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LAW SHOOTER

June 2014

SOMMER NOVELTIES!

We are pleased announce that the first German Business Ball, which our office also helped to organize, was a great success! You also read detailed information about the event on our website soon. If you could not make it to the ball, do not despair, because our office is planning numerous interesting events for the summer, such as a family tennis day and our famous poker boat.

This month's newsletter also includes numerous interesting articles such as an article on bank secrecy, once on the breakthrough of liability and finally we answer the question as to whether comments on the internet are punishable.

If you have any query related to the articles, please contact them.

Dr. Arne Gobert
Managing Partner

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BANK SECRECY NO LONGER PROVIDES PROTECTION?

In its order No. IV/5/2013.the Constitutional Court stipulates that the liability of internet content providers or operators of forums is objective regarding the non-moderated infringing comments. According to the judicial body, the intermediary internet service providers may be held liable when disclosing comments, regardless of whether they had monitoring obligation as to their content or not.

The legal determination of internet service providers´ liability has always raised questions of fundamental significance in the world of internet. This was

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faced in the case underlying the order of the Constitutional Court, where an internet content provider (hereinafter: ICP) initiating constitutional complaint had disclosed an opinion in its homepage concerning the advertising practice of one realtor company.

The article recorder that from several users complaints arrived about the contractual practice of the homepages operated by the realtor, which after examination the ICP found it to be unfair itself and declared the practices of the company as being based on deceit of consumers. At the same time, it called the attention of users to the importance of awareness of internet use and to read through carefully the terms of use. The opinion was commented and was communicated forward by several other internet portals too.

The realtor company had filed a petition against the ICP for the infringement of its personal rights. According to its opinion the content of the articles is false and along with the comments made thereto, infringes its right to the protection of good reputation.

According to the courts of first and second instance the article of the ICP is not unlawful, however, it provided platform for serious violating and degrading comments, hence it conducted the infringement of good reputation by rumor. The court added that the fact that the comments were removed by the ICP without delay, has no significance when determining the infringement.

The ICP had pointed out that according to the effective legal regulations pertaining to the information society, it is in the present case deemed to be an intermediary service provider; therefore, it shall not be responsible for the contents of the comments, since the intermediaries are not obliged to moderate the blogs and the comments, or to monitor their content, such internet service providers provide exclusively storage and platform for placing the content. Comments appear on the website by one click, without the assistance and supervision of the intermediary.

The Association of Hungarian Content Providers (hereinafter: AHCP), who intervened to the case in the interest of the ICP to win the lawsuit and turned to the Constitutional Court, whilst it found injurious that according to the court decisions it is infringing that someone is ensuring possibility on its homepage for the placement of comments without monitoring them, whereas it must count with the possibility that there may be an infringing comment among them. According to the constitutional complaint the court decisions infringe the freedom of express of opinion and the freedom of press. It held that it is a necessary and proportionate restriction of the freedom of press when the court qualifies the opinions infringing good reputation, unlawful; however, it is un-proportionate, if the person who has no influence on the content of such comment shall be held liable as well, since it provides exclusively the platform for disclosing the comment.

In the view of the AHCP, whereas being a fundamental right of communication, the aim of the right of expressing opinion is to ensure the discussion of „public matters", „the possibility of self-expression in a social context". These are the internet forums and comments, where users may express their thoughts and opinions. As per the AHCP, it is the significant element of the freedom of the expression of opinion that someone may disclose comment on the internet without prior moderation, hence if only previously moderated comments could appear, opinions would not meet and an important element of the clashes of opinions would disappear.

However, according to the Constitutional Court, the complaint was not justified.

At the beginning of its order it refers to the currently effective laws, pursuant to which the liability of internet service providers and intermediaries is different. While the internet service provider is responsible for the unlawful information made available, since it creates and publishes it by itself, on the other hand the intermediary - although as a general rule it is liable -, in the existence of certain conditions may be exempted from the responsibility, according to the governing act it is obliged to monitor the information only forwarded and stored by it.

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Furthermore, the Constitutional Court stipulates on conceptual basis that the Fundamental law ensures and protects free communication, regardless of its content of value or truth, thus the constitutional protection extends to all opinions no matter its content. It elaborates further that the freedom of press grants constitutional protection to the freedom of spreading information, opinion; does not protect the content of the opinion, but its forward to the public. Therefore, the determination of the liability of the operator of the internet page, without no doubt restricts the freedom of press extending as well to the internet communications.

It also points out that there are two forms of comments: the moderated and non-moderated comments. The prior are preliminarily examined by the webpage operator and if it finds it unlawful or contrary to its own moderating principles, will not disclose it. The latter are not moderated by the operator, it is not in its duty either.

Nonetheless, since mainly the person of the actual infringer „*commenter*" is unknown, the liability is on the operator of the webpage. The moderated comment, if it is infringing, triggers the same legal consequence as if it was not monitored previously or subsequently. The moderation of the comments does exempt from the liability or responsibility for unlawful communications. The liability for the unlawful comments (and the obligation for damages in certain case) is independent from moderating: it is based on the sole fact of the unlawful comment.

Conclusion

The Constitutional Court stipulates thereby in its order that it does not deem it justified to differentiate between the moderated and non-moderated comments. According to its opinion, if the internet providers undertaking moderating are liable for the illegal comments appearing on their page, then determining the infringement against the intermediary operators of the pages not undertaking moderating shall be proportionate as well. Question arises as to whether the modern form of expressing opinion will be limited in the light of the findings of the above order and whether the operation of non-moderated internet commenting in Hungary will be become questionable?

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CLAUSULA REBUS SIC STANTIBUS

The Constitutional Court has recently examined the question whether the state has possibility to change the content of already concluded contracts. This decision is particularly important in the light of the so called "foreign currency loan agreements", where we may meet frequently with the example that the exchange rate risk is borne exclusively by the debtor, or the creditor (for example the bank) increases the interest unilaterally, at its own discretion. In such and similar cases a wide range of consumers and debtors find themselves in a serious situation and the courts do not adopt consistent decisions in the procedures pending before them.

Interpreting the Fundamental Law, the Constitutional Court ordered that in exceptional cases the state has possibility to change the already existing contracts by the adoption of legal regulations. The order highlights that in a market economy the freedom of conclusion of a contract stands under constitutional protection; therefore, the parties may determine the content of their contract freely; however there is a risk – particularly in case of long term contracts –that at the time of the conclusion of the contract unforeseeable economic and social changes happen, which seriously infringe one of the party's interest. If it concerns masses, it is warranted that the legislation elaborates a general solution. The state may amend, change the content of existing contracts by means of legal

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regulations only if those same conditions exist, of which existence is necessary for the amendment of a contract through judicial way, namely:

- following the conclusion of the contract, a circumstance has occurred due to which the maintenance of the contract with unchanged content would infringe one of the parties legal interest,
- this change in circumstances was not reasonably foreseen and goes beyond the risks of the regular changes; furthermore,
- the change in circumstances shall be of society-wide.

These must be considered by the state, when it wishes to create such legal provision. Furthermore, it is important that all parties' interest is taken into account to the wildest possible extent, meaning that even in case of changed circumstances the balance of interest must be endeavoured to achieve.

In sum, the above outlined order of the constitutional court may give proper guidance for the treatment of the upcoming crisis, thus the foreign currency loan's grieve economic-social consequences as well.

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PUNISHABLE ONLINE COMMENTS

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THE CONFLICT OF THE REGULATIONS OF THE NEW LAND ACT REGARDING THE ACQUISITION OF OWNERSHIP AND THE REGULATIONS REGARDING THE ACQUISITION OF OWNERSHIP OF LAND AS PLEDGED PROPERTY SERVING AS A CREDIT SECURITY

1. Preamble

The main provisions of the Act CXXII of 2013 on the trade of agricultural and forestry lands("Land Act") aiming at the spread of middle-sized properties, the subservience of the right of ownership and the right of use of tillers practicing agricultural production, the restriction of acquisition of lands aiming at the interests of speculation and capital investment came into force on 1 May 2014.

One of these provisions is the acquisition of ownership of land.

2. The regulations regarding the acquisition of ownership of land

In the first place the domestic natural persons and the citizens of other member-states are entitled to acquire the land.

The regulations regarding the acquisition regarding the measure of the territory of land differ from each other according to the person acquiring the right of ownership, whether he is a farmer or a person not qualified as a farmer. The natural person not qualified as a tiller can acquire the ownership of a land up to one hectare, the person qualified as a tiller can acquire the ownership of a land up to 300 hectares.

The land possession maximum regarding a person qualified as a farmer on legal title of ownership or on other legal title is up to 1200 hectares.

The contract aiming at the acquisition of the right of ownership of land, which violates the restriction or prohibition of acquisition determined by the Land Act, is void.

The right of ownership of land can be acquired by the state, religious institutions, the mortgage credit institution and the municipality in cases of the aims defined by the Land Act.

Aiming at the realization and maintaining of property-system serving the aims of Land Act the acquisition of the right of ownership is secured by a right of pre-emption.

According to the rules of the Act CCXII of 2013 on the certain regulations and transitional provisions in connection with the Act CXXII of 2013 on the trade of agricultural and forestry lands the contract aiming at the acquisition of the right of ownership has to entail the binding elements defined by this act, and it has to be put into a private document, or into a private document of full probative value, otherwise the contract is void.

The contract announced to the persons entitled to the right of pre-emption on the way of notice aside from some exception is bound to the approval of the authority.

Within the framework of the procedure the agricultural authority controls the existence of the right of the acquisition and the conditions of the acquisition, and it establishes the person exercising his pre-emption right and confirms the contract, or refuses the confirmation.

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There are specific rules stated in the Land Act regarding the confirmation of the contract by the authority regarding the transfer of ownership by means other than a sale and purchase agreement and the acquisition qualified not as transfer of ownership.

Such contracts are the following: exchange, easement by prescription, testamentary disposition, the auction or tender in the framework of judicial execution procedure, liquidation proceeding, debt restructuring by the local government.

The auction is conducted by the agricultural authority.

If the agricultural authority refuses the confirmation of the acquisition, the land gets into the ownership of the state and into the National Land Reserves for the payment of appraised value.

If the contract aiming at the acquisition of the right of ownership is not bound to the confirmation of the authority, the control of the real estate-authority ensures the exclusion of restrictions or prohibition of acquisition regarding the contract before the registration of the right of ownership.

If the real estate-authority states one of them, it proceeds according to the regulations regarding the invalidity of the document.

3. The conflict of the regulations of the Land Act regarding the acquisition of ownership and the regulations of the Civil Code regarding the acquisition of ownership of land as pledged property serving as a credit security

The Land Act nominates as its aim that the mortgage on agricultural and forestry lands can serve as a security instrument of credit- and lending operations.

According to the provisions of the Land Act the mortgage credit institution can acquire a right of ownership of the land; however, it is important to emphasize, that the majority of the creditors eventually acquiring lien on land are not qualified as mortgage credit institutions, these organisations are characteristically credit institutions offering mortgage credit within the scope of Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises ("Hpt."), or branch offices of foreign financial enterprises within the scope of Hpt.

The Land Act entails specific regulations regarding the acquisition of the right of ownership of the land during judicial enforcement procedure, since it orders, that the auction after the request of the bailiff is conducted by the agricultural authority, if the sale is conducted in the course of auction, and it entails special regulations regarding the sale of land during judicial execution procedure and the acquisition of the right of ownership.

Regarding the acquisition of the right of ownership of the land besides the provisions of the Act LIII of 1994 on Judicial Enforcement the special provisions of the Land Act shall be also applied, according to them the agricultural authority examines (i) the capacity to contract of the purchaser, (ii) the existence of pre-emption rights of the persons entitled to pre-emption rights, and (iii) the eventual violation or circumvention of the restriction of the acquisition of the ownership.

The Civil Code puts down among the provisions regarding the right of pledge, that (i) the lien holder shall have the option to exercise his right to satisfaction either by way of judicial enforcement or by means other than by judicial enforcement, and the right to satisfaction by means other than by judicial enforcement shall be exercised, at the lien holders discretion:

a) through the sale of the pledged property by the lien holder, or

b) through the acquisition of the pledged property by the lien holder, supposing that it is not about the consumer-lien contract.

The Civil Code entails more detailed provisions regarding the sale by the lien holder or the acquisition of the right of ownership by the lien holder.

The decree Nr. 66/2014 (13 March) on the detailed rules of procedure of the suspension and restriction of the realisation of the lien by means other than by judicial enforcement and the exercise of the right to

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satisfaction coming into force at the same time as the Civil Code also does not prohibit the application of the realisation of the lien on land as real estate by means other than by judicial enforcement in accordance with the provisions of Civil Code, even the Subsection (2) Section 1 of that decree states expressly, that some provisions of the Civil Code must be applied during the exercise of the lien by means other than by judicial enforcement.

The aim regarding the above provisions is to serve that aim of the Civil Code regarding the credit securities, which states that the creditor as lien holder can effectively exercise the realization of his essential interest and right that is his right of pledge in that case, if his right to satisfaction is conferred.

The question arises therefore whether the creditors are obliged to apply the special additional provisions of Land Act during the exercise of their above rights, either during the sale of the pledged property, or during the acquisition of the ownership of that by them, or these provisions must be applied only in case of sale by way of judicial enforcement.

While the Land Act entails special provisions regarding the acquisition of ownership by way of judicial enforcement besides the general rules regarding the acquisition of ownership of land, it does not specifically mention the acquisition of ownership by means other than by judicial enforcement, therefore the intent of the legislator cannot be stated clearly, if it orders to apply obligatorily the restrictions regarding of acquisition, the ensuring of pre-emption right, or the procurement of administrative authorisation also regarding the above provisions of the Civil Code regarding lien.

The question arises therefore,

i) if the interpretation is correct, according to that the lien holder as a creditor is entitled to realize his lien by means other than by judicial enforcement under the binding provisions of the Civil Code.

ii) and that, if the above interpretation is correct, and the creditor realizes his lien on the land as real estate by means other than by judicial enforcement under the provisions of Civil Code - that is the creditor acting on behalf of the owner sales the land as real property or he acquires the ownership of the land with the contribution of the owner- than he is obliged to act exclusively according to the binding provisions of the Civil Code during his proceeding regarding the realization of lien, or he is obliged to apply the specific additional provisions of the Land Act besides the above provisions of the Civil Code.

It should be noted, that the application of the restrictive provisions of the Land Act would mean an additional burden for the creditors, it would prevent the effective realization of securities, so the question has an importance for the whole credit market.

It is likely, that a legal provision or the interpretation of legislator will answer the above questions in the future.

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„BREAKTHROUGH OF LIABILITY" – OR THE LIABILITY OF THE MANAGING DIRECTORS AND THE MEMBERS OF THE LEGAL PERSON IN THE LIGHT OF THE JUDICIAL PRACTICE AND THE NEW CIVIL CODE

You could be informed about the changes of the rules pertaining to the liability of managing directors in accordance with the entry into force of the new Civil Code (CC)– inter alia from our article *„The liability of the managing directors based on the new CC"*

published in our 2013 Newsletter. Nevertheless, the rules of the new CC to that effect have not been stipulated by the unilateral decision of the legislator. In the past few years, managing directors „wrapped in the separate liability of the companies' legal personality" and the problem of the damage caused to third parties by the members, was a target of several court decisions. On the basis of the judicial practice of the past few years it is seen that the judgments – in spite of the lack of concrete provisions to that effect in the old CC, but by analysing the rules contained therein– held the managing directors and the members causing damage as well jointly and severally liable beside the legal persons. As the illustration of the above we present one ad hoc decision of the Court of Appeal in Szeged. (Court of appeal in Szeged No. Gf. II. 30 194/2013)

Factual background of the case

Plaintiff has concluded product sales contract with the defendant business association. The parties have agreed that the payment of the purchase price will be due subsequently by bank transfer by simultaneous provision of bank guarantee.

Afterwards, the defendant managing director gave to the plaintiff a bank guarantee issued by a bank, based on which the plaintiff has fulfilled its contractual obligation. Defendant business association had resell the products delivered by the plaintiff to other legal persons.

The plaintiff had issued an invoice, indicating the deadline for fulfilment therein; defendant business association had; however, failed to meet its payment obligation. Meanwhile it became obvious to the plaintiff that the bank guarantees received from the defendant managing directors, were not listed in the register of the given bank; therefore, it submitted a criminal report for the felony of fraud causing damage of substantial value as well as initiated civil proceedings against the defendant business association and defendant managing director. In its petition it required - beside the determination of the invalidity of the contract due to several reasons – the joint and several condemnation of the defendant business association and defendant managing director on the legal title of unjust enrichment and the payment of purchase price.

Findings of the Court of Appeal

The Court of first instance had only determined the liability of the first defendant, namely the liability of the business association. Afterwards, due to an appeal, the case was forwarded to the Court of Appeal in Szeged, which examined the judgment of first instance from more thorough point of views affected by the appeal of the parties. In the present article we highlight exclusively the findings concerning the liability of the managing director and the member of the business association.

The executive officer, who is in the present case simultaneously the member of the business association and the statutory representative of the business association, as a general rule its conduct must be imputed to the business association. Nevertheless, in case the executive officer or the member of the legal person abuses the separate liability of the legal person and conducts such behaviour, which infringes the principle of good faith and fair dealing, or qualifies to be abuse of rights, the executive officer and the member may be petitioned by third parties.

The abovementioned legal principles were listed among the fundamental principles of the old CC. (These are, however, included in the new CC as well.)

According to the judgement of the Szeged Court of Appeal, based on the „breakthrough of liability " the joint condemnation of the member and the executive officer may only be feasible –pursuant to the prohibition of abuse of right defined as a fundamental principle in the CC. - , if the member and the executive officer conducts on behalf of his own individual interests and assets an intentional, fraudulent and wilful conduct deemed to be abusive, abusing thereby the separate liability of the business association. As a consequence of this, the member or the executive officer may not refer to the separate liability of the legal person, it will be held liable towards third parties jointly together with the legal person according to the rules of damage caused from other than contractual relation. Whereas in

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the present case these criteria existed fully, the Court of Appeal changed the judgment of the court of first instance **and obliged the defendant executive officer – and the member of the business association as one - together with the defendant business association to fulfil the provisions of the judgment of first instance.**

Conclusion

As it is seen from the above judgment, the judicial practice has allowed in certain cases to jointly condemn the business associations and executive officers also according to the old CC, in cases when they proceeded as to causing damage to third parties and intentionally abused the separate liability of the business association for their own interest.

The regulating system of the new CC. – beside the tightening of the liability - has its significance in legitimating the judicial practice of the past years, lifting the legal practice to a legitimate stage, - which in the Hungarian legal system does not possess binding force - bounding thereby the courts as well. The judgments adopted on the basis of the provisions of the new CC, thus will not build on the interpretations of the legal principles, but on concrete rules stipulated in the acts.

Accordingly, the legislator complied with the requirement of legal certainty; therefore, based on the new CC the executive officers and members of the business associations may be aware that third parties may with success enforce their claim for damages against them along with the business associations as well.

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