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Legal Transplants: Snapshots of the State of the Art and a Case Study from Central Europe – Post Transplantation-adjustment of Contractual Liability in the New Hungarian Civil Code

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Abstract: *Strict contractual liability, foreseeability and non-cumul in the new Hungarian Civil Code are a living laboratory of legal transplantation. After an introduction (I) an overview is provided on the state of the art on legal transplants in seven theses (II). A case study follows next (III), sorted into three categories: 'full legal transplants' (comparative analyses took place both before and after the transplantation); 'limping legal transplants' (no a priori comparative considerations took place but the comparative toolbox is used in interpreting the new rules) and 'surprising legal transplants,' based on the spontaneous intuitions of the legislator having resulted in rejection and/or conversion into a 'legal irritant'. The conclusions (IV) verify the significance of comparative analyses both in the pre- and post-transplantation phase.*

Résumé: *Les domaines de la responsabilité contractuelle stricte, la prévisibilité et le non cumul dans le nouveau Code civil hongrois reflètent d'un véritable laboratoire vivant de la transplantation légale. Après une brève introduction de la matière (I), cet article dresse un aperçu de l'état de la technique en matière de transplantation légale aux travers de sept thèses (II). Il s'ensuit une étude de cas (III), divisée en trois catégories : les « transplantations juridiques complètes » (les cas où des analyses comparatives ont été effectuées avant et après la transplantation) ; les « transplantations juridiques boiteuses » (lorsque aucune considération comparative a priori n'a été effectuée, mais que la « boîte à outils comparative » est utilisée pour interpréter les nouvelles règles) et les « transplantations juridiques surprenantes », reposant sur une intuitions spontanées du législateur ayant entraîné un rejet et/ou*

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une conversion en un « objet juridique irritant ». Les conclusions (IV) offre l'opportunité de vérifier l'importance des analyses comparatives tant dans la phase précédant que dans celle suivant toutes transplantations.

Zusammenfassung: *Verschuldensunabhängige Haftung im Vertragsrecht, das Konzept der Vorhersehbarkeit und die Frage nach der Kumulierbarkeit von vertraglicher und deliktischer Haftung (bzw. deren Ausschluss) – in ihrer Regelung im neuen ungarischen Zivilgesetzbuch – erweisen sich als ein lebendiges Laboratorium von Rechtstransfer- und Rezeptionserfahrungen. Nach einer Einführung (I) wird ein Überblick gegeben zum heutigen Stand der Wissenschaft zu den "legal transplants" (Rechtstransfers) und dies in sieben Thesen (II). Eine Fallstudie schließt sich daran an (III), aufgegliedert in drei Kategorien: 1. tief gegründete Rechtstransfers, sog. 'full legal transplants' (mit vollständigem Rechtsvergleich vor Einführung und nach Implantierung des Rechtstransfers); 2. hinkende Rechtstranfers, sog. 'limping legal transplants' (ohne konkrete rechtsvergleichende Studie vorab, jedoch unter Heranziehung rechtsvergleichender Erkenntnisse bei der Auslegung der neuen Regeln); und 3. Spontantransfers, auch 'surprising legal transplants,' die mehr auf spontaner Intuition des Gesetzgebers beruhen und zur Ablehnung einer Lösung aus dem Ausland führen oder zu einer unangepassten und daher potential dysfunktionalen Übernahme (sog. 'legal irritant'). In den Schlussfolgerungen (IV) wird noch einmal klargestellt, wie wichtig rechtsvergleichende Analysen sowohl vor als auch nach der Verabschiedung von Regeln mit Rechtstransfers sind.*

I Introduction

Legal transplants are frequently in the focus of comparative law.[1] Even the variety of terms and metaphors on the phenomenon is astonishing. Gutan enumerates metaphors from the various sciences' point of view: legal transplantation is a medical metaphor, but there are many others, such as legal importation (commercial metaphor), legal imitation (cognitive metaphor) and legal acculturation or adaptation (socio-cultural metaphors).[2] Örücü prefers transposition to transplantation, because this term expresses the task to suit the borrowed rule to the particular socio-legal culture and needs of the recipients, just as a transposition in music is made to adjust the melody to the particular instrument or the vocal range

1 For a historical overview cf J.W. Cairns, 'Watson, Walton and the History of Legal Transplants' (2013) 41:3 *Georgia Journal of International and Comparative Law* 637.

2 See M. Gutan, 'The French Legal Model in Modern Romania. An Ambition, a Rejection' (2015) 6:1 *Romanian Journal of Comparative Law* 120, 129–130.

of the singer. She also mentions cross-fertilization and pollenization.[3] Another taxonomy can be found in Twining (reception, spread, expansion, transfer, exports and imports, imposition, circulation, transmigration, transfrontier mobility of law) and he prefers diffusion as an overall term that covers all those semiotic approaches. 'Diffusion is generally considered to take place when one legal order, system or tradition influences another in some significant way.'[4]

It goes beyond the aims of this paper to present the diverse history of thoughts on and analyses of legal transplants. Watson (legal transplants are unconditionally and easily possible)[5] and Legrand (legal transplants are impossible, since only meaningless words are transplanted and the meaning of the rule itself suffers a disjunction)[6] are at the two ends of the scale; others represent more nuanced views (legal transplant are conditionally possible depending on the circumstances, on the transferability and substance of the borrowed rules and, last but not least, on the adjustment to and within the recipient system). Kahn-Freund asks whether the transplantation of legal ideas is similar to the transplant of human organs, such as a kidney, or to the exchange of a wheel or the carburettor in a car instead. He points out that there are degrees of transferability, corresponding to the particular rule's location on the scale between the kidney as the organic and the carburettor as the mechanical end.[7] Teubner's view seems to be closer to the other end of the scale (Legrand). Legal transplant shall be replaced by 'legal irritant', because the former term does not fit the reality of legal borrowings. Transplant creates the wrong impression that the 'transferred material will remain identical with itself playing its old role in the new organism'; but if a foreign rule is imposed on the domestic legal culture then it 'works as a fundamental irritation which triggers a whole series of new and unexpected events. [...] Legal irritants [...] will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.'[8]

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3 E. Örücü, 'Law as Transposition' (2002) 51:2 *International & Comparative Law Quarterly* 205, 207, 222.

4 W. Twining, 'Diffusion of Law: A Global Perspective' (2004) 36:49 *Journal of Legal Pluralism and Unofficial Law* 1, 5, 14. (Diffusion is part of the broader term of 'interlegality' and a subtype of it.)

5 A. Watson, *Legal Transplants, An Approach to Comparative Law* (2nd ed, Athens and London: University of Georgia Press, 1993) 21, 55, 95–96.

6 P. Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4:2 *Maastricht Journal of European and Comparative Law* 111, 120.

7 O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37:1 *Modern Law Review* 1, 5–6, 12–13.

8 G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61:1 *Modern Law Review* 11, 12–13.

In this paper, legal transplants are analysed in the context of the recodification of private law in Hungary, when Act V of 2013 on the (new) Civil Code was enacted. The reform of contractual liability is based on three legal transplants. The first is the introduction of *strict liability* for the breach of onerous contracts, similar to Article 79 paragraph 1 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). (The old code provided for fault-based liability; however, fault was presumed.) The second pillar is the implementation of a *foreseeability clause*, similar to Article 74 CISG. (There was no such explicit limitation on the extent of damages or compensation in the old code.) The third is the Hungarian version of the French *non-cumul* principle, ie where there is a contractual relationship between the plaintiff and the defendant, parallel damage claims in non-contractual liability are excluded, unlike, for example, in German law where the principle of free choice between contractual and non-contractual claims (*freie Anspruchskonkurrenz*) applies, the same way as in common law.

In this paper the meta-level is at the forefront; it is not that much about the substance,[9] but the focus is on the characteristics of these three 'innovations' as legal transplants (the transplantation as a procedure) and on the comparative considerations, both in the pre- and in the post-transplantation stages, with special regard to the post-transplantation adjustment of the borrowed rules.

II Legal Transplants: Snapshots of the State of the Art – Seven Theses

1 Legal Transplants Exist

Imports and exports of legal concepts have occurred and are still occurring worldwide.[10] 'It now seems natural in the development of globalizing law for the na-

9 A. Fuglinszky, 'The Reform of Contractual Liability in the New Hungarian Civil Code: Strict Liability and Foreseeability Clause as Legal Transplants' (2015) 79:1 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 72. A. Fuglinszky, 'Some Structural Questions on the Relationship Between Contractual and Extracontractual Liability in the New Hungarian Civil Code', in A. Menyhárd and E. Veress (eds), *New Civil Codes in Hungary and Romania* (Springer, 2017) 107.

10 M. Müller Chen, C. Müller and C. Widmer Lüchinger, *Comparative Private Law* (Zürich and St Gallen: Dike, 2015) para 253. G. Rehm, 'Rechtstransplantate als Instrument der Rechtsreform und -transformation' (2008) 72:1 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1, 39–40. M. Graziadei, 'Comparative Law as the Study of Transplants and Receptions', in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 470.

tional to borrow from the international, and one national from another national,'[11] to be inspired by the legal solutions of other countries and to consider them as models.[12] The socio-cultural and historical embeddedness of legal systems should not be overestimated either, since societies and cultures undergo continuous interaction; they hardly, if ever, develop in isolation and entirely originally.

> There is a degree of uniformity with respect to the emergence of certain needs as societies progress through similar stages of development, and a natural tendency exists towards imitation, which may be precipitated by a desire to accelerate progress or pursue common political and socio-economic objectives.[13]

Those who deny the transferability of law in general (with reference to socio-cultural, economic and political embeddedness), also deny the ability of a legal system to perform any change and adaptation,[14] because if the law is shackled by (as a captive of) those particular metajuridical factors then it cannot change anyway (whether legal transfers or internal evolutionary initiatives are blocked). Religion, climate, socio-economic and political factors are – no doubt – important; these factors and the legal subsystem influence each other mutually, but they are no obstacles to legal borrowings. In the Hungarian literature, Eörsi underlines that 'legal migration' is a normal and natural phenomenon; it forms part of the global convergence in the legal world.[15]

2 Socio-culturally Less Embedded Rules are More Transplantable

There are rules that have a higher level of transferability than others, due to their lower socio-cultural, political, etc embeddedness and to the openness and permeability of that particular branch of the law to which they belong. Family law, law

11 E. Örücü, 'Comparative Law in Practice: The Courts and the Legislator', in E. Örücü and D. Nelken (eds), *Comparative Law, a Handbook* (Oxford and Portland: Hart, 2007) 412.

12 In the Hungarian scholarship cf A. Harmathy, 'Összehasonlító jogi kutatások az ezredfordulón', in I.H. Szilágyi and M. Paksy (eds), *Ius Unum, Lex Multiplex – Liber Amicorum Studia Z. Péter Dedicata, Studies in Comparative Law, Theory of the State and Legal Philosophy* (Budapest: Szent István Társulat, 2005) 123.

13 For these common demands and needs see G. Mousourakis, 'Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach' (2013) 54:3 *Acta Juridica Hungarica* 219, 233.

14 Rehm, n 10 above, 31.

15 G. Eörsi, 'A közvetett károk határai', in J. Németh and L. Vékás (eds), *Emlékkönyv Beck Salamon születésének 100. évfordulójára, 1885–1985* (Budapest: ELTE ÁJK – BÜK, 1985) 66.

of succession and property law (even if the latter to a lesser extent) are considered as more exposed to religious, socio-cultural (and sometimes political) factors than contract law, company law and commercial law;[16] it is not a coincidence that the latter branches of (private) law seem to be more suitable for legal harmonization.

Rules with a background of international conventions (with special regard to international trade) are likely to be transplanted more easily and with a bigger prospect of success, because they were negotiated amongst many countries to meet their needs[17] with the involvement of other organizations, actors and stakeholders and represent acceptable compromises with regard to compatibility, too. The drafting of international conventions and legal harmonization processes can filter out such general rules[18] or system-neutral rules,[19] that can be accepted due to their quality and the reasonable essence behind them. In the Hungarian literature, Eörsi refers to the relative independence of the rules being transplanted, which enables them to serve different circumstances.[20] According to him transferability depends not only on the branch of the law to which the respective rule or concept belongs but also on the structure and level of abstraction of the respective private law as a whole. He is of the view that common law and Swiss law are more suitable for transplantation than the private laws of other countries.[21]

3 Three Types According to the Motives: Cost Saving, Imposed and Legitimacy-generating Legal Transplants

The motives of legal borrowings have been systematised in different ways. Three types are highlighted by several authors. The first is the 'cost-saving transplant' (if one solution has already worked, the legislative drafter or the judge may save

16 Rehm, n 10 above, 32, 38. E. Kramer, 'Hauptprobleme der Rechtsrezeption' (2017) 72:1 *Juristenzeitung* 1, 4.

17 R. Baindu Cowan, 'The Effect of Transplanting Legislation form one Jurisdiction to another' (2013) 39:3 *Commonwealth Law Bulletin* 479, 485; similarly Rehm, n 10 above, 38. See partly dissenting P. Cserne, 'The Recodification of Private Law in Central and Eastern Europe', in P. Larouche and P. Cserne (eds), *National Legal Systems and Globalization: New Role, Continuing Relevance* (Springer, 2012) 80.

18 Discovering general principles of law is clearly one of the objectives of comparative law see E. Örücü, 'Developing Comparative Law', in Örücü and Nelken (eds), n 11 above, 55.

19 J. Zekoll, 'The Louisiana Private-Law System: The Best of Both Worlds' (1995) 10 *Tulane European and Civil Law Forum* 1, 13, 18, 30.

20 G. Eörsi, *Összehasonlító polgári jog* (Budapest: Akadémiai, 1975) 181.

21 *Ibid* 537.

time and thinking by adopting it),[22] which is frequently connected to the goal of improving economic performance by facilitating the development of efficient legal solutions.[23]

The second type is the externally dictated transplant, which can be traced back to the imposition of law through military conquest or expansion; these transplants are frequently sabotaged, resulting in a clash between statutory law and legal reality.[24] They will generally fail if the driving powers disappear, unless the provisions have already taken root due to their rational authority.[25] As such, voluntary receptions have a better chance of 'survival' (and operating properly) in a long-term view.

The third category is the so-called legitimacy-generating transplant (based on the prestige of the transplanted system or rule). They also tend to fail as soon as the prestige of the donor system loses its respect.[26]

Besides the 'classic' voluntary transplants and others imposed by force, Müller Chen, Müller and Widmer Lüchinger mention also 'semi-voluntary' and 'factual' transplants. The former is a seemingly voluntary import, but under the circumstances of the globally interrelated markets and other economic and/or socio-political necessities, bounds and constraints, there is no other choice than – for example – 'to pick the most efficient model'; the authors cite another example: if the recipient country wishes to keep up with alliance policies and/or to join a particular association of States then the reception of their harmonised law is a must or at least a very strong incentive. By 'factual legal transplant' they understand spontaneous legal migration, if a group of people migrating from one place to another takes their own law with them.[27] Again a different typology is provided for by Kramer: besides those listed above, he adds the inducement that the recipient State is small (as with the reception of the Austrian civil code, the ABGB in Liechtenstein) or underdeveloped (developing countries); the legislator is under time pressure (he mentions the establishment of the Turkish Republic by Kemal Atatürk in 1922 and the transformation of the Central European States after 1990),

22 J.M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51:4 *American Journal of Comparative Law* 839, 842, 845–846, Rehm, n 10 above, 32.

23 Graziadei, n 10 above, 459–460.

24 *Ibid* 456–457.

25 Miller, n 22 above, 842, 847, 868.

26 Graziadei, n 10 above, 457–458, Miller, n 22 above, 842, 854–855, 869. He refers to a fourth type, the so-called entrepreneurial transplant (based on the personal interest and curiosity of individuals, mostly legal professionals in order to obtain political or economic benefits). See 842, 849–850.

27 Müller Chen, Müller and Widmer Lüchinger, n 10 above, paras 266–278.

and finally the neighbourhood relationship, as with how the Swiss and Austrian legislators, judges and academics keep their eyes on the developments in the German legal system.[28]

4 Legal Transplant as a Multi-channel Phenomenon

Legal transplants are generally a multi-channel (pluralistic) phenomenon: they are not restricted to formal, government-driven one-way imports of State-made rules and concepts. There are several variants, which have been systematised recently by Twining: as far as the source and the destination are concerned, besides a bipolar relation between single exporter and single importer, multiple sources can be considered (including reciprocal influences or re-export); besides the 'classic' State law (and municipal) level, others levels (regional, non-State levels with agents such as NGOs, traders and lobbyists) can be involved; besides formal enactment, semi-formal and informal infusions can take place; beyond the transplantation of legal rules and concepts by the legislator or the judge, other legal formants can serve as a 'transmitter', such as the mentality and usages of legal professionals having an influence on contractual practice, etc; reception can take place both on one or several specific dates but in the same way through lengthy processes, gradually.[29]

5 Legal Transplants have Purposive-temporal Dimensions

Legal transplants have a purposive-temporal dimension: they

> can be viewed as a collection of experiences that happened in one legal system and are expected to be realized in the future in a different legal system. [...] they try to anticipate the future and, consequently, change it. Modernization, progress can be the driving forces of the process that is aimed at filling the gap between experience and expectations in the legal field.[30]

28 Kramer, n 16 above, 5–7.

29 See the pluralistic model of Twining, n 4 above, 3–4, 17–35, for further references to other models see 16 n 27, similarly Kramer, n 16 above, 8.

30 G.R.B. Galindo, 'Legal Transplants Between Time and Space', in T. Duve (ed), *Entanglements in Legal History – Conceptual Approaches* (Frankfurt/Main: MPI for European Legal History, 2014) 133, 135–142, 144–145.

Therefore the chances of the transplanted concepts fitting and operating properly are better if the legal practitioners were not satisfied with the predecessor rule(s) anyway[31] or there was no explicit solution for a particular problem and this resulted in social tensions. The bigger the tension, the more direct the negative impacts of the former rule and/or the lack of legislation on the respective issue on the everyday operation of law and order, the bigger the prospect of success of the transplanted rule.

6 The Transplanted Rule is Transposed and Adjusted to the Legal Environment

The transplanted rules, principles and concepts must be adjusted, transposed, fitted etc to the recipient legal system (*a posteriori*); and, to put this phenomenon into a retrospective perspective, care should be taken (*a priori*), since it is not enough that the concept to be transplanted 'has proved satisfactory in its country of origin'; a compatibility check needs to be run before the transplantation as to whether it will work in the legal system 'where it is proposed to be adopted,'[32] and whether it does not upset the integrity of the structure as a whole[33] including the culture, the socio-political structure and the level of economic development. To summarise, the *a priori* analysis and evaluation of the desirability and applicability of the transplant for legislative and judicial practice should take place[34] as far as outcomes can be predicted.[35] The process of a priori evaluation has receieved

31 Z. Péteri, 'Jogegységesítés és jogharmonizáció', in B. Fekete and A. Koltay (eds), *Péteri Zoltán – Jogösszehasonlítás, történeti, rendszertani és módszertani problémák* (Budapest: PPKE JÁK, 2010) 237.

32 K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (T. Weir tr, 3rd ed, Oxford: Oxford University Press, 1998) 17, see also K. Schadbach, 'The Benefits of Comparative Law: a Continental European View' (1998) 16:2 *Boston University International Law Journal* 331, 389. Or in the Hungarian literature Eörsi: 'not every plant can survive in every kind of soil, Eörsi, n 15 above, 65.

33 J. Du Plessis, 'The Promises and Pitfalls of Mixed Legal Systems? The South African and Scottish Experiences' (1998) 9:3 *Stellenbosch Law Review* 338, 344, 346–347. In the Hungarian literature see for the very critical opinion against the 'black letter' transplantation disregarding the economic and socio-cultural circumstances: A. Harmathy, 'A jogösszehasonlításról', in Á.O. Homicskó and R. Szuchy (eds), *60 – Studia in honorem Péter Miskolczi-Bodnár* (Budapest: KRE ÁJK, 2017) 259.

34 Mousourakis, n 13, 229, similarly Rehm, n 10 above, 39.

35 It can never be said for sure that the legal transfer will work (or not) in the receiving environment, but modern society insists on prognoses, Galindo, n 30 above, 145. Similarly A. Kisfaludi, 'Company Law in Hungary', in C. Jessel-Holst, R. Kulms and A. Trunk (eds), *Private Law in Eastern Europe* (Tübingen: Mohr Siebeck, 2010) 441: 'there may be sufficient information available regarding their application in their original environment, and from this data some conclusions may be

much attention in Central Europe. According to a Romanian author, Gutan, legal transplants mean far more than 'bringing legal ideas, norms and institutions from a foreign legal system into the domestic one', since this is 'just the surface of a complex process that implies [...] correct evaluation of legal models to be imported, critical awareness, cross-cultural dialogue, legal import skills, and socio-cultural risks.'[36] In the Hungarian literature, Eörsi differentiates between organic reception (if the transplanted law is in line with the socio-economic circumstances of the recipient legal system) and inorganic reception (if there is a big gap between the socio-economic models of the donor and the recipient country). The more organic the reception is, the bigger the chance to be accepted and not to be rejected, extruded by the recipient system.[37]

7 Former Encounters of Legal Professionals with the Transplanted Rules Matter

The chances of the transplanted rules operating properly are significantly better if the legal professionals in the recipient legal systems have at least some experience of the respective concepts; for example because they have already encountered them in implementing and applying international conventions, or a similar thought has already been developed implicitly within the scope of an existing domestic rule or concept.[38]

III A Case Study: Transplanted Mosaics among the New Hungarian Rules on Civil Liability

As already pointed out above, strict contractual liability, the foreseeability clause and the *non-cumul* principle in the new Hungarian Civil Code as legal transplants are examined in this article. The focus is on the legislative legal borrowings (and

drown as to the possible impacts in the new environment.' For further analysis see Á. Fuglinszky, 'Applied Comparative Law in Central Europe' (2019) 6:2 *Journal of International and Comparative Law* 245, 251–253.

36 M. Gutan, 'Comparative Law in Romania: History, Present and Perspectives' (2010) 1:1 *Romanian Journal of Comparative Law* 9, 28–29.

37 Eörsi, n 20 above, 24, 537.

38 See for example the foreseeability approach in the former judicial practice in Hungary within the frame of adequate cause in III 1 a).

on the use of legislative comparative analyses) on the one hand, and on the post-transplantation adjustment in case law and doctrine on the other hand, ie whether and if so, to what extent scholars and judges use the tool of applied comparative law in order to interpret, apply and to gain a better understanding of the rules and principles imported from other legal systems.

The comparative analyses and the compatibility check before the transplantation and also the comparative considerations in the post-transplantation phase were performed with different degrees of depth and thoroughness. According to the different intensity of them, I distinguish among full legal transplants (1), meaning that both before (ie in the course of the legislation) and after the transplantation (ie in interpreting the new rules) relatively broad and profound comparative analyses took place; limping legal transplants (2), referring to those aspects that were not touched upon in the pre-transplantation stage and did not undergo *a priori* comparative examinations and compatibility checks, but as soon as the academics realised in the post-transplantation phase that several interpretations were possible and the way of interpretation chosen had a very clear practical relevance and impact, comparative studies started in the legal literature; and, finally, surprising or overexcited legal transplants (3), which means that neither before nor after the legislative borrowing did any comparative study or compatibility check take place: both the legislative introduction and the rejection of the transplant in academic writings and in the case law happened spontaneously and desultorily without weighing up the pros and cons and considering alternatives.

1 Full Legal Transplants and their Post Transplantation Adjustments

a) Comparative analyses that preceded the legal transfer of strict liability (Article 79 CISG) and foreseeability (Article 74 CISG) in contract law

During the *travaux préparatoires* it was Lajos Vékás, the head of the academic codification committee, who conducted profound comparative research on the background of strict contractual liability and of the foreseeability limitation on damages, particularly focusing on the latter.[39] His goal was to convince the codification committee, and later on the Ministry of Justice, to replace the contractual

39 L. Vékás, 'Előreláthatósági klauzula szerződésszegésből eredő kártérítési igényeknél' (2002) 49:9 *Magyar jog* 513–526.

liability regime that was in force. This was fault-based liability with presumed fault and without an explicit foreseeability regulation but with a similar approach within the frame of the theory on the proximate or adequate cause. He therefore enumerated all antecedents in the Hungarian doctrine, ie all authors who considered or even supported the legal importation of foreseeability.[40] Eörsi for example gave a short summary on the history and development of the foreseeability principle from Doumulins and Pothier and its incorporation into the French Code Civil; through the first English translation of Pothier's treatise, which served as a valuable source in the US case law (Eörsi pointed to references to Pothier in late nineteenth century US judgments) and its export to the UK starting with the famous *Hadley v Baxendale* case; to the influence of the English case law on the Hague Sales Law and finally its arrival in the Vienna Sales Law. Eörsi praises the foreseeability limitation because it is suitable for building case groups on losses that are generally foreseeable and this increases the level of legal certainty.[41] Tercsák comes to the same conclusion: he prefers the foreseeability limitation to other tools such as the supplementary interpretation of the contract in the light of the putative intentions of the parties, because the former is more suitable as the basis for setting up case groups alongside the foreseeability from the reasonable man's point of view.[42]

As the legal transplantation is never or rarely equal to a one-to-one imitation, some scholars supported a modified or adjusted adaptation, for example Eörsi himself, who did not agree with one of the core points of the concept: notably the aspect that the foreseeability level is fixed at the point in time when the contract is concluded. He argued that important facts can also become known afterwards and questioned why these circumstances should be disregarded and thereby excluded from the horizon of the foreseeable if the contracting party can still adjust their actions to those circumstances.[43] Eörsi overlooks, however, the economic approach behind foreseeability: the time when the contract is concluded is the last possible moment when the parties can adjust (or harmonise) the risk and the contractual price. If any other later development should or were to be considered within the frame of what was foreseeable by the party in breach of the contract,

40 Vékás, n 39 above, 524. M. Világhy, 'A Polgári Törvénykönyv felülvizsgálatának elvi kérdései. Tézisek 2.' (1971) 18:8 *Magyar jog* 449, 456. A. Harmathy, *Felelősség a közreműködőért* (Budapest: Közgazdasági és Jogi Könyvkiadó, 1974) 243–251.

41 G. Eörsi, 'A szerződésszegési kártérítés korlátozásáról' (1974) 21:3 *Magyar jog* 142–144.

42 T. Tercsák, 'Előreláthatóság mint a szerződésen belül okozott kár megtérítésének korlátja', in A. Harmarthy (ed), *Polgári jogi dolgozatok* (Budapest: ELTE ÁJK, 1993) 245. See also his instructive comparative analysis with the limitations of liability in German law at 237–242.

43 Eörsi, n 41 above, 143.

the latter would not have a chance to decide on the acceptance or refusal of the risk revealed by that circumstance and/or to adjust the price to the additional risk that he gained knowledge of only afterwards.

Vékás took a closer look at almost all appearances of the foreseeability limitation, including the codified French rule (and its counterbalances in substantive and procedural law), the English case law and the Sale of Goods Act, the US-American Uniform Commercial Code (UCC); finally he compared explicit foreseeability with the functionally equal solutions of German law (*Adäquanzlehre*, ie adequate cause and Section 253 para 2 BGB). This is followed by a precise analysis of the foreseeability concept as included in the CISG, Unidroit Principles of International Commercial Contracts (UPICC) and Principles of European Contract Law (PECL).[44] Vékás highlighted the point that strict liability and foreseeability went hand in hand, since they were the two sides of the same coin, ie of the same liability and risk-allocation concept. He preferred the approach codified in the CISG (to that of the common law): foreseeability should not be imposed on both parties, it was necessary and also sufficient if the losses had been foreseeable by the party in breach. He insisted that foreseeability 'becomes fixed' at the time when the contract is entered into, though he considers the disadvantages of this approach from the point of view of prevention. He was convinced that it is enough if the type and the approximate extent (order of magnitude) were foreseeable to the party in breach, the foreseeability of the exact amount of the losses cannot be expected, otherwise nothing ever would be foreseeable.[45] Regarding the burden of proof, he took a stand on the prevailing view in English law (and discarded the opposite view of the French law) and suggested that this should rest on the plaintiff insofar as it should be asked what, in the circumstances, did the particular person foresee in the particular case. Finally he proposed that the foreseeability test should not be abandoned if the breach was intentional or grossly negligent, because this approach did not fit the risk allocation concept behind the strict liability-foreseeability combination (adjustment of risk and price before or in the course of entering into contract); moreover, to gather evidence on wilfulness or gross negligence could also be extremely difficult.[46]

Finally, the transplantation took place, but not exactly with the same content as it is in Articles 79 and 74 CISG. Strict liability and the foreseeability limitation apply to all contracts, not only to sales contracts (Section 6:142 of the Civil Code). Article 79 paragraph 2 (liability for third parties engaged to perform the whole or

44 Vékás, n 39 above, 516–517, 521.
45 *Ibid* 517, 519.
46 *Ibid* 520–521.

a part of the contract) has not been adopted by the Hungarian legislator. Article 74 CISG does not differentiate between losses (damages) to the contractual item (service) itself and consequential damages (losses beyond the contractual item), but S 6:143 paragraphs 1 and 2 do. The foreseeability limitation applies only to consequential damages and to loss of profit, but not to the so-called 'sticking damages,' ie losses to the contractual goods themselves. Finally, according to Article 74 CISG, the foreseeability limitation applies notwithstanding that the breach was wilful (intentional); however, it is switched off and the principle of unlimited (full) compensation applies according to Section 6:143 paragraph 3, provided the breach was intentional. These differences confirm that legal borrowings hardly if ever equal text-to-text reproduction but cause some further issues to surface: what was the rationale for the deviation from the rule as it was formulated and applied in the legal system of origin; what kind of additional difficulties arise during the post-transplantation adjustment due to the slightly modified implementation; and how does the deviation from the original rule influence (restrict) the possible referrals to the original rule in the course of interpretation of the new concept as it appears in its modified shape?

b) Post transplantation adjustment in the doctrine

The post-transplantation adjustment had already started, in an oxymoronic way, before the final act of the transplantation itself, ie before the new Civil Code's enactment and entering into force. Scholars (Farkas,[47] Fuglinszky,[48] etc) started

47 B. Farkas, 'Ésszerű előreláthatóság az új Ptk. felelősségi rendszerében – Elemzés az angol jog tükrében' (2009) 5:4 *Iustum Aequum Salutare* 189–203; the author refers to numerous English handbooks, but also to particular cases of significance (both in contract and tort law) such as the *C Czarnikow Ltd* v *Koufos or The Heron II* [1969] 1 AC 350; *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* [1949] 2 KB 528; *Parsons (Livestock) Ltd* v *Uttley Ingham & Co Ltd* [1978] QB 791; *Donoghue* v *Stevenson* [1932] UKHL 100; *Yuen Kun Yeu* v *Attorney-General of Hong Kong* [1988] AC 175; *Caparo Industries PLC* v *Dickman* [1990] UKHL 2; *Murphy* v *Brentwood District Council* [1991] UKHL 2; *Bourhill* v *Young* [1943] AC 92; *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560, etc. He also highlights the differences between foreseeability as used in contract and in tort law – raises a couple of questions that will arise in the course of the everyday application of the new rules.

48 Á. Fuglinszky, 'Az előreláthatósági klauzula egyes kérdései, avagy kinek, mikor és mit kell előrelátnia' (2011) 58:7 *Magyar Jog* 412–425. The author refers to the commentaries and handbooks on the CISG (published in English and German); to Canadian contract law handbooks; to academic monographs on art 74 CISG; to some English and Scottish (*Parsons*, *Hughes* v *Lord Advocate* [1963] AC 837, *Overseas Tankship (UK) Ltd* v *Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388, *Overseas Tankship (UK) Ltd* v *The Miller Steamship Co or Wagon Mound (No 2)* [1967] 1 AC 617), Canadian (*Cornwall Gravel Co Ltd* v *Purolator Courier Ltd, Levert and Boisvenue,* 1980 CanLII 35

to interpret and to set up prognoses on the application of the new rules; they sketched hypothetical cases and identified the questions to be answered by case law and doctrine. Quite a few papers have been published since the new Civil Code entry into force.[49]

When the first commentaries were published, almost all of them contained a lesser or greater amount of comparative references. There is, however, one commentary that refers to hardly any. The author mentions no more than one commentary on the CISG from 1990, written in Hungarian, when she describes the factors to be considered while deciding on reasonable foreseeability.[50] In the newest edition of another commentary – basically written by the members of the academic codification committee – Vékás refers to the CISG case law with reference to a Hungarian commentary on the CISG co-authored by him, without, however, specifying any particular case or giving any clue as to how the CISG case law should also be taken into consideration (Vékás attributes a kind of orientative function to that).[51] Again another commentary refers to the recent edition of a handbook on the CISG (authored by Schlechtriem and Schroeter); to an international sales law handbook (edited by DiMatteo *et al*); to an academic monograph on Article 74 CISG (Faust); to the opinions of the CISG Advisory Council (for example No 7: Exemption of Liability for Damages Under Article 79 of the CISG with special regard to the exemption if the losses were in fact caused by a third person engaged to perform the contract); to the CISG commentaries published in German (Magnus, Mankowski, P. Huber); and more or less to the same cases as the authors cited above. The author tries to project his comparative findings on the future application and interpretation of the new Civil Code.[52]

Thus, the case law of and the doctrine on the CISG seems to be the prime reference, which is no surprise since this treaty is declared to be the pattern for the transplant. The case law and doctrine of the common law world (first and foremost that of the UK) are almost as frequently referred to as the CISG. Without the aim of echoing all post-transplantation adjustment issues, a short summary

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[SCC]) and US (*Spang Industires, Inc, Fort Pitt Bridge Divisions* v *Aetna Casualty & Surety Co* 22 Ill 512 F 2d 365 [2d Cir 1975]) cases.

49 An academic monograph also shall be highlighted: see M. Csöndes, *Előrelátható károk? Az előreláthatósági korlát hatása szerződésszegési jogunkra* (Budapest: ELTE Eötvös Kiadó, 2016).

50 See A. Csécsy, Section 6:142, in A. Osztovits (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja* (vol 3, Budapest: Opten, 2014) 355.

51 L. Vékás, S 6:142-6:143, in L. Vékás and P. Gárdos (eds), *Kommentár a Polgári Törvénykönyvhöz* (vol 2, 2nd ed, Budapest: Wolters Kluwer, 2018) 1655, 1659.

52 See Á. Fuglinszky, S 6:142-6:143, in G. Wellmann (ed), *A Ptk. magyarázata V/VI, Kötelmi jog Első és Második rész* (vol 5, 3rd ed, Budapest: Hvgorac, 2018) 318, 319, 321, 325–326, 343, 345, 350–351.

on some of them is provided here to demonstrate the use of the comparative approach in the course of the adaptation or adjustment process.

- The Hungarian legislator did not transplant Article 79 paragraph 2 CISG (liability for third persons engaged to perform the whole or a part of the contract). Nevertheless, Hungarian scholars refer to Article 79 paragraph 2, and reject the extensive interpretation of liability as if the contracting party could never exempt himself if the breach were caused by the engaged third party, because the third party always fell within the contracting party's sphere of risk. Scholars share the view represented in CISG Advisory Council Opinion No 7, that the third party's conduct shal be checked as if he or she had been the seller, ie the third party's conduct shall be projected onto the contracting party and not the other way round.[53]
- Hungarian scholars support the strict approach toward the interpretation of 'beyond his control' and they refer unanimously to groups of cases that have emerged in the CISG case law and draw the same conclusions as their foreign colleagues: the granting of an excuse is almost unobtainable; unless both the extraordinary type of the injuries and/or losses and the large magnitude of the occurrence are present.[54]
- Before the transplantation of the foreseeability approach, the same function was performed by the adequate causality test, similarly to the Germanic systems, ie only those actions matter that can be expected to cause losses in the ordinary course of things due to day-to-day life experience. This was, and is, closely related to the foreseeability concept and is said to be hardly distinguishable from it.[55] If this is the case, the question is whether the former concept of adequate causality is going to be replaced completely by foreseeability; and, if not, the place, function and the relationship of the two concepts to each other must be identified or even created in jurisprudence and case law. One author states that both are needed and there is a difference between the

53 See Fuglinszky, n 52 above, 318–319 for the analysis on this matter, also in relation to the issue whether the manufacturer is such a third party, and also to views that represent the strict approach considering the third party engaged as always belonging to the contracting party's sphere of control; see also H. Kötz, *European Contract Law* (G. Mertens and T. Weir trs, 2nd ed, Oxford: Oxford University Press, 2017) 248 n 19.

54 L.A. DiMatteo, 'Excuse: Impossibility and Hardship', in L.A. DiMatteo *et al* (eds), *International Sales Law* (Baden-Baden: Beck, Hart and Nomos, 2016) 675, 679. Fuglinszky, n 52 above, 321–322, 325-326: besides this, other handbooks and CISG commentaries and the CISG Advisory Council Opinion No 7 is cited here too with reference to the 'wild and totally unexpected' business risk.

55 I. Schwenzer, P. Hachem and C. Kee, *Global Sales and Contract Law* (Oxford: Oxford University Press, 2012) 588–589; even 'the remoteness test is generally understood to be one of foreseeability', 591.

two: the test of causality should be limited to factual causation and to general principles and interrelationships according to common sense and reasonableness; and the scope (and the amount) of losses to be compensated for should be established by means of foreseeability.[56] Another author refers to the French and Louisiana Civil Code (which distinguish between the criteria of direct and immediate consequences on the one hand and foreseeability on the other); and takes the evaluation of Hart and Honoré (presented in their book on 'Causation in the Law') into consideration and finally pleads for the parallel and independent survival of both tests and concepts, and likens these to the concentric defensive walls around mediaeval fortresses (where causality serves as the exterior and foreseeability as the interior wall). However, this theoretical model has not gained a foothold in case law so far.[57]

- A basic question of foreseeability has always been whether the kind of loss incurred, its quantum or both must be foreseeable. French judicial practice focuses on the relevant quantum, while it is generally accepted in the common law legal systems that only the type of loss suffered needs to be foreseeable (although there are claims that fail, notwithstanding the foreseeability of the type of loss, if the quantum was extraordinary, however inconsistent it is; the borders of quantum and type are not always clear in case law either).[58] The Hungarian legislator referred to the type of loss and to the magnitude of loss in the reasons (Motifs) of the new Civil Code. Common law is frequently cited in the Hungarian scholarship, with reference to the difference between it and the decision of the Hungarian legislator (that both the type and the magnitude of the quantum shall be foreseeable);[59] however, there is one author who suggests that the new rules should be interpreted restrictively in a 'common law-manner' ie that the courts shall require only the foreseeability of the type of the loss suffered but not the magnitude thereof.[60]
- Those Hungarian authors who reflect on those issues are willing to import the refinements of the foreseeability concept developed in common law case law; sometimes notwithstanding the text of or the reasons (provided by the legis-

56 M. Csöndes, 'A Ptk. 6:143. § (2) bekezdésbe foglalt előreláthatósági korlát szabályainak tényállási elemeiről' (2017) 2:2 *Polgári jog* para 2.

57 See Fuglinszky (2015), n 9 above, 91–94 the author was consistently sceptical in this respect and emphasized that there hardly can be 'two separate drawers in the judge's mind'.

58 Schwenzer, Hachem and Kee, n 55 above, 600–601.

59 Fuglinszky (2015), n 9 above, 101–103.

60 However she adds that the foreseeability of the magnitude can nevertheless play a role if the losses suffered are of an unusual amount. Csöndes, n 56 above, para 14.

lator) for the codified rule. Though Section 6:143 paragraph 2 contains the wording 'possible consequence', there are authors who suggest a restrictive and to some extent *contra legem* interpretation through completing the codified rule with an additional (but unwritten) prerequisite: the consequence shall be not only possible, but also foreseeable as likely (from the reasonable person's point of view).[61]

– Another similar refinement is the differentiation between the infringed or injured values (assets), which entails that the higher a particular asset is valued on the scale of values, the more generous the courts are regarding the expected foreseeability level. In other words, the more the courts tend to lower the threshold of foreseeability or even to set aside the foreseeability limitation as a whole. This finds expression in the 'thin-skull' rule and in the 'unusual value' doctrine; ie regarding personal injuries, the foreseeability of the type of harm suffices, the contracting party in breach (or the wrongdoer in tort) cannot refer to the unforeseeability of the weaknesses and health preconditions of the injured person, nor to the lack of knowledge of the salary level of the injured person (who became disabled by the act or omission of the wrongdoer). The acceptance of this refinement in the Hungarian jurisprudence is not surprising: the same applied within the framework of the adequate causality test before the legislator transplanted the explicit foreseeability limitation.[62]

However, relying heavily on another legal system can involve the danger of overlooking the structural differences between the two legal systems and, even more so those between their economic, social, political and other foundations. As seen above, Hungarian scholars regard (UK) common law as one of the main sources of inspiration in interpreting the new rules. Beale compared English private law with the Hungarian on the basis of the new Hungarian Civil Code. He summarised his findings as follows:

> English law seems to address a highly developed market inhabited by sophisticated players with a lot of chips that they are prepared to gamble. I suspect that English law is really aimed at the international market and is much less good at catering for smaller businesses, which seldom appear as litigants. [...] English law is clearly much less protective, much more individualistic, than either the CESL or the HCC. [...] The HCC seems to leave much more to the discretion or appreciation of the judge than does English law; [...]. However, the degree of

61 Fuglinszky (2015), n 9 above, 104–105. Csöndes's analysis is restricted here to the description of the common law way of thinking; see M. Csöndes, 'A Ptk. 6:142. § (2) bekezdésében foglalt előreláthatósági korlátról' (2016) 2:7–8 *Polgári jog* para 3 and also Csöndes, n 56 above, para 18.
62 Farkas, n 47 above, 199, 202. Fuglinszky (2015), n 9 above, 103–104.

> discretion suggests to me that, like the CESL, the HCC is drafted with relatively 'small' (ie low value) disputes in mind. The degree of discretion conferred on the judge would not fit well, to the English legal mind, with high value, high-risk contracts between businesses that have large resources available to fund litigation. In those cases, certainty is at a premium.[63]

Therefore care should be taken and this issue should be included in the agenda of comparative analyses on the new rules of contractual liability too, in order not to overlook the structural and contextual differences between donor legal systems and the transplanting private law. However scruples and concerns should not be overestimated either, for at least two reasons. First, Hungary is also a market economy, 'mercilessly' bound into global trade, so the gap between the economic concepts of the UK and Hungary (behind contract law) is not as broad as it might have once been. Second, as elaborated on earlier, legal transplants also try to anticipate the future and, consequently, change it, for example to support or drive modernization and progress.[64]

c) Post transplantation adjustment in judicial practice?

There was not a single case among the published judgments up to 31 December 2019 that contained any comparative reference either to the CISG or to common law case law or doctrine.[65] The suggestions seem to be confirmed, as far as the Hungarian judicial practice is concerned, that academics interested in comparative research (with special regard to transplanted concepts) act like ferries: they supply the sources of inspiration drawn upon for comparative analyses the judges. This is even more important, since in some judgments at least some references to the commentaries and handbooks on the new Civil Code can be found. The lack of comparative interest and, even more so, the lack of more frequent and deeper perusal, at least of domestic doctrine, has two (negative) consequences. First, courts do not take advantage of the experiences of other legal systems that

63 H. Beale, 'A Comparison of the Contract Sections of the New Hungarian Civil Code with English Law and the Proposed Common European Sales Law' (2014) 2:1 *ELTE Law Journal* 35, 47.

64 Galindo, n 30 above, 133, 135–142, 144–145.

65 Hungarian Courts rarely if ever engage in dialogue with comparative legal scholars in their judgments. It goes beyond the goals of this paper to find out the reasons. Cserne, n 17 above, 71–72 is of the view that the judiciary strongly prefers the status quo with minimal reforms. Practitioners 'do not have much professional interests in anything else than the coherence of the law applicable in their work.' He continues: 'In contrast, law professors often take pride in drafting new laws, eventually based on comparative work.' May be the judges strive to find the old and habitual in the new? However, this may be partly traced back to the fact that comparative law is only an elective course in the curriculum of the Hungarian law faculties.

would simplify their search for fair and balanced solutions while interpreting the new rules. Second, without being confirmed by comparative findings and/or recapitulation of the domestic doctrine, there is a greater risk of misunderstanding the aims, functions and operational characteristics of the transplanted rules. This can be illustrated by two examples.

According to Section 6:142, exemption from liability is only possible if the party in breach 'proves that the breach of contract was caused by a circumstance that was outside his control and was not foreseeable at the time of concluding the contract, and he could not be expected to have avoided that circumstance or averted the damage.' It was the Szeged Regional Court of Appeal, the chief justice of the civil law division in particular (I. Kemenes), who first provided a general interpretation of this rule with special regard to the element 'circumstance outside his control.' Ultimately, the standpoint he represented became one of the general opinions of the Court of Appeal and this view was later accepted and also published as the opinion of the Advisory Body on the New Civil Code to the Curia (ie the highest court; this advisory body was convened by the Chief Justice in order to support the interpretation of the new code; it consists of judges, academics and representatives of the notaries' and attorneys' chambers; the opinions issued are formally not binding). Interestingly enough Kemenes did not pay any attention to the comparative perspective; nevertheless, he advocated for a rigorous interpretation, arguing that the exemption should not be allowed if the cause of the breach was, for example, the illness of numerous employees of the party in breach or a strike at the factory. Technical breakdowns, organizational difficulties (even illness, strike and fatalities) and problems related to purchasing or procuring raw materials and intermediates are generally within the control of the party in breach, even if that party could not have influenced and avoided those difficulties (not even with perfect diligence and prudence). Neither Kemenes nor the Regional Court of Appeal refers to CISG case law;[66] the Advisory Body to the Curia also makes only a short reference to the fact that the provisions of the CISG and the Draft Common Frame of Reference (DCFR) served as models for the legislator and the rule in the Civil Code was drafted in line with these two instruments.[67] Had the Szeged Regional Court of Appeal and its head of the civil law division conducted any comparative research, they could have received confirmation that the way they interpreted Section 6:142 was absolutely in line with the CISG case law and

66 I. Kemenes, 'A kontraktuális kártérítés egyes kérdései' (2017) 64:1 *Magyar Jog* 1, 2–4. See also Opinion No 1/2016 (XI 24.) of the Szeged Regional Court of Appeal.

67 All opinions of the Advisory Body can be accessed and downloaded here: https://kuria-birosag.hu/hu/ptk?tid%5B%5D=498&body_value= (last visited 12 December 2019).

commentaries.[68] To come to the same conclusions could have been so much easier with knowledge of the findings of a comparative overview. However, their conclusions can still be supported and confirmed by the comparative results, since this research and conclusions exist in the Hungarian doctrine, as presented above.

Not taking advantage of the comparative perspective 'does not hurt' if the courts come to more or less the same conclusions on their own as other foreign courts and scholars in those legal systems that directly apply the rules that served as models for transplantation, as seems to have happened with the exemption from strict contractual liability based on Article 79 CISG. The lack of a comparative double-check is obviously more dangerous if the national courts misunderstood the transplanted rules and their functions and/or the policy considerations behind those rules and, they apply them inappropriately. Unfortunately, eye-catching examples can be found in the Hungarian case law. For example, the contracting parties concluded a sales contract for hemp. The seller grew the hemp to be sold but the buyer supplied the seeds. The pre-contractual negotiations were deferred and therefore the seeds were supplied later than planned, ie only at the end of April instead of mid-March. The seeds, which were chosen by the buyer, were developed to fit an oceanic climate (which Hungary does not have), but the seller accepted them and did not make any objection. To make matters worse, the spring and the early summer experienced very low rainfall, far below the average. As a result, the hemp came up late and was weak; ragweed in particular overgrew the hemp. In order not to be fined by the authorities for not destroying the ragweed, the parties decided to destroy all plants, i.e. both the ragweed and the hemp. The performance of the contract became impossible. The buyer sued the seller for damages. The core question was whether the seller could be exempted from liability according to Section 6:142; in other words, whether these facts and circumstances were sufficient to be qualified as circumstances that were outside of his control and were not foreseeable at the time of concluding the contract, and he could not be expected to have avoided those circumstances or averted the damage. The court of appeal declared that the exemption was 75 percent successful, thus the defendants bore the liability for 25 percent of the losses suffered by the plaintiff. The court justified this as follows: it was the buyer who opted for the wrong seeds; this fell within his sphere of control. The delay of the conclusion of the contract and therefore the delayed sowing was the joint risk of the parties in

68 DiMatteo, n 54 above, 675; P. Schlechtriem and U.G. Schroeter, *Internationales UN-Kaufrecht* (6th ed, Tübingen: Mohr Siebeck, 2006) paras 651–654, 666. U. Magnus, Art 79 CISG, in *Staudinger BGB Neubearbeitung 2013,* paras 21–22, 24; Schwenzer, Hachem and Kee, n 55 above, 659–662.

equal parts. The unfavourable (extremely dry) weather conditions fulfil the requirements set in Section 6:142.[69] In this author's view, this outcome is based on a misunderstanding of Section 6:142 (and therefore also of Article 79 CISG). Section 6:180 paragraph 3, however, does make a kind of apportionment possible if both parties are liable for the performance becoming impossible. If this is so, the contract shall terminate and the parties may claim damages from each other pro rata to their contribution. Nevertheless, it is a preliminary question and a prerequisite of the application of this rule whether the party (in the above cited case, the seller) is liable at all and this depends on whether or not he can exempt himself from liability according to Section 6:142. If we focus on the exemption clause only, my understanding – and this understanding is confirmed by the CISG case law and doctrine too – is that there is no partial exemption. The apportionment of liability alongside the relevance and/or contribution of circumstances being equal to (or only converging to?) events beyond one's control is generally not possible. Either there is liability, since the exemption was not successful (due to the strict interpretation of the exemption clause), or there is no liability at all, if the exemption was successful. And if, and only if, both parties are liable (ie neither of them could exempt themselves from liability according to Section 6:142) then, and only then, can liability be allocated according to their contributions, in line with Section 6:180 paragraph 3. If the Szeged Regional Court of Appeal had conducted any comparative study on the source of Section 6:142, it would have realised the need to decide upon the liabilities of the parties separately, with an all-or-nothing approach (without allocating any proportion to nature) first.

2 Limping Legal Transplants and some Mustard after Meat

According to Section 6:143 Paragraph 3, 'In the event of intentional breach of contract, the entire amount of damage arising on the part of the obligee shall be compensated for', which means that the principle of full compensation applies regardless of the foreseeability of the losses. Intentional breach extinguishes the foreseeability limitation. Article 79 CISG does not include this exception, but Article 9:503 PECL and Article III-3:703 DCFR do; moreover, they also 'extinguish' foreseeability beyond intentional breach if the breach was grossly negligent. As referred to above, Vékás rejected this exception in his comparative article on fore-

69 See Szeged Regional Court of Appeal (Szegedi Ítélőtábla Gf III 30 061/2018), published as BDT 2018, 3952.

seeability;[70] it is all the more surprising that the intentional breach exception was finally included in the Civil Code, since Vékás was the head of the Academic Codification Committee. There is no particular justification for or explanation of this decision in the Reasons either.[71] I have 'baptised' this phenomenon as the 'limping legal transplant', since there was no profound comparative analysis on the pros and cons of this exception (there is no published sign of it before or in the course of the codification process), but now, after the new Civil Code has entered into force, the question is asked again and again: what exactly does 'intentional breach' mean? Scholars now cry out for tools to help them interpret this notion.

If a comparative analysis had been conducted before, the codification committee could have addressed this issue. In French law, *dol* was and is an exception to foreseeability; moreover, the French courts tend to broaden the understanding of dol, for example in a way that professional sellers are always deemed to have knowledge of the defect. Hence, professional sellers are in fact almost never protected by foreseeability. Due to this understanding, and to another approach developed by French courts – namely that they tend to equate gross negligence with intent – the foreseeability limitation almost never applies.[72] After the reform of 2016, Article 1231-3 Code Civil disables foreseeability beyond *dol* also in cases of *faute lourde*. The Italian (Art 1225) and the Spanish (Art 1107) civil codes also set foreseeability aside if the breach was intentional. According to some convincing critical views, the setting aside of the foreseeability limitation if the breach was intentional does not fit the risk-allocation concept behind contractual liability.[73] Regardless of the evaluation of this approach, comparative analyses of it could have drawn the Hungarian legislator's attention to this consequence.

If one takes the wording of Section 6:143 paragraph 3 of the Hungarian Civil Code seriously, it is sufficient if the intent of the party in breach covers the breach only, but not the damages caused by the breach. Even so, what does intent mean? The following issues arise:

– Can the criminal law notion of intent simply be applied to the private law appearance? According to Section 7 of Act C/2012 of the Criminal Code 'A criminal offence is committed with intent if the person conceives a plan to achieve a certain result, or acquiesces to the consequences of his conduct.' The second alternative is quite difficult to differentiate from negligence, when

70 Vékás, n 39 above, 521.

71 It is stated in the Reasons that the foreseeability clause does not protect that party who commits a breach of contract intentionally (for example sells the contractual goods to someone else). He or she must compensate for all losses of the other party.

72 Schwenzer, Hachem and Kee, n 55 above, 595, 598–599.

73 See for example the critical remark of Kötz, n 53 above, 258 n 55.

the offender does not acquiesce to the consequences of his conduct (which will occur with certainty), but 'is able to anticipate the possible consequences of his conduct, but carelessly relies on their non-occurrence' (Section 8 of the Criminal Code); the doctrine of criminal law can be of assistance in this point to differentiate the two.

- There are voices in the Hungarian doctrine that plead for a restrictive approach to the content of 'intentional breach', because a strict approach (including *dolus eventualis*) resulted in the *de facto* elimination of the foreseeability limitation. As such, Section 6:143 paragraph 3 should only apply if the breach was not just intentional, but also purposive,[74] which probably means that the intent shall cover (beyond the breach itself also) the losses caused by the breach.
- This restrictive approach can be even more justified if we take into consideration that the party in breach can be a legal person that cannot act personally but only through its representatives. Take the example of a strike. The employees definitely participate in the strike intentionally; they are not unaware of the fact either that the strike will most likely (almost certainly) cause financial losses to their employer, which means they act at least with *dolus eventualis*. If the employer cannot supply the products to their buyers on time and therefore breaches the contracts entered into with them, shall the intent of the striking employees be projected (extended) to the employer and shall it be interpreted as an intentional breach of the contract? Is this strict interpretation in line with the concept of contractual liability? Should the intent of all employees, agents and representatives be imputed to the employer (legal person)? Or only of those who are authorised to represent the legal person?
- Other Hungarian authors turn to US case law and doctrine to discover the fifty shades of intentional or wilful breach.[75] Szalai differentiates seven categories and asks which of them shall be considered as 'intentional' or 'wilful' in the light of Section 6:143 paragraph 3. The most severe level is fraud (1), if the contracting party enters into contract in the knowledge that he will not perform his contractual promise. The opportunist (2) does not have this intent at the beginning, but intents to shift a risk (that occurred after the conclusion of the contract) to the other party and therefore blackmails him or her that he will not perform (properly) if they do not amend the contract. Another varia-

74 L. Leszkoven, *Szerződésszegés a polgári jogban* (Budapest: Wolters Kluwer, 2016) 160–161. According to him, the civil law notion of intent 'stands closer to the notion of purposiveness'.

75 Á. Szalai, 'A szerződésszegés szándékossága – Tudatosság és ösztönzők', in F. Gárdos-Orosz and A. Menyhárd (eds), *Az új Polgári Törvénykönyv első öt éve* (Budapest: tkjti, 2019) 195. He quotes among others P. H. Marschall, R. Craswell, S. Thel and P. Siegelman and E. A. Posner.

tion is if the party receives and accepts a better offer and therefore refuses to perform (3); or if, due to a change of circumstances, the performance of the contract would cause financial losses to the party and therefore he or she opts for the non-performance (4). Yet another scenario: is the breach intentional if the craftsman did not know and was not expected to know that the raw material he worked with or the method he was told to use is not appropriate and will probably cause losses to his client, but he comes to know these facts at a later date (before or after completion of the performance) and he still fails to remedy the defect and/or notify the client (5)?[76] Szalai refers to law and economics and asks whether it could be an appropriate test of wilfulness to check whether the party in breach also profits from their breach or will 'only' lower the intensity of their precautionary actions if he decides to breach the contract. He concludes that in all cases of 'wilful' breaches there probably is also a coincidental factor besides the intentional or wilful decision or act, and the proportion of the contributions of the coincidence on the one hand and of the wilful decision on the other to the breach and losses as outcomes can be decisive at the borders of 'wilful breach'.[77] Moreover, he makes some critical remarks on foreseeability as such, since this limitation decreases the incentives to take precautionary actions in order not to breach the contract.[78] Consequently, setting foreseeability aside if the breach was wilful is an additional incentive to perform properly. This analysis provided by Szalai is very useful in considerations on 'intentional breach'. This would have been even more useful during the drafting of the new Civil Code and would have contributed significantly to the assessment of pros and cons.

3 Surprising or Overexcited Legal Transplant or a Legal Irritant in Teubner's sense?

a) Appearance of *non-cumul* in the Hungarian Civil Code

One of the most obscure legal transplants in the new Hungarian Civil Code is the inclusion of the *non-cumul* principle. As it is provided in Section 6:145: [Exclusion of parallel claims for damages]: 'The obligee may also enforce his claim for damages against the obligor in accordance with the rules on liability for damage

76 *Ibid* 202–205.

77 *Ibid* 207.

78 Szalai, n 75 above, 206, and the same way Tercsák, n 42 above, 250–251.

caused by breach of contract, even if the damage gives rise to the obligor's extra-contractual liability.' Though the wording sounds permissive at first glance, it follows from the title that the rule contains a prohibition of claims in tort if the losses were caused to and among the contracting parties. Moreover, Section 6:146 adds: [Liability for damage caused during performance]: 'The obligee may claim, in accordance with the rules on liability for damage caused by breach of contract, compensation for the damage caused to his assets by the obligor during the performance of the contract.' Thus, contractual and only contractual liability applies between contracting parties, even if there was no breach of contract in the narrow sense, but the losses were caused and suffered 'during the performance of the contract'. In other words, the contractual duties of the parties include a kind of *obligation de sécurité* in the sense of French law,[79] or the contractual liability covers also the *Schutzinteresse* beyond *Leistungsinteresse* in the sense of German law; and so the parties must take care not to cause any losses to the other party and to the assets of the other party during performance. The extra-contractual bypass is excluded.[80]

There is no sign of any comparative analysis on *non-cumul* before including this principle into the draft Civil Code. This exclusionary rule appears first in the Draft of the Academic Codification Committee published in 2012. The reasoning of this draft and this explanation did not change later either, ie it is the same even in the official Reasons of the new Civil Code. It just points out that strict contractual liability converges with the general strict liability in tort (for dangerous activities) so that it does not make sense not to cover those situations by strict contractual liability where the strict liability in tort would have previously applied (driving a car, operating a train, etc were and are qualified as dangerous activities in case law).[81]

Hungarian scholars warned (based on comparative reflections) that *non-cumul* only 'makes sense' if there are significant differences between contractual and extra-contractual liability (whereby the latter is more favourable from the plaintiff's point of view) and therefore plaintiffs were tempted to bypass contractual liability and to sue in tort instead of in contract (this is why the French courts developed that principle). The same scholars continued that this was (and is) not the case in Hungarian law: there is no reasonable temptation to sue in

79 Kötz, n 53 above, 250–251.

80 For a detailed critical and comparative analysis cf. Fuglinszky (2017), n 9 above.

81 L. Vékás, in L. Vékás (ed), *Az új Polgári Törvénykönyv Bizottsági Javaslata magyarázatokkal* (Budapest: Complex, 2012) 399. Vékás, the head of the codification committee reported later in a published paper that the French law and Art 1458 of the Quebec Civil Code served as models. L. Vékás, 'Az új Polgári Törvénykönyvről' 68:5 *Jogtudományi Közlöny* 225, 240.

tort.[82] They formulated *de lege ferenda* suggestions to conduct a detailed analysis in order to identify those real issues that the legislator wanted to solve by *non-cumul* and to see whether there are milder tools to achieve the same goals without the numerous side effects of *non-cumul*.

One of the real issues of this kind is that although the foreseeability limitation applies in both contractual liability and tort, the time of reference for which foreseeability is to be audited in the two regimes is different. While the date of concluding the contract matters in contractual liability, when the wrongful conduct was most likely committed is to be taken into consideration in tort. Hence, in the absence of any special rule, the contracting party could sue in tort and could thereby extend the time of reference of foreseeability from the conclusion of the contract to a later point in time when the party breached the contract and, as a result, also those losses referred to in the liability that had not been foreseeable when the parties entered into contract but became foreseeable later, between conclusion and breach. This bypass – if the lawmaker does not want to allow it for policy reasons, for example in order to protect the contractual equilibrium – can be barred by *non-cumul* indeed; however, there is a milder tool to reach the same result: for example if the legislator abandons *non-cumul* in order to avoid its adverse effects, but introduces another rule, which declares that even if the contracting party sues in tort, the point of reference of foreseeability is fixed when the contract was concluded. Csöndes refers to English law in this respect and points out that the contracting party that suffered losses can opt for the tort of negligence instead of contractual liability, but the courts nonetheless use the contractual test of foreseeability and not that of tort law, keeping the conclusion of the contract as the point of reference of foreseeability. As such, the solution suggested in Hungarian scholarship already works elsewhere.[83]

b) Side Effects, Rejection, Faith of a Legal Irritant?

Non-cumul in Hungarian law bears all the symptoms of a legal transplant being rejected or, as Teubner calls it, of a legal irritant. First, although the courts tend to become used to the new approach and apply it correctly in most of the cases,[84]

82 Fuglinszky (2017), n 9 above, 118, 122–125.

83 Fuglinszky (2017), n 9 above, 128; Csöndes, n 56 above, para 25.

84 Cf for example Budapest Metropolitan Court of Appeal Pf 20 448/2017/4: if a pupil is hurt during a swimming lesson, the liability of the instructor is to be evaluated on the basis of contractual liability, since taking part in a swimming course is a contractual relationship; or Szeged Regional Court of Appeal Pf 20 053/2017/3: if the visitor falls out of the waterslide in the aqua park, the lia-

there are also some judgments, where the attorneys and the courts involved ignored the *non-cumul* principle. The latter phenomenon can be called as a kind of spontaneous rejection; there was probably no wilful decision behind that judgment, both the judges and attorneys just failed to apply *non-cumul* and this shows that the new concept had not yet taken root in the knowledge of the Hungarian legal community.[85]

Much more instructive is the phenomenon of wilful rejection. Soon after the new Civil Code entered into force, scholars warned that the *non-cumul* principle could have considerable adverse effects. For example, if someone is given a lift in a car for free, this can – depending on the circumstances – be qualified as a gratuitous contract (in contrast with English law, contracts without consideration ie without any counter-value still qualify as enforceable contracts in Hungarian law). However, if someone provides a service for free within the frame of a gratuitous contract, the less severe fault-based liability applies for losses caused by the breach and during the performance of the contract.[86] Hence, if someone gives a lift for free to someone else and they suffer an accident but the driver-operator of the car can refer to the lack of fault, the passenger remains without compensation for the losses suffered. If *non-cumul* did not exist, he or she could claim damages in tort and refer to the strict liability in tort for dangerous activities, but this is just the point: he or she is barred from doing so through *non-cumul*.[87] Before the new Civil Code – since the earlier civil code did not contain the *non-cumul* clause – the injured passenger could refer to strict extra-contractual liability and therefore everybody used to do so. And suddenly the level of protection of passengers being transported for free was relegated from strict to fault based liability.

What finally happened fits very well into the Teubner formula. Based on the discrepancy as described above, the Hungarian community of lawyers regarded *non-cumul* as a 'fundamental irritation that indeed triggered a whole series of new

bility of the operator is contractual and not extra-contractual, since the visitor suffered the injuries during the performance of the contract (providing various services in the aqua park) and the protection of the health and bodily integrity of the visitors is also covered by the contractual duties.

85 The final judgment of the Curia is published under no Pfv 20 153/2017/4. The plaintiff bought the ticket and then drove into the carwash. First she decided to stay in the car while it was being washed. Then she made up her mind and decided to wait outside of the car. When she got out of her car she slipped on the wet floor and broke her arm and her smartphone. Though she suffered injuries and other losses 'during the performance of the contract', all attorneys and courts referred to extra-contractual liability.

86 See Section 6:147 para 2: 'A person undertaking the performance of a service free of charge shall be required to compensate for the damage caused by his service to the assets of the obligee. He shall be exempted from liability if he proves that he was not at fault.'

87 Fuglinszky (2017), n 9 above, 123–124, 127.

and unexpected events and unleashed 'an evolutionary dynamic, in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.'[88] Those unexpected events and evolutionary dynamic were as follows:

- It was the Civil Law Department of the Szeged Regional Court of Appeal that published an opinion, according to which it could not have been the legislator's intent to deprive car accident victims (just because they were given the lift for free) of compensation if the driver-operator was not at fault. They tried to underpin this supposition with systemic arguments such as the location of the rules: they were of the view that because the liability for the breach of gratuitous contracts (Section 6:147) can be found after the sections on *non-cumul* (Sections 6:145-6:146), the latter therefore only applies to the breach of onerous contracts, because the rules on the breach of onerous contracts are placed before the rules on *non-cumul*.[89] Though this systemic approach is not convincing and was rightly criticised in the scholarship, even the *Advisory Body on the New Civil Code to the Curia* accepted this view (even if without the systematic interpretation, since their opinion is restricted to the alleged intentions of the legislator: not having had the purpose of depriving car accident victims of the safety net of strict liability).[90]
- (Liability) insurance companies simply ignored and still ignore the consequences of *non-cumul* and continued to settle the damage claims as if nothing had happened, as if *non-cumul* did not exist at all, on the base of strict liability in tort (for dangerous activities), because they were and are scared of losing market share in the context of stiff competition.
- Since *non-cumul* seems to have enhanced the importance of the distinction between contracts and non-contracts (agreements without the binding force of the law of obligations, *ex-gratia* relations, *Gefälligkeitsfahrt – Gefälligkeitsverhältnisse*), new discussions started on the borders of contracts (is it really a contract if someone is given a lift for free; did the parties' intention cover the legal enforceability of this promise; if yes: is it still a contract – even if gratuitous – if someone gives the lift for free to a family member; etc).
- Another discussion focused on the structural qualification of Sections 6:145-6:146 (*non-cumul*): are they mandatory rules or are they default rules, as are

88 Teubner, n 8 above, 12–13.

89 Cf Opinion No 2/2016 (XI.24.) of the Civil Law Department of the Szeged Regional Court of Appeal, and Kemenes, n 66 above, 7, 10.

90 The related Opinion of the Advisory Body on the New Civil Code to the Curia can be accessed here: https://www.kuria-birosag.hu/hu/ptk?tid%5B%5D=501&body_value= (last visited 10 December 2019).

most of the rules on obligations? Even if they should happen to be default rules, is it realistic to consider that the passenger given a lift for free would uphold the extra-contractual remedies, ie waives *non-cumul*?[91]

– Last but not least, is it worth a broad comparative analysis to find out how the losses suffered by passengers having been transported for free are dealt with in other legal systems? Maybe other legal systems attribute a great significance to contractual equilibrium, which means that those who are given a lift for free must take into account that they are less protected, since the liability of the driver-operator is reduced to fault. Hungarian scholars seemed to be sympathetic to this view earlier. Marton for example in his Draft on Civil Liability prepared in 1945–46 pleads for the operator's strict liability to be set aside if someone was given a lift for free and justifies this view with the healthy and balanced moral sentiment of society.[92] Eörsi refers to German and French law of the time and illustrates the legal techniques of these two legal systems whereby their courts can arrive at a less strict (fault-based) liability as far as the free lift (by car) is concerned. He underlines however that through the expansion of insurance the whole issue becomes less important, since personal injuries suffered during 'free rides' can be covered by insurance contracts or schemes, too.[93]

The *non-cumul* principle thus seems to encounter resistance in Hungarian civil law. It seems to be simply ignored in insurance practice. One regional court of appeal set it completely aside in order to apply strict liability in tort for losses suffered in car accidents in the future, including those suffered during lifts given free of charge. The advisory body to the highest court in Hungary supported that view, with some amendments to the reasoning. It is not surprising that there are more authors who suggest *de lege ferenda* that the legislator should consider the abrogation of *non-cumul*; some of them underline this suggestion with the findings of their comparative analyses: Pusztahelyi and Fazekas emphasise – with

91 Two authors are of the view that the *non-cumul* principle must be mandatory. See R. Pusztahelyi, 'Igényhalmazatok a szerződésszegési jogkövetkezmények rendszerében, különös tekintettel a Ptk. 6:145. §-ára' (2016) 5:2 Pro futuro 60, 72 and J. Fazekas, 'A kontraktuális és a deliktuális felelősség viszonya az új Polgári Törvénykönyvben', in J. Fazekas, Á. Kőhidi and B. Csitei (eds), *Állandóság és változás – Tanulmányok a magánjogi felelősség köréből* (Budapest: Gondolat, 2017) 44–45. On the opposite view – the *non-cumul* is a default rule – is Vékás, S 6:145-6:146, Vékás and Gárdos, n 51 above, 1664.

92 G. Marton, 'Tervezet egy polgári jogi törvénykönyv kártérítési fejezetéhez' printed in *Az Igazságügyminisztérium iratanyaga az 1959-es Polgári Törvénykönyv előkészítésével és hatályba léptetésével kapcsolatban* (vol I, Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2017) 101, 137.

93 Eörsi, n 20 above, 427–428.

special regard to French law (including the since then completed reform of the law of obligations) – that those reasons that indicated the development of the *non-cumul* principle in French law are not necessarily present in Hungarian civil law notwithstanding the recent introduction of strict contractual liability and foreseeability limitation.[94] The transposed norm appears to have become an irritant and in this capacity made the receiving system produce antibodies, such as the reluctance of the insurance companies and the opinion of the advisory body besides the highest court.[95] Did *non-cumul* become a virtual reality in Hungarian civil law?

Some additional structural questions arise. As Canivet states, the courts 'complete and give meaning to legislative changes through their work of interpretation.'[96] An irritant can also serve 'as a "corrective," by inspiring a new development to correct, for example, a 'historical accident.'[97] Maybe that is what we are facing these days, partly on the basis of the comparative approach (had it been conducted before transplanting *non-cumul*). However, can this interpretive work and competence reach so far that the case law (with special regard to one court of appeal) and a consultative advisory body clearly derogate from the codified rule in a codified legal system? Is *judicial desuetudo* compatible with the concept of codified statute law in the civil law world?

IV Conclusions

The examples elaborated on in this paper confirm the general findings on the nature of legal transplants. Moreover, the more the transplanted concepts can rely on common denominators, manifested also in international conventions and/or model laws; and the less they are socio-culturally bound and determined, the better the chances of a smooth and successful transplantation. Strict liability in contracts and the foreseeability clause meet these requirements. They represent the cost saving and legitimacy-generating motivations opted for by the legislator.

As far as comparative considerations are concerned, there were unfortunately no systemic and comprehensive comparative studies during the recodification of

94 Pusztahelyi, n 91 above, 67–68 and Fazekas, n 91 above, 35–43, (Fazekas suggests even an exception from *non-cumul* in line with the – back then ongoing – French reform of obligations as far as personal injuries were concerned); see also Fuglinszky (2017), n 9 above, 128.

95 See in this respect Örücü, n 3 above, 208, 222.

96 G. Canivet, 'The Use of Comparative Law Before the French Private Law Courts', in G. Canivet, M. Andenas and D. Fairgrieve (eds), *Comparative Law Before the Courts* (London: BIICL, 2005) 183.

97 Örücü, n 3 above, 211.

Hungarian private law; neither before nor after the transplantation. Though there were some comparative analyses, their selection and profoundness depended very much on the experience, curiosity and language skills of the academic codification committee's members and other scholars. Vékás strove after a comprehensive analysis on foreseeability. Fuglinszky elaborated instead on the case law of the direct pattern subject to transplantation, ie of Article 74 (and 79) CISG. One of the leading Hungarian authors, Csöndes, was a guest researcher at Warwick School of Law and though she did not restrict the scope of her analyses to UK case law and common law in general, it is obvious from her papers that she looks for answers first and foremost in the UK common law for interpreting the new Hungarian rules. Judges need the comparative guidance provided by academics, otherwise they can misunderstand the operation of the transplanted concepts, as transpired with the interpretation of strict contractual liability by the Szeged Regional Court of Appeal in the hemp case.

If we put the three legal transplants elaborated on here on a scale, we can observe that the intensity and depth of the comparative analyses decreases as one goes ahead on this scale. They were and are more substantiated as far as the foreseeability clause (according to Article 74 CISG) is concerned; less so with reference to the strict contractual liability in contract (similar to Article 79 CISG), and the introduction of the *non-cumul* principle was not preceded by any targeted comparative examination at all and such studies have not taken place so far either in the post-transplantation or adjustment phase. On the contrary: considerations on the advantages and disadvantages of the *non-cumul* principle are characterised by being haphazard, hurry-scurry and extremist in favour or against *non-cumul*.

At this point, some additional general findings seems to take shape: the more substantiated and profound the *a priori* comparative studies and, in particular, the compatibility check were, the less adaptation and adjustment difficulties arose in the post-transplantation phase. The more the courts and the academics (in the recipient system) consider the dilemmas, answers and interpretation alternatives (at the place of origin), the easier it is to solve compatibility and interpretation issues (though these cross-border observations have to take place in awareness of the relevant structural differences between the donor and the recipient, if any). The less profound and comprehensive the preceding studies were, and the less the case law and doctrine of the place of origin is taken into account, the bigger the risk of gaps between the law in books and reality or even of rejection (explicitly or hidden in the manner of *desuetudo*) in the recipient legal system. In other words, the bigger the chance that the borrowed or imported concepts act like legal irritants, triggering new and unpredictable dynamics in the respective fields of law. In this respect, *non-cumul* seems to be a striking example.

Rephrasing again, with reference to the taxonomy created in this paper, the less they are 'full legal transplants' (relatively comprehensive preliminary comparative studies both before and after the legal borrowing) and the more 'limping' (lack of comparative analyses before but some comparative examinations after the transplantation) or even the 'surprising' legal transplants (without any comparative analysis at all, based on spontaneous legal intuitions of the legislator); the latter have the greatest risk of being rejected or converted into dead letter. Even limping legal transplants are better than not performing any comparative research related to the transplanted rules at all. As one example, it is gratifying that Hungarian academics frame the flexible and more granular concept of intentional or wilful breach of contract around comparative experience.