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LAW SHOOTER

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LEGAL UPDATES

As you have come to expect from us, our November newsletter provides details of important legal developments.
An article can be found in our November newsletter regarding the Act on foreign exchange loans, another interesting article about the surprising answer of the Curia on working hours without any break and last but not least some advice regarding what to do if falling victim to medical malpractice.

Finally we are excited to announce that DWC (www.dwc.hu) is organizing a Christmas Gala on the 6th of December at Stefania Palace. The special musical guest will be Bogi, the famous Eurovision Contest singer.

Should you have any questions regarding the material provided, we are at your disposal.

Dr. Arne Gobert
Managing Partner

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IS THE ACT ON FOREIGN EXCHANGE LOANS UNCONSTITUTIONAL?

As we have earlier reported the new second package helping the foreign currency debtors has arrived.

The second package has been adopted by the Parliament two weeks before. The Hungarian Banking Association requested the President of the Republic not to countersign the Act. Finally president János Áder countersigned the Act on Saturday. Thus the financial institution have to reckon with the clients between 14 January 2015 and 30 September 2015 in connection that how much was the overpayment due to the exchange-rate spread, respectively due to unilateral contract modifications. This procedure concerns approximately 1,3 million contracts, of which almost half are forint credits. However for this procedure first of all the State have to win the legal proceedings initiated by banks, in which the banks try to prove that they played fair.

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Up to now 65 judgments have been adjusted and altogether three plaints of the public institutions were partly accepted and three other cases are currently in front of the Constitutional Court. Last week the minister of Ministry of Justice said that the lawsuits might be permanently completed at the latest in the first half of January. „According to our hopes the appeal proceedings shall be completed until the middle of November. The judicial review, which is pending in front of the Supreme Court shall be permanently completed under our hopes until the end of the year or at the latest in the first half of January" – declared László Trócsányi, the minister of the Ministry of Justice.

The action of the EvoBank was the first from the actions initiated against the Hungarian state by the public institutions which has been negotiated on the second instance by the Court of Appeal of Budapest. On the court hearing the presiding judge emphasized in the oral preamble of the legally binding warrant that the council of the Court of Appeal asks the Constitutional Court to state several sections of the first Act on foreign exchange loans (Act XXXVII of 2014) unconstitutional and to obliterate those. Among other things for the section which adjusts that the contractual stipulation is void if the public institution did not initiate civil proceeding in the deadline stipulated in the Act or the action was rejected by the court or the civil procedure was terminated by the court. The Metropolitan Court would get the Constitutional Court to terminate that legal provision as well, under which the public institution has to reckon with the consumer according to separate Act.
According to the Metropolitan Court as appellate court additional 10 more sections of the Act are unconstitutional, principally those sections relating to civil proceeding which are fix that what kind of procedures are suitable for the public institutions to disprove the legal presumption of the unfairness.

According to the opinion of the Metropolitan Court of Budapest these legal sections harm the principle incorporated in the New Fundamental Law of Hungary, namely that Hungary is an independent, democratic rule-of-law state, harm the principle of division of powers, respectively harm that section under which everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act. Furthermore the Act hurts the principle relating to the independence of the judges set out in the Fundamental Law, the principle of legal certainty, respectively hurts that the judges provide judicial activity according to the opinion of the Court of Appeal.

In his preamble the judge evaded that the unfairness of the contractual condition is an ethic conception, and the „logically conclusion based on public experience" of the judge has significant consequence by the judgment of the conception; however, the judge could not conclude conclusion, which requires expertise merely under the logical rules, without any help in this respect. The judge said that the realization of the seven principles set out in the Act can be mostly educed without any special expertise, but the legal knowledge of the judge is not always sufficient for the assessment of the effects of the economic procedures.

The judge added that because of the tight deadline set out in the Act, the conduction of the evidence procedure may solely confine to handing over the documentation, and enforcement of additional evidence instrument may jeopardize the observing of the deadlines, moreover it makes impossible that.

In the appeal the EvoBank Zrt. requested that the Constitutional Court sets out that the Act is unconstitutional, respectively it interferes international contracts and requested at the Constitutional Court the initiation of the procedure aimed at excluding the enforcement of the unconstitutional provisions. According to EvoBank in the preamble of the judgment passed by the Court of Appeal, the Court has acknowledged that „having unconstitutionally anxiety in the Act" as well.

The plaintiff Bank added in its appeal that the rising of the regular payments does not go hand in hand with the groundless „enrichment" of the creditor, since the creditor enforced in principle the plant of the fund costs in the course of the interest elevation, thus the balance between services did not fall over certainly in general aspect.

The respondent Hungarian State requested the approval of the judgment on first instance passed by the and state its cross-appeal that the Act on foreign exchange loans is not post legislation because the harmonized decision of the Supreme Court based on the "old" Civil Code and other legislations connected to consumer sales contracts.

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According to the Hungarian State the legislator did not create such legal environment, so the disadvantage of the scope extended for the contracts technically concluded earlier shall be borne solely by the public institutions.

Should the decision of the Metropolitan Court does not suitable for the banks, so for the banks shall remain only the way of extraordinary remedy to dispute the judgment, whereby they could submit retrial or review request. Here we would like to indicate that constitutional challenge submitted to Constitutional Court on transaction stamp and concerned to banks has already rejected by the Constitutional Court.

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IS IT POSSIBLE TO REQUEST ALLOWANCE FOR 12 HOURS OF WORKING WITHOUT BREAK?

The Curia has expressed its opinion on the excessive working hours without any break regarding the case No Mfv.II.10.185/2014 in September and we recommend our summary on it to the attention of both the employers and employees.

Plaintiffs in the underlying case had been employed by the defendant with a daily period of 12 hours working time. They claimed in their petition to oblige the defendant to pay overtime allowance and for the same period of downtime a personal base wage. Remuneration for overtime shall be justified by the fact that such ordering means a greater work load on the employee.

The court of first instance found the petition justified and obliged the defendant to pay allowance for the overtime work and a personal base wage for the period of downtime with the reasoning that the defendant had failed to schedule the working time of the plaintiffs, not defined the date of the break time and the employees had not even a possibility to use it.

However, the court of second instance had changed the judgment of the court of first instance based on the appeal of the defendant and refused the petition. It stated that the statutory terms of the overtime and the downtime did not exist and that the plaintiffs had worked off the 12 hour working time and received their wage for that period.

Uncertainties arising from the differing standpoints of the courts were eventually dispelled by the Curia; it maintained the judgment of second instance in force and stated that even though the circumstance that the employer does not ensure the 1 hour break time for which the employees are entitled within the frame of the scheduled 12 hour working time, may give base for the unlawful employment, but it does not prove the fulfillment of overtime without the necessary statutory conditions. (Extraordinary work shall mean an ordered overtime, which is a work differing from the scheduled working time, is above the working time frame, or is an on-call work.)

Whereas, the plaintiffs had worked off their working time according to their schedule, received the wage for that period, there is no such lost time when they could not perform work due to a cause being in connection with the employer's economic operations. [LC. Section 151.§ (4)].

Non-compliance with the break time is one of the most common infringements affecting employees in Hungary, but failure to pay allowances (break time daily allowance, overtime allowance, special payment for shift work, night shift allowance etc.) is another typical irregularity. The committed infringements may be brought into connection with lack of knowledge of the respective legislation, simple negligence and the employer's risk taking. In spite of the frequency of these cases based on the above decision of the Curia it can be stated; however that the courts are always very careful and proceed strictly taking into account also the interests of the employers, when determining whether infringement occurred or not.

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HELP! I HAVE FALLEN A VICTIM TO MEDICAL MALPRACTICE

The inefficiency of the medical activity may originate in several reasons. It may be occurred by means of treated illness, or by means of the doctor's mistaken, fault as well. In the latter case we may say about the occurrence of medical malpractice. In this case the question arises that who is the responsible for the death or for the health damage of the patient? In this regard we have to separate the criminal and civil law liability. The present article is concerned with the latter.

In the civil law the obligation to fulfil the damage commitment is not always encumber to that person who personally caused the damage. That is the situation in the cases of medical malpractice, since in this case the conventions of liability for the acts of employees shall apply, under which the employer is responsible for the damages caused by its employee. Thus the medical institution is liable for those damages which was caused by the doctor the as long as the damage was caused unintendedly, because if it is caused by intendedly, the liability is joint and several.

What could we do then if we have fallen a victim to medical malpractice?

Before we initiate the lawsuit first of all turn with complaint to that medical institution, where the presumptive medical malpractice has been caused and ask the complete documentation in connection with the incident. Beside this it is preferable to lay in an expert opinion thereof, that the medical malpractice may be diagnosed or not.

We need to know that the lawyers do not initiate the lawsuit even if their claim is grounded. Previously they try to agree out of court with their medical institution, respectively its liability insurer. The reason for this precedent that the compensation lawsuits in front of courts may be drawn out either for years. Furthermore the medical institution often tend to pay defined money out of court, since they undertake a long and expensive lawsuit and with this procedure they can avoid the publicity and payments obligations over their insurance limit. If they had a big publicity lawsuit, it would have caused significant loss of face for the institution. On the other hand the insurer takes responsibility only up to the limit of the insured amount, the remaining amount is to be paid by the medical institution from its own resources. Nevertheless, it is an advantageous option also for the victim since he/she can get a compensation quickly, without having to wait until the end of a long proceeding, the outcome of which is uncertain.

In cases which become the subject of legal proceedings, the court grants compensation for material damages on the basis of evidences submitted by the victim. Victims can also turn to an expert (forensic service provider) in order to obtain an expert opinion about the costs of medical services. Since the entry into force of the new Hungarian Civil Code it is possible to claim for the so called compensation for immaterial damage, the amount of which is defined in the relevant case-law of courts, with regard to the extent of the damage, age of the deceased at the time of his/her death, family relationships, etc.

However, before initiating legal proceedings, it is recommended to file a complaint with the owner of the medical institution, with the Hungarian Public Health and Medical Officer Service (ÁNTSZ), or with the Ministry of National Resources (Nemzeti Erőforrás Minisztérium), with the Office for Supervision of Consumer Protection (Fogyasztóvédelmi Főfelügyelőség) in order to enable an out of court settlement. As a further opportunity the victim can turn to a person representing the rights of patients, and initiating an ethical or criminal proceeding can also be regarded as an additional option.

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