair distribution of the risks associated with contracting, justifies the reasonable limitation of the damages to be compensated: „in a legal system that is based on the principle that the relevant party is only liable for the damages emerging

42 Lajos Vékás: Review and constructive remarks to the proposal draft of the new Civil Code. *Magyar jog*, 2008/9, p. 583.; Lajos Vékás (ed.): *The Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2013. p. 604.; Lajos Vékás: *The new Civil Code*. *Jogtudományi Közlöny*, 2013/5, p. 236.; Lajos Vékás – Péter Gárdos (eds.): *Commentary to the Civil Code*, Wolters Kluwer Kft., 2014. p. 1534.

43 The Supreme Court took a contrary position regarding this issue. Based on their opinion stated at the common meeting of the Supreme Court Civil Collegium and the Codification Committee of the Civil Code held on September 9, 2002: „ regarding the liability for contractual damages, it was possible to get excused from liability based on the lack of culpability in only a certain group of cases and in a certain time period, as the courts usually set the requirement of the standard of care very high, almost rising to the level of unavertability. However, courts have applied the exculpatory provision in the realm of contracts outside the business world. ... Thus, according to the judges, it is unnecessary to modify the jurisprudence that has been created throughout the past decades and that satisfies the requirements of the current regulation, also because the proposed amendments would lead to sometimes absurd and unacceptable results.” In: András Kisfaludi: *The Supreme Court debate on the concept of the new Civil Code*, *Polgári Jogi Kodifikáció*, 2002/5-6. p. 32.

44 Lajos Vékás: *Parerga*, HVG-ORAC Lap- és Könyvkiadó Kft., 2008. p. 291.; Lajos Vékás (ed.): *Expert Proposal to the Draft of the new Civil Code*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2008. p. 810. ; Lajos Vékás (ed.): *Committee Proposal to the new Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2012. p. 396.; Lajos Vékás (ed.): *The Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2013. p. 605.; Lajos Vékás: *The new Civil Code*. *Jogtudományi Közlöny*, 2013/5, p. 236.; Lajos Vékás – Péter Gárdos (eds.): *Commentary to the Civil Code*, Wolters Kluwer Kft., 2014. p. 1535.

from the breach of contract in case the breach is attributable to him, the importance of the more subtle instruments in lowering the level of liability is significantly less than in a system of strict liability.”⁴⁵ The risk-assessing function of contracting constituted the compass during the adjustment of the rules on the extent of damages as well. It is expected of the contracting parties to bear the burden of those irregularities that emerge from the risks associated with contracting as well as to examine, assess and assume these risks beforehand. The new Civil Code uses the limitation of foreseeability to determine the set of compensable damages. The damages in the subject matter of the service shall be compensated in their full amount, as they were completely foreseeable at the time of the execution of the contract. The complete damages cannot include the consequential damages and lost profits, as it would be against the principle of fairness to expect the obligor to count on these forms of damages without any specific additional information. These types of damages can only be compensated to the extent that the obligee is able to prove that the damages, as a consequence of the breach of the contract were foreseeable at the time of the execution of the contract. Consequential damages and lost profits were also outside the scope of compensable losses under the regime and corresponding jurisprudence of the old civil code. The judgments mostly denied relief for damages claims based on the lack of evidence or lack of causation (according to the principle of adequate causation),⁴⁶ moreover, the judicial practice even often made it possible to partially decline the claims for damages by not evaluating the circumstances of special consideration regarding tort damages.⁴⁷ The new code does not accommodate the purposefully breaching party with the limitation of foreseeability /Section 6:143.

45 Lajos Vékás: The foreseeability clause in contractual damages claims. *Magyar Jog*, 2002/9, p. 517.; Lajos Vékás: *Parerga*, HVG-ORAC Lap- és Könyvkiadó Kft., 2008. p. 225.

46 Lajos Vékás: The foreseeability clause in contractual damages claims. *Magyar Jog*, 2002/9, p. 513.; Lajos Vékás: *Parerga*, HVG-ORAC Lap- és Könyvkiadó Kft., 2008. p. 293.; Lajos Vékás (ed.): *Expert Proposal to the Draft of the new Civil Code*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2008. p. 811.; Lajos Vékás (ed.): *Committee Proposal to the new Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2012. p. 397.; Lajos Vékás (ed.): *The Civil Code with comments*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2013. p. 606.; Lajos Vékás: *The new Civil Code*. *Jogtudományi Közlöny*, 2013/5, p. 237-238.; Lajos Vékás – Péter Gárdos (eds.): *Commentary to the Civil Code*, Wolters Kluwer Kft., 2014. p. 1537.

47 Lajos Vékás: The foreseeability clause in contractual damages claims. *Magyar Jog*, 2002/9, p. 513.; Lajos Vékás: *Parerga*, HVG-ORAC Lap- és Könyvkiadó Kft., 2008. p. 210.

paragraph (3)⁴⁸/. Foreseeability has its roots in English common law (the most important case being the *Hadley v. Baxendale* decision).

The damages system of the Slovakian civil code – which regulates the contractual and tort damages in a uniform manner – is built on the notion of presumed culpability. It is the aggrieved party that has to prove the three conditions of relief for damages. However, the breaching party is able to excuse himself if he establishes the lack of culpability. Nevertheless, the code fails to explain the definition of this latter concept. According to the uniform interpretation of the Slovakian scholarly literature on private law, the private law definition of culpability has its roots in criminal law,⁴⁹ hence the actual definition of this notion is not surprising: culpability is the internal, psychological connection between the breaching party or tortfeasor and the damage caused by him as well as his unlawful behavior.⁵⁰ However, the interpretations of the definition of culpability show some differences among the legal scholars. One group of the commentators take the position that civil and criminal culpability are substantively the same,⁵¹ and there are even some positions which opine that for exculpation, the breaching party „shall prove the existence of circumstances from which it clearly flows that the party could not avoid the harm despite all, objectively

48 Based on Section 5:122 paragraph (3) if the contract was breached intentionally or with recklessness, the aggrieved party also has the right to have those damages compensated that were only foreseeable for the breaching party at the time of the breach. In: Lajos Vékás (ed.): *Expert Proposal to the Draft of the new Civil Code*, CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2008. p. 810. The new code purposefully refuses to apply the Expert Proposal's approach. The reason behind the reconsideration of the rule was the goal to avoid the evidence problems of the proof of grave negligence or recklessness.

49 Imrich Fekete: *Občiansky zákonník – Komentár /Civil Code - Commentary/*, Ing. Miroslav Mračko – EPOS, 2007. p. 409.; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2., IURA EDITION, spol. s r. o., 2010. p. 319.; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2., IURIS LIBRI, spol. s r. o., 2014. p. 321.; Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 317.; Peter Vojčík (ed.): *Občiansky zákonník – stručný komentár /Civil Code – concise commentary/*, IURA EDITION, spol. s r.o., 2008. p. 476.

50 Imrich Fekete: *Občiansky zákonník – Komentár /Civil Code - Commentary/*, Ing. Miroslav Mračko – EPOS, 2007. p. 409.; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2., IURA EDITION, spol. s r. o., 2010. p. 318. ; Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, vol. 2., IURIS LIBRI, spol. s r. o., 2014. p. 321.; Marek Števíček (ed.): *Občiansky zákonník I. § 1-450. Komentár /Civil Code I. 1-450. §. Commentary/*, C. H. Beck, 2015. p. 1346.; Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 317.; Peter Vojčík (ed.): *Občiansky zákonník – stručný komentár /Civil Code – concise commentary/*, IURA EDITION, spol. s r.o., 2008. p. 476. Regarding the Hungarian legal definitions of culpability, bad faith and deceit see also: Károly Benedek – Miklós Világhy: *The Civil Code in practice*, Közgazdasági és Jogi Könyvkiadó, 1965. p. 291-292.

51 Peter Vojčík (ed.): *Občiansky zákonník – stručný komentár /Civil Code – concise commentary/*, IURA EDITION, spol. s r.o., 2008. p. 474-477.

expected effort”.⁵² Based on some other opinions, the interpretation of culpability in civil law must commonly originate from an objective point of view, contrary to the criminal law interpretations. Only those ones of the specific situations and the specific circumstances of the emergence of damages should be considered which are all justified from the point of view of any normal, full-grown and average person.⁵³ According to our conclusions, which are supported by the findings of our research of the Hungarian civil law, this latter view is the most compatible with the risk-distributive function of contracts. It also has to be stated that the Slovakian civil law literature lacks the actual theoretical justification for the objectivization of the standard of care of damages liability and this is most likely the reason why the new civil code currently under progress does not envision to change the statutory provisions in this field either. In our opinion the latter mentioned position is to be approved, even though it lacks a statutory basis and this deficiency will not be remedied by the new civil code. Thus, the Slovakian private law scholarship does not touch on the examination of the relation between the breach of contract and liability for damages, and as a result, the study of the difference between the liability standards for warranty rights and commercial guarantee also falls outside the sphere of interest of the Slovakian civil law.

3.13. The relation between damages and warranty claims regarding damages in the subject matter of the service

In the regulational system of the new Hungarian civil code the mutual relation between the liability for contractual damages and the instrument of warranties had to be assessed on a statutory level, as the claim for damages could have easily suppressed the application of warranty claims, considering the new standard of liability and the further differences detailed in the previous chapter.

The new Hungarian Civil Code states that the obligee is entitled to damages for loss caused by lack of conformity for which the obligor is liable, unless the lack of conformity is excused /new Civil Code Section 6:174. paragraph (1)/. Similarly to the

52 Jaromír Svoboda (ed.): *Občiansky zákonník (Komentár a súvisiace predpisy) /Civil Code (Commentary and related statutes)/*, EUROUNION, spol. s r. o., 2005. p. 317.

53 Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, Vol. 2, IURA EDITION, spol. s r. o., 2010. p. 319, Ján Lazar (ed.): *Občianske právo hmotné /Civil substantive law/*, Vol. 2, IURIS LIBRI, spol. s r. o., 2014. p. 321, see also: Imrich Fekete: *Občiansky zákonník – Komentár /Civil Code - Commentary/*, Ing. Miroslav Mračko – EPOS, 2007. p. 410-411.

rule amending the level of liability, the provision of the measurement of damages is different in case the obligee compensates the loss of value accrued in the subject matter of the service due to the defect with applying a damages claim. In these cases the breaching party is not entitled to evoke the limitation of damages by way of the foreseeability clause: any damage in the subject matter of the service is always foreseeable to the breaching party /new Civil Code Section 6:143. paragraph (1)/.⁵⁴ The new code aims to exclude the possibility for the breaching party to avoid the consequences of his acts by the rules of damages, and states that the lapsed warranty claims cannot be enforced as damages claims /new Civil Code Section 6:174. paragraph (2)/, except in case the damages claim is evoked as a challenge to a claim originating from the same contract. Obviously, the instances of consequential damages and lost profits fall outside the scope of this limitation. Besides, the primacy of the warranty rights is also embodied in the concept that the compensation of the damages in the subject matter of the service can only take place if the conditions of the performance in nature of the contract fail.

It is also stated in Slovakian literature that the loss of value that can be remedied by the enforcement of warranty rights cannot be compensated by any other claims. The theoretical analysis of this limitation is also ignored by the Slovakian legal literature.

54 Lajos Vékás: The concept of the new Civil Code. *Polgári Jogi Kodifikáció*, 2002/4, p. 8.; Lajos Vékás: The foreseeability clause in contractual damages claims. *Magyar Jog*, 2002/9, p. 518.; Lajos Vékás: Parerga, HVG-ORAC Lap- és Könyvkiadó Kft., 2008. p. 228-229., p. 293.; Lajos Vékás (ed.): Expert Proposal to the Draft of the new Civil Code, *CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft.*, 2008. p. 811., Lajos Vékás (ed.): Committee Proposal to the new Civil Code with comments, *CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft.*, 2012. p. 397.; Lajos Vékás (ed.): The Civil Code with comments, *CompLex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft.*, 2013. p. 606.; Lajos Vékás – Péter Gárdos (eds.): Commentary to the Civil Code, *Wolters Kluwer Kft.*, 2014. p. 1537.

List of published articles in the respective field of research

The general provisions on lack of conformity. In: M. Števček (ed.): Civil Code II. 451-880. §§. Commentary. C. H. Beck, Bratislava, 2015

The rules of liability for contractual damages in the new Hungarian Civil Code /in Slovakian/. Acta universitatis Brunensis (essay-compilation), p. 65-85. Masaryk University Faculty of Law, Brno, 2014

Private law reform in Hungary. Acta universitatis Brunensis (essay-compilation), 171-195. Masaryk University Faculty of Law, Brno, 2014 – co-author

Lajos Vékás: About the new Hungarian Civil Code. Právny obzor, 2013/4, p. 313-325. (author of the Slovakian translation)

Comparative analysis of the implementation of Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees into Hungarian and Slovakian law. Jogi Tanulmányok – Eötvös Loránd University Faculty of Law, III. Conference of Doctoral Schools, 2012

Warranties and/or damages liability for lack of conformity. Polgári jogi kodifikáció, HVG-ORAC Lap- és Könyvkiadó Kft., 2007/4, p. 31-35.