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**COMPARATIVE ANALYSIS OF THE MATERIAL SCOPE OF
SUBSTANTIVE FINALITY, BASED ON THE HUNGARIAN,
GERMAN AND SWISS CODES OF CIVIL PROCEDURE**

PhD Dissertation

Theses

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Budapest

2019

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I. Brief summary of the set research task

The regulation of finality is based on the fact that the main purpose of any procedural law, whether at domestic or international level, is to strive for finality; namely that courts decide on the dispute brought to them finally, thus ensuring the legally regulated order of social relations. That is, the need for finality is the common core of the procedural law of each country.

Finality necessarily incorporates the tension that every legal system (and its constituent civil procedural law) has to face: the fact that the legislator cannot aim for the facts reflected in the final judgment at the end of the proceedings to be the same as the actual historical facts. In civil lawsuits, the principles of disposition and trial prevail; in other words, it depends on the will of the parties what facts are presented and what motion for taking evidence is made. In view of the fact that in a civil procedure there is only a very limited range wherein the court acts *ex officio*, there is no legal possibility for the court to “investigate” facts that the parties do not intend to present.

Instead, the state may commit itself to ensuring that claimants have the right to a *fair trial*. This is a requirement that appears internationally, globally in Article 6 (1) of the Rome Convention¹, Article 47 (1) of the Charter of Fundamental Rights of the European Union, and Article XXVIII (1) of the Fundamental Law of Hungary.

In addition, the content of a fair procedure has been interpreted in several cases in the practice of the Hungarian Constitutional Court. Accordingly, the essence of the right to a fair trial is that “all the requirements detailed in the Constitution - the constitutionality, independence and impartiality of the court, that trials should be fair (using the specific wording of international conventions: *fair; équitement, in billiger Weise*) and public - serves this purpose; only by fulfilling these requirements may a decision on the merits be delivered that qualifies as constitutionally final and establishes a subjective right.”²

The right to a fair trial enforced through *finality* is not only of significance in constitutional law and legal theory but also gives effect to legal certainty. And legal certainty, as one of the basic prerequisites for the rule of law, is in the fundamental interest of both natural and non-natural persons. Legal certainty and the right to a fair trial are also essential for the efficient functioning of a market economy,

¹ Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the eight additional protocols thereto

² Constitutional Court Decision No. 7/2013. (III. 1) Statement of Reasons [24] – with reference to Constitutional Court Decision No. 39/1997. (VII. 1), also with identical content: Constitutional Court Decision No. 6/1998. (III. 11); Constitutional Court Decision No. 34/2014. (XI. 14), Statement of reasons [142]-[2015], Constitutional Court Decision No. 8/2015. (IV. 17), Statement of reasons [65].

as it is also important for economic operators that their legal dispute, if any, is finally (!) and fairly settled within a reasonable time.

In addition to legal certainty, which is part of the rule of law, the institution of finality is also protected by the right to a fair trial.³ The right to a fair trial manifests itself not only in the formal guarantee of access to the courts, but also in the fulfilment of the safeguards, through which the court may deliver a decision on the merit with the need for finality.⁴

Civil procedure serves two purposes: to enforce specific individual subjective rights, and to provide the objective, abstract protection of rights, that is, to protect the legal institutions defined by the substantive legislation. The individual level ensures the protection of subjective rights rooted in private law, the possibility to settle disputes related to them in a definitive way, and thus the right of recourse to courts (Article XXVIII. (1) of the Fundamental Law). The implementation of the objective, abstract protection of rights, as an aim, is already ensured by the existence of civil procedure, since the awareness of enforceability motivates compliance while demotivates any infringement.⁵

Ideally, these two purposes (functions) are accomplished at the same time and affect each other, therefore civil procedure must establish a procedure that guarantees the fulfilment of both functions. However, there is necessarily a conflict between these two, since, for the reasons explained above, the State cannot, through its courts, assume responsibility for ensuring that the facts reflected in the final judgment correspond to the actual historical facts of the case.

In contrast, the ultimate requirement of legal certainty stemming from the rule of law is the final settlement of disputes and thus guaranteeing legal peace. “Substantial justice⁶ and the requirement of legal certainty are reconciled by the institution of finality.”⁷

³ Constitutional Court Decision No. 3027/2018. (II. 6) Statement of Reasons [59] - with reference to Constitutional Court Decision No. 30/2014. (IX. 30), Statement of reasons [81].

⁴ VARGA István: Preambulum In: ISTVÁN Varga (ed.): A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja (Commentary on the Code of Civil Procedure and Related Legislation) HVG-ORAC, Budapest, 2018. p. 4, paragraph 6

⁵ *ibid.* p. 6, paragraph 10

⁶ In this dissertation, I do not intend to deal in detail with the pair of concepts of substantial truth and formal truth and their significance. This may be set as a task for an independent dissertation.

For details on this issue, see in detail: Sándor PLÓSZ: A keresetjogról (On the capacity to bring proceedings) Magyar Igazságügy, 1876. (Vol. V), DAISY Kiss: A fair eljárás (A fair procedure) In: Zsuzsanna PAPP (ed.): A magyar polgári eljárásjog a kilencvenes években (Hungarian Civil Procedural Law in the 1990s) Elte Eötvös Kiadó, Budapest, 2003; Miklós KENGYEL: Bírói hatalom és a felek rendelkezési joga a polgári perben (Judicial Power and the Parties' Rights of Disposal in Civil Litigation), Academic Doctoral Dissertation, Pécs, 2003; GÁBOR GADÓ: Az eljárási igazságosság a polgári perben (Procedural Justice in Civil Procedure) In: Magyar Jog 2000/1 p. 18-43.; Gergely Czoboly: A perelhúzás megakadályozásának eljárási eszközei (Procedural Tools for Preventing Delays in litigation), Pécs 2013, Csaba VIRÁG: Az alaki igazságosságot előtérbe helyező fair eljárás nem zárja ki a jó és helyes döntés lehetőségét (A Fair Trial that Promotes Formal Justice does not Exclude the Possibility of a Good and Correct Decision) In: ISTVÁN Varga (ed.): Egy új polgári perrendtartás alapjai (Foundations of a New Code of Civil Procedure), HVG-ORAC, Budapest, 2014. p. 362–376

⁷ Constitutional Court Decision No. 5/1999. (III. 31); – referring to Constitutional Court Decision No. 9/1992. (I. 30).

It follows from the above that there is a conflict between these two functions, for which the Code of Civil Procedure must propose a resolution.

From this, it is reasonable to conclude that the State must develop a civil procedure and, within that framework, a rule on finality that provides for a fair compromise in order to settle disputes with the intention of finality. This requirement includes the establishment of a procedural order that, having regard to the fundamental right to a fair hearing within a reasonable time (Article XXVIII (1) of the Fundamental Law), allows the parties to make their statements of law, claims, statements of fact and motions for evidence-taking.

In this context, it must be borne in mind that “civil justice must be based on reality. However, this is not a question of procedural law, but follows from the hypothesis of a substantive civil law rule: the hypothesis of a civil law rule governing a subjective right defines the legal facts which open, change or terminate the subjective right. Given that the civil procedural law serves the purpose of enforcing substantive legislation, any legal system that separates the basis of judgment from reality, that is to say from the facts, is defective.”⁸

At the same time, however, even if the actual facts cannot be established for any reason, the Code of Civil Procedure must guarantee that each dispute will calm down (to be closed with final effect) and that legal peace may be resumed.

The case law of the Constitutional Court also confirms this interpretation: “The precise definition of the institution of finality as formal and substantive finality is a constitutional requirement as part of the rule of law. [...]... Respect for finality serves the security of the entire legal order. [...]... If the conditions for reaching finality are satisfied, it will be effective irrespective of the correctness of the decision in terms of its content.”⁹

Accordingly, it may be stated that the ultimate aim of a civil action must be to ensure the protection of rights. From the plaintiff's point of view, protection of rights appears against the defendant who infringes the law, while from the defendant's point of view, against the plaintiff who is suing baselessly.¹⁰

This task necessarily implies that the State must establish a procedural order, in which even the inability to establish the facts (as the case may be) may not prevent the adoption of a substantive decision. This is most manifest in the standard of the burden of proof.

Final settlement also requires the regulation of finality (substantive finality). The institution of the

⁸ TAMÁS Éless: A tárgyalás szerkezete, perfelvétel, perhatékonyság (Structure of Trial, Preparation of Trial, Efficiency of Litigation) In: *Közjegyzők Közlönye*, 2017/5, p. 17

⁹ Constitutional Court Decision No. 9/1992. (I. 30) - Following the entry into force of the Fundamental Law, the same principle was confirmed by Constitutional Court Decision 30/2014. (IX. 30), Statement of reasons [76].

¹⁰ ÉLESS *ibid.* In: *Közjegyzők Közlönye*, p. 13

burden of proof guarantees the absolute establishment of the finality and the legal effects connected with it (that is to say, the definitive nature of the substantial finality effect).¹¹

In addition to the burden of proof, finality has a close correlation with the concept of the subject matter of the action, which gives the essence and characteristic feature of procedural law, since finality (effect of substantive finality) means the sameness of parties-facts-rights. The notions of law and statement of facts are decisively influenced by the concept of the subject matter of the action (monomial, binominal, or trinomial subject matter of the action), which in turn influences the definitions of the amendment of the action or the joinder of claims. With regard to the material scope of finality (effect of substantive finality), defining statements of law and statements of fact is unavoidable.

The scope of the most important legal effect, the scope of the effect of substantive finality in the Hungarian Code of Civil Procedure, is also related to the changed procedural law concept of set-off.

However, the notions of finality and the subject matter of the action is also an unavoidable legal institution, not only in the procedural law of Hungary, but also in the German and Swiss codes of civil procedure that played a decisive role in the Hungarian codification. Indeed, the German procedural law literature has consistently held that the notion of the subject matter of the action also determines the interpretation of the amendment of the action, the joinder of claims and the effect of substantive finality.

Furthermore, the intention to settle disputes with a view to bringing them to an end is also apparent at EU level, as the European Court of Justice (ECJ) has, in several judgments, sought to define the concept of subject matter of the claim that applies at EU level.

Following the above overview, it may be concluded that finality is one of the most important legal institutions of civil procedural law, the basis of the legal order (BH2015. 14). Namely, the regulation of finality fundamentally determines the regulations governing civil contentious and non-contentious proceedings.

In my dissertation I use the term "finality" to refer in general to finality, without distinguishing between formal and substantive finality. The term of the effect of finality is applied when the legal effect specifically related to the (formal or substantive) finality is relevant.

“The precise definition of the institution of finality as formal and substantive finality is a constitutional requirement, as part of the rule of law. Respect for the finality that occurred subject to

¹¹ VARGA: Preambulum In: A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja (Commentary on the Code on Civil Procedure and Related Legislation), p. 6-7. paragraphs 10 to 12

the remedies provided for in accordance with the Constitution serves the security of the legal system as a whole.” (Constitutional Court Decision No. 9/1992. (I. 30).

The above cited decision of the Constitutional Court also points out that finality and its precise definition are fundamental guarantee factors in civil procedural law. In addition to this definition, the material scope of the effect of substantive finality, i.e. which parts and provisions of the individual decisions may become final, is also of distinguished importance.

In my dissertation, I intend to examine this issue with the help of not only the Hungarian but also the German law of civil procedure, which is considered to be a model, on the basis of historical and legal history traditions. Given the entry into force of the federal level Code of Civil Procedure on January 1, 2011, I will review the Swiss Code of Civil Procedure and related law of civil procedure literature in a separate chapter.

In my dissertation, in addition to the effect of substantive finality, I examine the so-called effect of third-party intervention (*Wirkung der Nebenintervention*), the incorporation of which into the Hungarian system of the *law of civil procedure* was raised during the codification of the procedural law. However, this legal instrument is known only in the German and Swiss Rules of Procedure; the Austrian law did not regulate this effect. In view of this, I do not analyse Austrian law in this paper.

Closely related to the effect of substantive finality is the so-called doctrine of the subject matter of the action (*Streitgegenstands-lehre*), which raises numerous questions of interpretation for both the legal literature and the jurisprudence. However, the doctrine of the subject matter of the action is present not only at the national (primarily German and Swiss) level but also at the regulatory level of the European Union, so I briefly examine how European law sources and the practice of the CJEU define the concept of the subject matter of the action and what interpretation issues arise in this context.

However, an appropriate depth of analysis involves examining some of the fundamentals, such as the manifestations of finality (effect of finality), an overview of what decisions may become final and an interpretation of the concept of the “right enforced”. In the examination of the Hungarian legal environment, unless otherwise stated, I present both Act III of 1952 (Pp. 1952) and Act CXXX of 2016 on the Code of Civil Procedure (Pp.), in a comparative approach. During the dissertation I also have look at the regulatory model of the Expert Proposal.¹²

¹² István VARGA - Tamás ÉLESS (ed.): Szakértői Javaslat az új polgári perrendtartás kodifikációjára (Expert Proposal for the Codification of the New Code of Civil Procedure), HVG-ORAC - Magyar Közlöny Lap-és Könyvkiadó Kft. Budapest, 2016. (hereinafter the Expert Proposal)

In my dissertation, I deliberately disregard any history of law overview, so I will not review the provisions of Article I of the 1911 Code of Civil Procedure and the preceding rules of procedural law, given that the New Hungarian Code of Civil Procedure and the Expert Proposal made at the end of the codification process, and the Code of Civil Procedure effective until December 31 2017 also contains several issues to be analysed in detail.

In my dissertation, I consciously examine some contentious civil procedures (and the judgments delivered at the end), so I do not deal with the the effect of substantive finality or the material scope of judgments given in proceedings under Act I of 2017 on the Code of Administrative Procedure.

In my dissertation, I rely heavily on Hungarian, German and Swiss case law, in addition to the Hungarian and German legal literature, so I draw my conclusions partly from the legal literature and partly from the jurisprudence. By analysing the jurisprudence, my aim is to provide a summary of how the material scope of finality evolves, classified into types on the basis of the response to the claim and the nature of the claim at each level of the court system.

II. A short description of the examinations and analyses carried out; the methods of processing

1. Hungarian legal environment

One of the basic aspects of this dissertation was conceptual clarification, so I used the term “finality” to refer gto finality in general, without distinguishing between formal and substantive finality. The term of the effect of finality is applied when the legal effect specifically related to (formal or substantive) finality is to be emphasised. At the same time, I considered the technical term “*res iudicata*” to be relevant only for objections based on claim preclusion, that is to say the negative aspect of the effect of substantive finality.

During the analysis of Hungarian law, I tried to cover all areas related to the regulation of finality, so I examined the manifestations of effect of finality in detail. In this context, I have reviewed whether or not the effect of substantive finality includes enforceability as a legal effect. In addition to the legal literature in this field,¹³ I tried to find an answer to it after analysing the relevant decisions adopted

¹³ GYÖRGY Gátos: Határozatok (Decisions) In: János NÉMETH - DAISY Kiss (ed.): A polgári perrendtartás magyarázata (Explanation of the Code of Civil Procedure), Complex kiadó, Budapest, 2010. p. 850; József FARKAS: A jogerő a magyar polgári peres eljárásban (Finality in the Hungarian Civil Procedure) Akadémiai Kiadó, Budapest, 1976. p. 23; László NÉVAI: Gondolatok a jogerőről (Thoughts On Finality) In: Jogtudományi Közlöny 1973/9, p. 441; Dr. PÁL Bajory: Határozatok (Decisions) In: A polgári perrendtartás magyarázata (Explanation of the Code of Civil

by the Constitutional Court,¹⁴

I have examined the range of judgments with the effect of substantive finality on several points, emphasising that not only judgments and decisions with the effect of a judgment, but also, to a certain extent, orders have the effect of substantive finality (cf. Pp 176. (1) *(f)* and *(h)*). In the course of this I presented the theories related to judgments and their legal effects, developed by earlier Hungarian litigation lawyers.¹⁵

Particularly in view of the recent codification of procedural law, the concepts of title-cause of action-right enforced have played a decisive role in literature disputes in the law of civil procedure. This is illustrated by the fact that many interpretations may be read in relation to these three *terminus technicus*, such as:

- 1) The content of the right enforced is the same as that of title;¹⁶
- 2) The concepts of title and the right enforced are not identified; title is considered to be a legal institution of substantive law;¹⁷
- 3) A jogcím a jogcselekmény célja (The title is the purpose of the act);¹⁸
- 4) No distinction can be made between the concepts of cause of action and title. This view appeared in the paper on Constitutional Court Decision No. 9/1992. (I. 30), and Constitutional Court Decision No. 1/1994. (I. 7);¹⁹
- 5) “Title means the legal content linked to the objective legislation, as specifically identified and

Procedure) (ed.): Dr. JENŐ Szilbereky - dr. László NÉVAI, Közgazdasági és Jogi Könyvkiadó, Budapest, 1976. p. 1090 [hereinafter Pp Explanation SZILBEREKY - NÉVAI] p. 1090 MIKLÓS Kengyel: Magyar polgári eljárásjog (Hungarian Civil Procedure Law), Osiris kiadó, Budapest, 2013. p. 245; László ÚJLAKI: Ideiglenes (függő) joghatások a magyar polgári eljárásban (Temporary (contingent) Legal Effects in Hungarian Civil Procedure) In: Magyar Jog 1989/12, p. 1108–1109

¹⁴ Constitutional Court Decision No. 9/1992. (I. 30.), Constitutional Court Decision No. 30/1994. (V. 20.)

¹⁵ JENŐ Bacsó: Prerequisites for legal protection in civil litigation. Máramarosziget, 1910; Bertalan SCHÖNVITZKY: Az ítélet és a jogerő – Bevezetés a jogerőtanba (Judgment and finality - Introduction to the theory of finality.) Szent János Nyomda Eger, 1938.; GÉZA Magyary: A magyar polgári peres eljárás alaptanai (Basic Theories of the Hungarian civil procedure - The Theory of Procedural Acts) Budapest Franklin Társulat, 1898; József FARKAS: A jogerő a magyar polgári peres eljárásban (Finality in the Hungarian Civil Procedure) Akadémiai Kiadó, Budapest, 1976.

¹⁶ Egon HAUPT: A jogcímhez kötöttség a polgári perben (Title limitation in civil litigation) In: Magyar Jog, 2000/10, p. 609 LÁSZLÓ Leszkoven Újra a jogcímhez kötöttség kérdéséről (Again on the issue of the title limitation) In: Gazdaság és Jog, 2009/12, p. 23

¹⁷ Mátyás PARLAGI: Az érvényesíteni kívánt jog elbírálása, különös figyelemmel a Polgári Perrendtartás alapelveire (Assessment of the right enforced, with particular reference to the principles of the Code of Civil Procedure) In: Magyar jog 2013/4, p. 223 and TAMÁS Éless: Szerkezeti alapkérdések a polgári per kapcsán (Basic structural issues in the context of civil litigation) In: Magyar jog 2013/10, p. 615

¹⁸ László KOVÁCS: Mit jelent a bíróság jogcímhez kötöttsége? – Észrevételek dr. Haupt Egon cikkére (What does the court’s title limitation mean? - Observations on the article by Egon Haupt) In: Magyar jog 2003/9, p. 553

¹⁹ József LUGOSI: Gondolatok a kérelemhez kötöttségről (Reflections on the limits of the action) In: Magyar jog 2010/11, p. 674-684

adequately defined in the objective legislation (*titulus iuris*) and shall be used in that sense.”²⁰

6) Limitation by the claim does not exclusively mean being bound to a definite request for a court decision, but also to the right enforced; i.e. the latter is the same as the concept of title.²¹

7) According to the case law, the right enforced is the same as the concept of title.²²

8) The title, in a substantive law sense, is the name of the subjective right as used in the objective legislation (*ius est norma agendi*), which helps to distinguish one right from another. This distinction is based on the fact that the specific identification of the right is accompanied by a definite content, described in detail in the objective legislation, i.e. the title of the subjective law (*titulus iuris*). In procedural terms, the title is the cause of the action, the *causa petendi*. The statement of claim must therefore refer to the right under substantive law, which the applicant considers to have already been acquired on the basis of facts of law. In order for the action to be well founded, it is essential that there be a piece of legislation that confers (addresses) a subjective right on the applicant, on the bases of the facts on which he relies.²³

However, the correct interpretation of the above three concepts necessarily requires the establishment of a correct concept of the subject matter of the action, so a detailed review of the concepts of the subject matter of the action developed in the Hungarian legal literature was justified. All this made it possible to draw the conclusion that, while the 1952 Pp. follows the binomial concept of the subject matter of the action (application, statement of facts), the Pp. then follows the trinomial concept of the subject matter of the action (statement of law, application, statement of facts).

The analysis of the subject matter of the action induced a review of the notions of statement of fact and statement of law - with special emphasis on the role and importance of cause of action (cf. Pp Section 7 (1) (8)] - and the importance of legal arguments. However, all of this would be an analysis *per se* without identifying sameness as legal concept, since the effect of substantive finality means the sameness of rights, parties and facts (Pp. Section 360 (1)).

It exercised decisive influence on the material scope of the effect of finality that a conceptually

²⁰ Csaba VIRÁG: A jogcímhez-kötöttség egyes kérdései (Certain Issues of Title Limitation) In: Magyar jog 2013/11, p. 28

²¹ Tamás GYEKICZKY: Az európai polgári eljárásjog hatása a magyar polgári eljárásjogra (The Impact of European Law of Civil Procedure on the Hungarian law of civil procedure) In: Zsuzsa WOPERA (ed.): Az Európai Unió polgári eljárásjoga (European Union Law of Civil Procedure) Budapest, 2007. p. 229

²² dr. DREXLERNÉ dr. EDIT KARCUB: A jogcímhez kötöttség a polgári eljárásban a bírói gyakorlat tükrében (Title Limitation in Civil Procedure in the Light of Judicial Practice) In: Zsuzsa WOPERA (ed.): 50 éves a Polgári Perrendtartás (50 years of the Code of Civil Procedure), Miskolc, 2003. p. 46-47

²³ Attila DÖME: A jogcímhez-kötöttség problematikája (The Issue of Title Limitation) In: Miklós KENGYEL (ed.): A polgári perbeli bizonyítás gyakorlati kézikönyv (Practical Guide to Evidence Taking in Civil Litigation) KJK-Kerszöv, Budapest, 2005. p. 37, paragraph 34

different meaning was attributed to set-off, compared to the notion established in the earlier law of civil procedure.

As such, under Section 209 (9) of the Pp., unless otherwise provided, the rules governing the claim shall apply. In parallel, Section 360 (1) of the Pp. also expressly states that the effect of substantive finality must be applied in relation to set-off where the court decided on the merits.

This has led, among other things, to the following questions:

- a) Do I have to pay a court fee when submitting a document containing set-off?
- b) Should set-off be decided on in the operative part of the judgment or in the statement of reasons?
- c) May set-off be submitted as conditional?

(For answers to the questions see point III/1.)

In addition to analysing and examining the legal literature, I have set as a fundamental objective the processing of individual decisions representing all levels of the judicial system, because, in my view, substantiated conclusions regarding the material scope of the effect of substantive finality may only be drawn in this light.

This also means that I have classified judgments on the basis of the response to the claim (negative, partially upheld and upheld) and the nature of the application (condemnation, establishment or constitution of rights), and conclusions related to the material scope were drawn with this in mind.

Section 2 German law of civil procedure

As an introduction to the analysis of the German law of civil procedure, I examined the substantive law and procedural law theories that have evolved in connection with the concept of the effect of substantive finality, as well as the unique approach by Leo ROSENBERG,²⁴ along with the other legal effects linked to judgments (binding force, right constitution effect, enforceability, factual (fact-forming) effect).

The complete processing of the subject matter of the action doctrine included presenting the individual elements of the subject matter of the action concept (*Streitgegenstand*), so I dealt with the interpretation of

- (a) the definite application (*bestimmte Antrag*),
- (b) the claimed subjective right (*behauptetes Recht*),
- (c) statement of law (*Rechtsbehauptung*); and

²⁴ Leo ROSENBERG – Karl Heinz SCHWAB: Zivilprozessrecht, zwölfte, neuarbeitet Auflage, C.H.Beck'sche Verlagsbuchhandlung, München, 1997

(d) the basis of the claim (*Grund des Anspruches*), including the theories of *individualisation* and *substantiation*.

There are three major trends in the legal literature regarding the definition of the subject matter of the action:

- (a) substantive law;
- (b) those recognising a procedural law approach; and
- (c) those that represent a kind of intermediary view between these two.

I went through all approaches in detail, highlighting their most prominent representatives²⁵ and their opinions. My basic working method in this field was, if the procedural law specialist concerned discussed an issue, to emphasise his position on the subject matter of the *lis pendens*, the amendment of the action, the joinder of actions and the effect (material scope) of the substantive finality.

Following the legal literature approach, it may be concluded that the advantages and disadvantages of the monomial, binomial, trinomial, and the relative concepts of the subject matter of the dispute must be examined, as it should be acknowledged that this concept reflects the value judgment of the legislator. In addition, in order to establish the correct concept of *Streitgegenstand*, it is necessary to consider, on the one hand, the different types of *claims* and the delimitation between *Gesetzeskonkurrenz* and *Anspruchskonkurrenz*.

While, according to the position prevalent in the Hungarian procedural law, the decision on the merits of the action may become final, in the ZPO's system, a judgment on a procedural issue (*Prozessurteil*) may also have the effect of substantive finality. It should be noted, however, that Wolfram HENCKEL²⁶ puts forward convincing arguments in his work against the substantive finality effect of a *Prozessurteil*.

HENCKEL'S name may also be linked to the question of the parties' constrainedness to each of the grounds for dismissal or condemnation with regard to judgments dismissing the application and upholding the action, respectively.²⁷

The set-off, from a procedural law point of view, is dealt with in section 322 (2) of the ZPO. Similarly to Hungarian procedural law, the main question with regard to set-off is how the effect of substantive

²⁵ Thus, THE VIEWS OF BETTERMANN, HÖLDER, BLOMEYER, STEIN-JONAS-SCHÖNKE, SCHÖNKE-KUCHINKE, NIKISCH, BÖTTICHER, ROSENBERG, SCHWAB, HELLWIG, AND LENT-JAUERNIG, HENCKEL

²⁶ Wolfram HENCKEL: *Prozessrecht und Materielles Recht*, Verlag Otto Schwarz & CO. - Göttingen, 1970.

²⁷ Wolfram HENCKEL: *Prozessrecht und Materielles Recht*, Verlag Otto Schwarz & CO. - Göttingen, 1970.

finality covers set-off; that is, whether it may only be effective if the defendant's set-off objection is successful or also if the court rejects the set-off objection.

There are several authors in German procedural law²⁸ who dealt with the question of the preclusion effect (*Präklusionswirkung*). The preclusion effect is intended to answer the question of how facts not presented may be covered by the effect of substantive finality, and until which point in time facts may be presented in the first case.²⁹ In my dissertation, I dealt with both general and the specific preclusion effects.

In addition to the effect of substantive finality, one of the legal effects of the judgments is the so-called third-party intervention effect, which in some respects is more powerful and of wider effect than the effect of substantive finality. I therefore considered it justified to analyse this legal effect, which however included a brief review and examination of the rules of intervention in the ZPO. Within this framework, I discussed the main intervention and the third party intervention separately (corresponding to the intervention under Section 41 of the Pp.) in both cases, presenting the most important procedural rules and comparing them, where appropriate, with the effective Hungarian procedural law rules.

3. The regulation of Swiss civil procedural law

In Switzerland, prior to the 2011 procedural law reform, substantive law was regulated at federal level, while procedural law (law of civil procedure) was regulated at cantonal level. This also meant that the plaintiff's statement of law was of a federal law nature (although the procedural law interpretation of a claim was predominant); the claimant was able to enforce a subjective right afforded by substantive law through a claim understood in the sense of the law of civil procedure. Hence, what should be understood as statement of law is to be decided under federal law rather than cantonal law.

On 1 January 2011, the new Code of Civil Procedure (hereinafter referred to as "the sZPO") entered into force, effective in all cantons of Switzerland.³⁰ From that date, civil lawsuits before a cantonal court are governed solely by the Uniform Swiss Pp and by the BGG before the Swiss Federal

²⁸ ROSENBERG, SCHWAB, OTTO, RIMMELSPACHER, HABSCHIED

²⁹ The legal literature uses the term "*im ersten Verfahren*", which in my view should be translated as the first case, whereas the term "*Vorprozeß*" has already been used in relation to *Identität*, which is perhaps more fortunate to be interpreted as a preliminary case. With this in mind, in my work, where the role of the preliminary issue is irrelevant, I use first case-second case, while where the significance of the preliminary issue arises, I used the terms preliminary case and second case.

³⁰ Zivilprozessordnung vom 19. December 2008

Court.^{31,32} At the same time, all cantonal codes of civil procedure were repealed.

From the point of view of substantive finality, the principle that the sZPO takes precedence over cantonal laws in civil lawsuits is also important, with one important exception: the autonomy of the cantons applies regarding the organisation of the courts (sZPO Section 3.), unless otherwise provided by the sZPO itself. In practice, this means that the acting forum is determined by the sZPO but the composition of the individual courts by the cantons.³³

It is interesting that the sZPO however does not contain any provision on the concept of finality, but it does refer to both finality and *lis pendens* in several locations (i.e. recognising their existence and significance). For example, according to Section 59 (2) of the sZPO in relation to impediments to an action (that is to say, the precondition for an action) is, in particular, that the matter has not yet been finally decided on. This rule clearly reflects the concept of substantive finality.³⁴

Here, too, the definition of the scope and subject matter of the effect of substantive finality could be reached by defining the statement of law and the statement of fact, bearing in mind that the date of 1 January 2011 was considered to be a milestone for all relevant legal concepts (*lis pendens*, joinder, amendment of the action, notion of the subject matter of the action); that is, it had to be examined whether they changed upon the entry into force of the sZPO.

The entry into force of the federal-level code of civil procedure also induced research on the issue of finality to take place in the following directions:

- 1) Analysis of the concept of finality developed on the basis of earlier fragmented cantonal laws;
- 2) To draw conclusions by examining the rules on the existence of substantive finality in the current sZPO.

This necessarily meant that the following five issues related to finality (effect of finality) could be assessed, primarily on the basis of earlier cantonal laws:

- (a) Content and essence of finality
- (b) Disputed issues related to finality
- c) The material (objective) scope of finality
- d) The personal (subjective) scope of the effect of substantive finality

³¹ Bundesgerichtsgesetz - Federal Act on Courts

³² Thomas SUTTER-SOMM: Die neue Schweizerische Zivilprozessordnung (ZPO) In: Ritsumeikan Law Review 2012. No. 29 p. 82

³³ SUTTER-SOMM (2012) im: p. 87

³⁴ Beat BRÄNDLI: Prozessökonomie im schweizerischen Recht – Grundlagen, bundesgerichtliche Rechtsprechung und Auswirkungen im schweizerischen Zivilprozess Stämpfli PublikationenAG Bern 2013 144. o. Rn. 311.

(e) Temporal limitations on the effect of substantive finality³⁵

In the system of the sZPO, similarly to the Hungarian and German laws of civil procedure, the question to be decided is how the foundedness or unfoundedness of the set-off objection affects the material scope of the judgment's effect of substantive finality.

Swiss civil law also regulates intervention as the participation of a third party in a lawsuit, dealing with the effect of intervention in a separate section. It should be emphasised that it is essentially the same as the German model of procedural law, but at the normative level; Section 77 of the sZPO words the essence of this legal instrument in a much simpler and clearer manner.

4. European (European Union) law of civil procedure environment

In the law of civil procedure of the European Union, the issue of sameness of rights does not arise in relation to judgments rendered as final but in the context of *lis pendens*, where, in a case pending in two countries, the rights enforced are the same and subsequently the rules on pendency determine the court of which state may continue the lawsuit.

In view of this, I have analysed the concept of sameness of rights, which emerged in the context of the Brussels I Regulation³⁶ and is still decisive in the Brussels Ia Regulation,³⁷ as well as the view developed in the case law of the European Court of Human Rights, and developed by the German legal literature, also called as *Kernpunkttheorie*. In order to grasp the essence of the *Kernpunkttheorie*, the determination of the cause of action and the identity of the parties, as well as the essence of torpedo actions, are relevant.

The answer to these questions necessarily included an overview of the relevant CJEU case law,³⁸ and the processing of relevant legal literature, mainly in German.³⁹

³⁵ Walther J. HABSCHEID: Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht – Ein Lehrbuch seiner Grundlagen – unter Mitarbeit von Stephen Berti, 2., neuarbeitete und erweiterte Auflage Verlag Helbing & Lichtenhahn Basel und Frankfurt am Main 1990 269. o. Rz. 472

³⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

³⁷ Az Európai Parlament és Tanács 1215/2012/EU Rendelete (2012. december 12.) a polgári és kereskedelmi ügyekben a joghatóságról, valamint a határozatok elismeréséről és végrehajtásáról (átdolgozás)

³⁸ C-144 / 86th s. *Gubisch Maschinenfabrik KG v Palumbo*, paragraph 6; C-406 / 92nd s. *Tatry*, paragraph 30; C-351 / 96th s. *Drouot assurances*, paragraph 16; C-1 / 13th s. *Cartier parfums-lunettes and Axa Corporate Solutions assurances*, paragraph 32; C-523/14. s. *Aannemingsbedrijf Aertssen*, paragraph 38

³⁹ When UNKEL: Die Garantie einer gerichtlichen Entscheidung innerhalb angemessener Frist und der Ausschluss von Parallelverfahren durch 27. Section EuGGVO In: Martin AHRENS - Volker FLAG - Stephen VARGA (hrsg.): Europäisches Zivilprozessrecht - Einfluss auf Deutschland und Ungarn Universitätsverlag Göttingen, 2011; Stefan LEIBLE: Brüsszel Ia-Vo. In: Thomas RAUSCHER (hrsg.): Europäisches Zivilprozess- und Kollisionsrecht-EuZPR /

III. Short summary of scientific results, their utilisation and potential utilisation

Section 1 Hungarian legal environment

An overview of the Hungarian legal framework leads to the following main conclusions:

(a) Only judgments and decisions that have the effect of a judgment may have the effect of substantive finality. Orders may have it only in the specific case⁴⁰ where that order is the only lawful decision, that is, any judgment that may be rendered would have purely pretence finality.

(b) With regard to the concept of the effect of substantive finality, it should be noted that, in my view, it does not include enforceability, but this is a different legal effect, which in most cases pertains to judgments with an effect of substantive finality;

c) Under the temporal scope of the 1952 Pp., there was a lively debate in the legal literature on the meaning of the concepts of cause of action-title-right enforced. Section 7 (1) 11 of the Pp. provides some normative guidance in this debate, with the proviso that, in my opinion, the statutory definition is not entirely correct. With this in mind, I formulated my specific *de lege ferenda* proposal (see: Section III/5).

d) In my dissertation, I have tried to create my own concept of title, i.e. it is a substantive concept, which may be interpreted in the system of substantive law. From a procedural law point of view, this means that the title appears in procedural law terms in the statements and statements of law. The rights to be enforced may be identified and defined through making statements of law, also in view of Section 7 (1) 8. of the Pp.

(e) In my opinion, in the Pp.'s system it is necessary to consider whether the legal literature reference to the subject of the action being "the right enforced, which may be a substantive law claim or another right or a legal relationship" will continue to prevail.⁴¹ Namely, the legal relationship is not equal to the right enforced;⁴² i.e. the subject of an action cannot be a legal relationship, since the action stems from the legal relationship (cf. Pp., Section 173 (1)).

f) The effect of substantive finality, its concept and its material scope are largely determined by the

EuIPR neu, Bearded Auflage, Verlag Otto Schmidt, 2015; Jan KROPHOLLER: Europäisches Zivilprozessrecht - Commentary on EuGVÜ and Lugano-Übereinkommen, 6th edition, Verlag Recht und Wirtschaft GmbH, Heidelberg, 1998; Helmut RÜBMANN: Streitgegenstandslehre und die Rechtsprechung des EuGH - Nationales Recht unter gemeineuropäischem Einfluß In: ZZP 111 (1998)

⁴⁰ I deliberately used the term "case" as there is no litigation in these cases, and no claim has been communicated.

⁴¹ Daisy KISS: A polgári per titkai – Kérdések és válaszok a polgári perrendtartás Általános Részéből (Secrets of civil procedure - Questions and Answers from the General Part of the Code of Civil Procedure), Second (Revised) edition, HVG-ORAC, Budapest, 2009. p. 418, with identical content: Miklós KENGYEL: A felek és más perbeli személyek (The parties and other litigants) In: A polgári perrendtartás magyarázata (Explanation of the Code of Civil Procedure) (NÉMETH - KISS) p. 488

⁴² Dr. Mátyás PARLAGI's lecture on 20 February 2018

fact that, as of 1 January 2018, the Hungarian system of the law of civil procedure follows the trinomial concept of subject matter of the action (statement of law, application, statement of fact);

(g) The notion of a trinomial subject matter of the action not only entails a substantive change in connection with the material scope of the effect of substantive finality, but in parallel the legislator has changed the concept of an amendment of the action (amendment of the counterclaim) (cf. Pp., Section 7 (1) 4. and 12.);

(h) It is relevant that Section 342 (3) clearly establishes the principle of title limitation, which in turn restricts the material scope of the effect of substantive finality, since if the plaintiff invokes a different statement of law compared to the one invoked in the first case then Section 360 (1) of the Pp. is no longer applicable, because the sameness of rights cannot be established in the two cases;

(i) The conceptual innovation, which clearly applies to set-off decided on in the merit, also substantially affects the effect of substantive finality. In addition to content criteria, its significance is also relevant from a formal approach.

Thus, the submission of set-off, in view of Section 242 (1) of the Pp., does not qualify as initiation of an independent procedure, in that the submission of a document containing set-off is not subject to court fee payment. On the set-off - due to its application nature (Section 342 (1) of the Pp.) - the court must rule in all cases in the operative part of its judgment. Given the substantive law and procedural law specificities of set-off, a conditional set-off may not be interpreted (a set-off is dismissed in the operative part, not in the statement of reasons);

j) The Hungarian legal literature has always and still emphasised the formal approach, namely which structural element of the judgment is covered by the effect of substantive finality. With this in mind, I tried to analyse the individual decisions, which have the capacity to produce a substantive finality effect, and their structural units, and to draw conclusions. On this basis, it can be concluded that a uniform definition that may be applied to all judgments cannot be given, but it can be argued that, in certain cases, certain parts of the statement of reasons also have the effect of substantive finality.

(ja) Judgments dismissing the action

In this case, the operative part shall contain the following statement: “The court dismisses the action.”⁴³

Because of the negative content of the operative part, both the relevant facts (statements of fact) and the statements of law must necessarily be contained only in the statement of reasons: the statements

⁴³ To this effect, see the judgments of the Fővárosi Törvényszék 8.G.43.185/2015/19.; Fővárosi Bíróság P.20.136/2011/17.; Debreceni Törvényszék P.21.678/2015/8.; Pesti Központi Kerületi Bíróság 24.P.85.045/2008/47.; Veszprémi Törvényszék 1.G.40.107/2010/46.; Veszprémi Törvényszék 1.P.20.505/2012/10.; Miskolci Törvényszék P.22.942/2015/12.; Tatabányai Törvényszék 9.G.40.001/2014/51.; Szigetvári Járásbíróság 3.P.20.259/2013/27.;

of fact are in the factual part of the statement of reasons and the statements of law are in the legal arguments.

It should be noted, however, that this does not mean that the factual and legal arguments parts of the statement of reasons may be capable of producing the effect of substantive finality in their entirety; the material scope of the effect of substantive finality may only be interpreted in connection with the statements of fact and law that are relevant in terms of the right enforced.

(jb) Judgments upholding the action

(jba) In the case of an action for condemnation, the operative part of the judgment contains an order to the defendant ("The court orders the defendant to pay the applicant HUF 5,000,000 within 15 days"), without specifying the facts and title serving as a basis for condemnation).⁴⁴ That is, the statements of fact and statements of law relevant to the later litigation (for the purposes of establishing the sameness of facts and rights) are not identifiable on the basis of the operative part alone.

In my view, however, a restrictive interpretation should be adopted in this regard; that is to say that the effect of substantive finality may only cover the most necessary elements of the facts and the legal arguments, in order to avoid unjustified factual elements or legal conclusions having the effect of substantive finality.

(jbb) In the case of an action for declaration, it is necessary to distinguish the sui generis declaration petitum from the content of Section 172 (3) of the Pp.

A glaring example of a *sui generis* declaration claim is:⁴⁵

- a) declaration of the invalidity of a contract (Civil Code,⁴⁶ Section 6:108 (2)),
- b) in the context of personality rights cases, the declaration of the infringement by the court (Civil Code, Section 2:51 (1) (a)) *petitum* [BH2018. 332.], and
- c) the declaration of the invalidity of a will (Civil Code, Section 7:37).

(a) The operative part of a judgment declaring a contract invalid states that the (specific provision of

⁴⁴ Veszprémi Törvényszék 1.P. 20.526/2014/47.; Fővárosi Bíróság P.28.493/2005/11.; Miskolci Törvényszék 21.G.40.084/2013/13.; Fővárosi Bíróság 22.G.41.768/2009/18.; Veszprémi Törvényszék 1.G.40.022/2013/17.; Pesti Központi Kerületi Bíróság 10.P. 88.616/2011/114.; Tatabányai Törvényszék 4.P.21.579/2011/4.; Miskolci Törvényszék P.20.787/2012/75.; Pesti Központi Kerületi Bíróság 2.P.93.919/2013/11.; Pécsi Városi Bíróság P.20.707/2007/11.; Pécsi Törvényszék P.20.289/2015/17.; Fővárosi Bíróság 11.G.41.774/2007/5.; Pesti Központi Kerületi Bíróság 41.P.90.886/2006/49.

⁴⁵ A number of additional *sui generis* declaration *petita* are known in the legal system (e.g. copyright cases); in this dissertation I highlight only the examples occurring the most frequently in practice.

⁴⁶ Act V of 2013 on the Civil Code

a) contract concluded under the number XY or on the date ZV is⁴⁷ invalid.⁴⁸

It follows from this that, apart from the operative part, the legal justification of the statement of reasons (which is necessarily linked to that operative part) may have the material scope of the effect of substantive finality.

A similar approach is followed in the case of claims for annulment of a general meeting resolution in condominium lawsuits [BH2016. 15). As such, the above may also be relevant *mutatis mutandis* in these cases.

(b) If the plaintiff seeks only the declaration of the violation of his personality rights, the court will declare in the operative part that the defendant has violated the plaintiff's particular personality right(s) on a specified date, by a specified course of action.⁴⁹

This content limitation of the operative part follows partly from Section 172 (3) of the Pp., and partly from the title limitation set out in Section 342 (3); that is, the court may decide on a personality right infringement claimed by the plaintiff.

It also follows that, in this case, the operative part clearly sets out both the factual and cause of action, that is to say, the scope of the effect of substantive finality may only (!) extend to the operative part and none of the elements of the statement of reasons.

(c) In the event of the declaration of a will's invalidity, under Section 7:37 (3) of the Civil Code, the invalidity or ineffectiveness of the will may be declared on the basis of the right enforced in the challenge and to the benefit of the challenging person.

This means that the operative part of the upholding judgment contains, in addition to the particulars necessary for the unequivocal identification of the will, also the reason for invalidity(!).⁵⁰ In other words, not only the factual basis but also the cause of action may be identified, solely from the operative part.

Again, in my view, we must conclude that only the operative part may have the effect of substantive

⁴⁷ This is included in the operative part only in the case of the declaration of partial invalidity.

⁴⁸ So for example: Budapest Környéki Törvényszék 25.P.25.224/2010/27.; Zalaegerszegi Törvényszék 4.P.20.094/2014/38. Fővárosi Törvényszék 30.G.41.702/2015/33.; Győr-Moson-Sopron Megyei Bíróság 16.P.20725/2006/57.; Szegedi Városi Bíróság 26.P.21.742/2007/14.; Fővárosi Törvényszék P.25.603/2010/20.; Tatabányai Törvényszék 20.P.20.645/2011/12.; Pesti Központi Kerületi Bíróság 17.P.91.935/2013/9.; Szegedi Törvényszék 7.G.40.179/2012/23.; Hajdú-Bihar-Megyei Bíróság 7.G.40.162/2005/21.; Fővárosi Törvényszék 10.G.43230/2013/13.

⁴⁹ Miskolci Törvényszék P.22.643/2011/5.; Fővárosi Törvényszék 33.P.23.274/2016/6.; Kaposvári Törvényszék 8.P.21.562/2015/9.; Budapest Környéki Törvényszék 20.P.20.291/2015/72.; Fővárosi Törvényszék P.20.723/2015/6.; Fővárosi Törvényszék P.25.003/2014/6.; Fővárosi Törvényszék P.24.324/2015/4.; Fővárosi Törvényszék P.20.229/2015/3.; Fővárosi Törvényszék P.24.933/2015/13.; Miskolci Törvényszék P.22.113/2015/15.

⁵⁰ Fővárosi Bíróság P.27.299/2009/16.; Borsod-Abaúj-Zemplén Megyei Bíróság 23.P.21.943/2009/37.; Kiskunhalasi Városi Bíróság P.20.743/2010/8., Győri Városi Bíróság P.20.541/2010/10.; Fővárosi Törvényszék P.25.524/2010/32.; Fővárosi Bíróság P.24.561/2006/77.

finality, and none of the elements of the statement of reasons.

However, in addition to the *sui generis* declaration claims, there are *petita*, for which the existence of conditions set out in Section 172 (3) of the Pp. must be assessed. Thus, for example, there is no legal impediment for a party to seek the declaration of invalidity of an already terminated contract [BH2013. 221]; in the same way, the declaration of the non-establishment of a contract may also be requested [BH2012. 294).

With regard to these types of lawsuits, the stricter requirements detailed above for the operative part are not generally identifiable, and consequently no general conclusions may be drawn for the material scope.

jb) A classic example of *right constitution petitions* are claims submitted in actions related to personal status (Section 429 of the Pp.). The essence of the right constitution judgments adopted at the end of these lawsuits is that “the creation, modification or termination of a legal relationship or status shall constitute the establishing degree of the judgment... that is, the judgment of the court shall be a fact that creates, amend or terminates a right.”⁵¹

A common feature of these cases is that the judgment clearly defines the factual basis and the cause of action. For example, in paternity lawsuits: the court declares that the child of a specified mother registered on a given day by a particular registrar under a registration number, with a specified name, originates from the specific defendant (personal data). In an action brought to settle the exercise of parental responsibility, the operative part of the judgment contains the name of the child, for which one of the parties is authorised by the court to exercise parental responsibility.⁵²

In my view, it follows from this that, in the case of a constitutive *petitum*, only the *operative part* may become final, but not the statement of reasons.

In the dissertation I also examined in detail and tried to draw conclusions in the relation matrix between the subject matter of the effect of substantive finality and the decisions of the second instance and the decisions of the Kúria.

Section 2 German law of civil procedure

After the analysis of the German civil procedure literature on the doctrine of the subject matter of the action, as well as the jurisprudence, the following conclusions may be drawn:

PÁL Bajory: A jogalakító ítéletek (Judgment constituting a right) In: Jogtudományi Közlöny 1978/9, p. 540.

⁵² Budai Központi Kerületi Bíróság P.30.971/2014/41.

(a) The significance of the subject matter of the action's concept appears primarily in the context of the joinder of actions, the amendment of the action, the *lis pendens* and the effect of substantive finality. In defining the subject matter of the action concept, three major possible interpretations have emerged: substantive, procedural, and mediational "school". The main demarcation criterion for each approach is that they seek to identify the concept of the claim from a substantive law (*Anspruch*) BGB,⁵³ Section 194)) or procedural law perspective;

(b) The German law clearly follows the binomial concept of the subject matter of the action and consequently refuses to accept the principle of title limitation; in the PROCEDURAL LAW literature, HABSCHEID was the most prominent representative of the trinomial concept of the subject matter of the action. The so-called relative concept of the subject matter of the action is also known, under which no single definition may be established, but a flexible interpretation is to be supported that allows both individual claims and problem areas to be properly addressed;

c) Under Section 253 (2) of the ZPO, it can be concluded that the act follows the second of the theories of *individualisation* and *substantiation*;

(d) It puts *strong* emphasis on the *distinction* between the *Gesetzeskonkurrenz* and *Anspruchskonkurrenz* in the German procedural law, with the proviso that, in the case of *Anspruchskonkurrenz*, no joinder is to be identified, but a procedural law claim is to be recorded;

e) The cornerstones of the effect of substantive finality are the sameness, the adjudication on the preliminary issue and the contradictory subject matters of the action. Furthermore, the essence of the material scope of the effect of substantive finality is "to provide the parties, in reliance to the rules of logic, with guidelines that will enable them to consider what is at stake in the proceedings."⁵⁴

(f) From the point of view of the effect of substantive finality and its material scope, they do not take the formal approach (the relation and content of the operative part and the statement of reasons), but take a substantive approach to this issue. That, in my view, can be traced back, *inter alia*, to the relationship between the judgment dismissing or upholding the action and the judgment in the second action and the effect of substantive finality.

Based on this, *insoweit* (cf. ZPO, Section 322 (1)), it is justified for the parties to be bound by the outcome of the litigation (its basis and the relevant fact findings) if the procedural rules are capable of guaranteeing the correctness of the ruling, i.e. if the procedural rules (rules of procedural law) are capable of guaranteeing the correctness of the decision on the subject matter of the action.⁵⁵ Thus, it may also be stated that the applicant is bound by the grounds on which the action is dismissed if, according to the case-file, it can be established that he should have challenged the ground for refusal

⁵³ Bürgerliches Gesetzbuch - German Civil Code

⁵⁴ Bruno RIMMELSPACHER: *Materiellrechtlicher Anspruch und Streitgegenstandsprobleme im Zivilprozess*, Verlag Otto Schwarz & CO – Göttingen, 1970 178–179. o.

⁵⁵ HENCKEL i. m.: p. 154-155

in order to avoid being unsuccessful. This rule is also in line with the principle of fair trial.

(g) Therefore, in the German procedural law, the operative part and the statement of reasons do not play such a prominent role as the individual structural parts of the judgment, since the judgment is treated as a single, whole decision, the entire content of which must lead to the actual content of the effect of substantive finality, thus also its material scope;

(h) The effect of substantive finality applies with regard to the claim requested for set-off; to put it another way, even if the court rejects the set-off objection and also if the defendant's set-off objection is successful. All this adequately demonstrates that the role of effect of substantive finality in the context of the set-off objection is unavoidable, since without it there would be no restriction on the defendant not to re-litigate the claim against the plaintiff which is the subject of the set-off. If successful, the plaintiff would be twice unsuccessful, since in the first case the claim for set-off quasi extinguished the claim (or part of it) and in the other case the defendant would have been entirely successful on the basis of the claim on which the set-off is based.⁵⁶

(i) Furthermore, it is also relevant that the German procedural law attaches great importance to the effect of preclusion. Two striking positions may be identified: the effect of preclusion is part of the effect of substantive finality, while the other interpretation states it is a different effect;

j) A significant difference between the Hungarian and the German procedural law is that, according to the majority of the German legal literature, not only judgments on the merits (*Sachurteil*), but also judgments on procedural issues (*Prozessurteil*) are capable of having substantive finality;

(k) The effect of a third-party intervention is not the same as an effect of substantive finality, but it is a qualitatively different legal effect attached to the judgment, which is stronger in terms of its material scope than the substantive finality. The binding nature of the effect of a third-party intervention does not only include the decision itself (that is, the court order over the right enforced) but also the factual and legal findings on which the decision is based.⁵⁷

l) During the codification of procedural law, the adaptation of the effect of a third-party intervention to the Hungarian law was raised; however, recognising the positive aspects of the effect of a third-party intervention, its inclusion in the new code of civil procedure was avoided, facilitating the establishment of other conceptual changes in the judicial practice.

Section 3 Swiss civil procedural law regulation

On the basis of the Swiss procedural law, it can be concluded that, in principle, it follows the German

⁵⁶ Ulrich FOERSTE: Rechtskraft in Ausgleichszusammenhängen In: ZZP Band 108, 1995, p. 178

⁵⁷ Peter ARENS: Zivilprozessrecht – Erkenntnisverfahren, Zwangsvollstreckung, 2 Auflage, Verlag C.H. Beck, München, 1982 p. 284. Rn. 453.

procedural law dogma and pattern; the differences may be summarised as follows:

(a) I consider it important to emphasise that the civil procedural law of the defendant's country is dominated by the binomial approach to the subject matter of the action. In contrast, in the German procedural law, the trinomial and the so-called relative concept of the subject matter of the action appear clearly and prominently, at the level of the legal literature.

(b) The sZPO does not recognise the principle of title limitation (Section 57 of the sZPO).

(c) There is no clear distinction between the statement of law and the claim; they are treated as synonyms by the legal literature;

(d) The Uniform sZPO, which entered into force in 2011, does not contain a specific provision on the effect of substantive finality, although it clearly recognises its existence. As a result, the case law and the legal literature play a prominent role in the definition and scope of the effect of substantive finality. Therefore, in the context of the concept of effect of substantive finality and its material scope, it is unavoidable to review the earlier cantonal procedural laws prior to 2011, and to take into account the principles elaborated by the case law;

(e) As regards the material scope of the effect of substantive finality, it is important that substantive finality relates to the operative part of the judgment (*Urteilsanspruch*) and does not cover the statement of reasons;

(f) The effect of the preclusion relates to the facts existing at the time of the closure of the trial, even if they were unknown to the parties;

(g) If the court considers the set-off objection to be well founded, the substantive finality of the judgment shall extend to this objection. If the set-off objection is unfounded (that is, it has been examined by the court and found not to be founded), it is not subject to substantive finality, since the set-off objection (like a counter-right - *Gegenrechte*) divides the fate of the counter-rights, which are not covered by the effect of substantive finality even if they are well-founded.⁵⁸

(h) The effect of the intervener in the law of the Alpine country is not the same as the effect of substantive finality, but in some respects it has stronger legal effect, which, however, is essentially rooted in the substantive law [OR⁵⁹ Section 193.).

4 European civil procedural law environment

Analysing the relevant literature on the law of civil procedure (European procedural law), as well as the CJEU case law, it can be stated that the issue of the *lis pendens* has become an area that was

⁵⁸ Max KUMMER: Das Klagerecht und die materielle Rechtskraft im schweizerischen Recht, Verlag Stämpfli, Bern, 1954, p. 116-118

⁵⁹ Das Schweizerische Obligationsrecht - Swiss act on contract law

raising constant interpretation issues already upon the entry into force of the Lugano Convention and the Brussels I Regulation.

According to a 2009 CJEU decision,⁶⁰ the expression “same cause of action” in Article 27 of the Brussels I Regulation is not to be interpreted in the light of the relevant national law.

For the purposes of this Regulation, this term has an autonomous interpretation,⁶¹ according to which two claims have the same cause of action when the “subject matter” (*Gegenstand*) and the “basis” (*Grundlage*) are the same. The sameness of claims thus also means the sameness of the action’s object and its (!) cause.

Furthermore, the legal literature also notes, based on *Gubisch Maschinentabrik KG v Palumbo*⁶² and the *Tatry case*, that the requirement of same claims means “the same factual basis (the cause of action), the same legislative reference, and the corresponding objective right (subject of the action) and the identical purpose of the actions, namely the result an action seeks to achieve, actually a request for a decision in favour of that party (the content of the action).”⁶³

The essence of the so-called *Kernpunkttheorie*, developed in the German-language literature, is that the decisive *factor in* connection with *lis pendens* is the core or heart of the proceedings(disputes).

The notion of the sameness of parties also has an autonomous EU meaning. Sameness of parties may also be established where the same parties are involved in both proceedings, but the position of the parties in the litigation is irrelevant.⁶⁴ However, according to the case law, it is not possible to establish the sameness of parties where the mother is a defendant in a lawsuit pending before a German court against her child, and the mother is acting as a creditor plaintiff before the Italian courts.⁶⁵

It is relevant that the sameness of parties also exists if the finality effect of the judgments delivered in the lawsuits extends to all parties involved, that is to say, a mutual interest (*Interessenübereinstimmung*) is created between the parties, for example in connection with proceedings involving the insurer and the insured.⁶⁶

The apparent plaintiff in the other party's view is sufficient for the existence of sameness of parties; that is, if one party considers the person concerned to be a plaintiff that has not actually acted as a

⁶⁰ GZ 6 Ob 122/09y (the court decision is available at https://www.ris.bka.gv.at/Docse/Justiz/JJT_20090805_OGH0002_0060OB00122_09Y0000_000/JJT_20090805_OGH0002_0060OB00122_09Y0000_000.pdf) 22 November 2018)

⁶¹ Judgments in C-144/86 *Gubisch Maschinenfabrik KG v Palumbo*, Paragraph 6; C-406/92 *Tatry*, Paragraph 30; C-351/96 *Drouot assurances*, Paragraph 16; C-1/13 *Cartier parfums-lunettes and Axa Corporate Solutions assurances*, Paragraph 32; C-523/14 *Aannemingsbedrijf Aertssen*, Paragraph 38

⁶² *Palumbo* Judgment - This case was based on the 1968 Brussels Convention, but what was said there is still relevant.

⁶³ Zsuzsa WOPERA: In: Lajos WALLACHER (ed.): Polgári eljárásjogi szabályok az Európai Unió jogában (Rules in European Union’s Law of Civil Procedure), Complex kiadó, Budapest, 2006. p. 141

⁶⁴ Stefan LEIBLE: Brussel Ia-Vo. In: Thomas RAUSCHER (hrsg.): Europäisches Zivilprozess-und Kollisionsrecht-EuZPR/EuIPR neu, bearbeitete Auflage, Verlag Otto Schmidt, 2015. p. 870, paragraph 10

⁶⁵ BGH IPRax 1987, 314.

⁶⁶ C-351/16 *Drout* judgment

plaintiff;⁶⁷ if the party in one of the proceedings acts as the assignor and in the other as the assignee.⁶⁸

The above mentioned *Tatry* case is also relevant. because it allowed the emergence of the so-called Italian torpedo (see: torpedo actions), i.e. the blocking of proceedings (hence the name blocking effect, *Blockadewirkung*) in cases where *lis pendens* has already occurred and the proceedings are not expected to be completed within a reasonable time.⁶⁹ The reason for this is that the average length of court proceedings varies considerably from one Member State to another.⁷⁰ The point of torpedo actions is that “[T]he primacy of jurisdiction solely on the basis of the condition of timeliness serves the benefit of the party who is the fastest to bring proceedings in the courts of a Member State. However, it is well known that there is a risk of torpedo actions, which are used by parties acting in bad faith to bring actions as quickly as possible in order to circumvent the rules of ordinary jurisdiction, in particular the defendant's domicile, or solely with the view to delay them.”⁷¹

It should also be noted that the legal instrument of *lis pendens* is relevant not only in the context of the Brussels I and Brussels Ia Regulations, but also to the application and interpretation of other EU acts, notably the Inheritance Regulation, which clearly requires the sameness of the facts to establish the *lis pendens*.

V De lege ferenda proposals

1. Following the comparative legal analysis, and taking into account the German, Swiss and European Union concepts of the subject matter of the action, the conclusion may be drawn that the trinomial concept of the subject matter of the action introduced into Hungarian law, and the role of legal arguments as part of it, should be reconsidered, specifically in order to facilitate access to justice as fully as possible.

It is no coincidence that the German law of civil procedure, although it deals with the trinomial concept of the subject matter of the action at the level of the legal literature, follows the binomial concept at the normative level, as there seem to be a consensus among German litigation practitioners that the concept of the subject matter of the action fundamentally determines the interpretation of the joinder of actions, the *lis pendens*, and the material scope of the effect of substantive finality. The

⁶⁷ C-159/02 *Turner* judgment

⁶⁸ OLG Cologne IPRax 2004, 521.

⁶⁹ Jens ADOLPHSEN: *Europäisches Zivilverfahrensrecht*, Springer Verlag, Berlin-Heidelberg, 2011. p. 153

⁷⁰ Matthias ABENDROTH: *Die Verfahrensgrundrechte und das Phänomen der “Torpedoklage” im Europäischen Zivilverfahren* In: Martin AHRENS – Volker LIPP – István VARGA (hrsg.): *Grundrechte im Zivilprozess* Eötvös Universitätsverlag, Budapest, 2015. p. 67

⁷¹ Opinion of Advocate General Nilo JÄÄskinen in Case C-438/12 s. *Irmengerd Webe*

Swiss civil law follows a similar approach.

All of this becomes even more pronounced when we look at the concept of subject matter of the action developed by the CJEU, which, compared to the German and Swiss procedural laws, created a simpler concept of subject matter of the action, thus facilitating the enforcement of EU citizens' right to effective judicial protection.

2. With the introduction of the trinomial concept of the subject matter of the action, the concept of amendment of the action has been transformed significantly. Although I did not elaborate on the notion of amendment of the action in detail in this dissertation for content reasons, the following conclusions may be drawn from the analysis of the Hungarian and German legal literature:

It unreasonably limits the parties' ability to enforce their rights that, under Section 7 (1) (12) (a) of the Pp., reliance on a further or different fact constitutes an amendment of the action. (An amendment of the action under the former concept of law of civil procedure was where the plaintiff sought to enforce a right other than the one originally enforced, while the additional facts put forward in support of the claim did not result in an amendment of the action, unless the changed facts pointed to another subjective right.⁷²

This problem is intensified if the parties are to submit the fact on which the amendment of the action is based at the substantive trial stage of the proceedings, since it is only allowed in a very limited fashion, subject to formal and substantive restrictions (cf. Pp., Sections 215 to 219).

The unjustified extension of the concept of amendment of the action [cf. Pp., Section 7 (1) (12) (a)] and its very strict form may lead to unnecessary duplication of lawsuits and counteract the establishment of legal peace, since the procedural law regulator is unable to afford the opportunity to establish the actual facts. In other words, although disputes are finally settled by virtue of the effect of substantive finality, it does not mean that they are settled.

Moreover, the notion of fair trial must necessarily mean that the rules of civil procedure – in accordance with the right to a fair hearing (Article XXVIII 1 (1) of the Fundamental Law) – ensure that the factual situation of the judgment is the same as the actual historical situation.

In light of the above, it can be concluded that both the simplification of the concept of subject matter of the action and the alignment of the concept of the amendment of the action with the former setup of procedural law, could help to enforce the law more efficiently.

⁷² In detail: Marcell KOVÁCS: A polgári perrendtartás magyarázata, (Explanation of the Code of Civil Procedure) Benkő Gyula Cs. és Kir. Könyvkereskedés, Budapest, 1911. p. 289–294.

3. My suggestion to simplify the Hungarian concept of subject matter of the action also means revisiting the role and importance of legal arguments. (As I mentioned in Section 4.2.7, legal arguments are a very unique legal institution in the EU; this concept is not present in the law of civil procedure in other countries.)

In the context of legal arguments, it is important to consider - in line with what has been written in connection with the concept of the amendment of the action - whether it is the right solution that a further or different legal argument constitutes an amendment of the action. This makes the litigation of the parties and their representatives much more difficult and also more burdensome for the courts. Hence, I consider appropriate the amendment of Section 7 (1) (4) (b) and (12) (b) of the Pp, that the further or different legal arguments do not constitute an amendment of the counter-claim, and/or an amendment of the action.

4. After presenting the theories of the right of action, in my opinion, it may be concluded that Section 7 (1) (11) is not precise in the context of the expression “right enforced by an action”. According to the Code of Civil Procedure, the right enforced by an action is the subjective right; the enforcement is ensured by the law. The grammatical meaning of this wording is positive (enforcement is ensured), i.e. it assumes that if the plaintiff (in the case of a counterclaim, the defendant) is successful, the court will decide according to his claim, because this is the only way to ensure enforcement. Conversely, the plaintiff may have a subjective right granted by the objective legislation (such as damages), but its enforcement will not be successful and the court will dismiss the action.

For all these reasons, also from a dogmatic point of view, it would have been more fortunate if the Code of Civil Procedure did not contain a specific interpretative provision or definition in connection with the term “right enforced by an action”.

However, if the legislator decides that a normative definition of this term is warranted, then, in my view, in light of the above, Section 7 (1) (11) of the Pp. would need to be reasonably drafted as that the right enforced through an action is the subjective right, for which *the possibility* of enforcement is provided by the substantive legislation. By including the word “possibility”, the law would not say anything more than something occurring in numerous cases, namely that the plaintiff has a right granted by substantive legislation (such as for damages), so it is possible to enforce it, but it does not necessarily follow that it will be successful, since it is also possible that the claim may be dismissed by the court, for example because of an objection on the ground of statute of limitation.

Based on the above, I would consider reasonable the following wording for Section 7 (1) 11 of the Pp:

“*right enforced by an action* : means a subjective right, the enforcement *possibility* of which is secured by a provision of substantive legislation”.

5. In connection with the concept of the right enforced, I made an attempt to create my own concept of the title, based on the fact that title is a substantive law concept and may be interpreted in the system of substantive law (cf. the title-transfer (*traditio*) system).

From a procedural law point of view, this may be interpreted as the title appearing in procedural law terms, through claims and statements of law. The rights to be enforced may be identified and defined through making statements of law, also in view of Section 7 (1) 8. of the Pp. It follows that the procedural equivalent of the title as a substantive law concept is the right enforced.

6. Within the framework of Hungarian legal analysis, I examined in detail the changed procedural law regulation of set-off.

In the context of set-off, I consider the regulatory model that applies to set-off, interpreted as a separate procedural law instrument, to be revisited. A significant part of the issues of interpretation of law is specifically attributable to this conceptual innovation.

In the event that the legislator chooses to maintain set-off as a stand-alone procedural law instrument, I would highlight, as a *de lege ferenda* proposal, that the submission of the set-off document should be subject to court fee payment. Although, in my view, it is dogmatically correct to conclude that no court fee should be levied upon the submission of the set-off document, at the normative level an approach contrary to that is also acceptable, in view of Section 248 (3) of the Pp.

Therefore, in order to resolve this issue clearly, I deem it reasonable to consider the amendment of Section 248 (3) of the Pp. as follows:

“ Beyond warning him of the consequences of omission, the court shall call upon the party to remedy deficiencies, if

a) rejecting the statement of counter-claim or set-off document would be required on any of the grounds specified in Section 176 (1) (j) or (k),

b) for a set-off document on any of the grounds specified in Section 176 (1) (j),

– except if a content element referred to in section 247 (1) is missing.

If the party does not remedy the deficiency

the statement of counter-claim or set-off document shall be rejected by the court; a separate appeal may be filed against the order on rejection.”

It becomes clear through such regulation that, of the defendant's pleadings, only the lodging of the counterclaim is subject to the charge of a court fee but not the set-off.

IV. List of relevant publications

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