

# VOLUNTARY (NON-CONTENTIOUS) JURISDICTION AROUND THE WORLD

Ed. by V. V. Argounov

Fills the gap  
on English material on voluntary jurisdiction

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No many and relevant books on the legal basis for  
voluntary jurisdiction exist in the world

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jurisdiction in a large number  
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*Moscow*

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## ABOUT THE AUTHORS

**Alexey Argounov** – Candidate on Legal Sciences, Assistant Professor at the Department of Civil, Commercial and Administrative Procedure at the Russian Academy of Justice (Moscow).

**Vsevolod Argounov** – Candidate on Legal Sciences, Assistant Professor at the Department of Civil Procedure at the Lomonosov Moscow State University.

**Daniel D. Birk** – Partner, Eimer Stahl LLP; J.D. 2010, Northwestern University School of Law.

**Lorenzo M. Bujosa Vadell** – Tenured Professor of Procedural Law at the University of Salamanca. Member of the International Association of Procedural Law and of the Iberoamerican Institute of Procedural Law. Director of Bogota’s head office for Latin America of the General Foundation of the University of Salamanca.

**Alexandre Freitas Câmara** – Professor Emeritus and Head of Civil Procedure Department at EMERJ (Rio de Janeiro Judicial School). Judge at Rio de Janeiro Court of Appeals. Member of the International Association of Procedural Law (IAPL).

**Carlos Enrique Camps** – Barrister, Professor of Civil Procedure at the National University of La Plata (Argentina).

**Gergely Czoboly** – Lecturer at the Department of Civil Procedure and Legal Sociology at the University of Pécs (Hungary), fellow of the Institute for Legal Studies, Center for Social Sciences, Hungarian Academy of Sciences.

**Laura Ervo** – Dr. Professor of law, University of Örebro, Sweden. Adjunct professor (“docent”) at the Finnish Universities of Turku, Helsinki and Eastern Finland. Member of the International Association of Procedural Law (IAPL).

**Aleš Galič** – Associate Professor at the University of Ljubljana, Faculty of Law, and a legal advisor to the Constitutional Court of Slovenia. Member of the International Association of Procedural Law (IAPL).

**Jorge I. González Carvajal** – Professor of Procedural Law at Universidad Central de Venezuela.

**Peter Gottwald** – Dr. jur. habil., Chair for Civil Law, Procedural Law and Conflicts of Law at the University of Regensburg, former president of the (German) Association of International Procedural Law and of the International Association of Procedural Law (IAPL).

**Viktória Harsági** – Associate Professor, Head of Department at the Pázmány Péter Catholic University (Budapest), Faculty of Law, Department of Civil Procedure Law and lecturer at the Andrassy Gyula German Speaking University (Budapest).

**Miklós Kengyel** – Chair of the Department of Civil Procedure and Legal Sociology at the University of Pecs (Hungary). Part-time Professor of Comparative Civil Procedure at Andrassy Gyula University in Budapest. Former Dean and Rector. Member of the Council of the International Association of Procedural Law (IAPL).

**James E. Pfander** – Owen L. Coon Professor of Law, Northwestern University School of Law.

**Elisabetta Silvestri** – Associate Professor of Civil Procedure and Comparative Civil Procedure at the University of Pavia, Italy.

**Cédric Tahri** – Director of the Institute of Judicial Training of La Rochelle (IRFJ). Lecturer at the University of Montesquieu-Bordeaux IV.

## AN INTRODUCTION

Alexey Argounov – Vsevolod Argounov

The title of the book – Voluntary (Non-Contentious) Jurisdiction Around the World – is somewhat provocative. It implies that the concept denoted as voluntary or non-contentious jurisdiction is well known. However, the content and scope of this concept have not yet been determined precisely. Moreover, it is subject to multiple and lengthy discussions in different countries. However, we have considered it possible to use it as, its uncertainty notwithstanding, the concept of “voluntary jurisdiction” is the most all-embracing in terms of meaning and reflects all possible procedures of considering the cases traditionally referred to as “non-contentious”.

It should be clarified why we see the concept of voluntary (non-contentious) jurisdiction as a sort of a unifying idea. For this purpose, we will need a brief introduction to the history of this concept emergence and development in the continental law. For many foreign systems of justice that have borrowed the Roman legal legacy, the axiomatic principle is to divide jurisdiction into contentious (*jurisdiction contentiosa*) and voluntary (non-contentious) (*jurisdiction voluntario*). This has been noted in many articles included into this book. As many other legal doctrines, voluntary jurisdiction has, through the efforts of the glossators, grown out of the laconic utterances of the Roman jurists into a unique area of legal rules and concepts. Dependent on the country, legal regulation of voluntary jurisdiction may be assigned to the domain of substantive, procedural, public or private law. Situated on the junction of these subsystems, voluntary jurisdiction may be referred to as a “buffer” reflecting the interaction of individual freedom and public enforcement, harmonizing private and public interests in law.

Thus, it is closely related to the social security law, the imperative rules of civil law and family law. Often, non-contentious cases fall within the competence not only of the judicial authorities, but other public authorities as well, or the notaries. The scope of legal literature dedicated to the problematics of the voluntary jurisdiction is vast, and the interest to this subject of jurists and practicing lawyers from all over the world is quite high, and has been high for several centuries now, evidence of which is provided in the chapters of this book, describing the history of voluntary jurisdiction development and containing the main literary sources.

In many foreign systems of law, the concept of “voluntary jurisdiction” includes the following areas of legal regulation:

- the operation of the court related to considering and final resolution of civil cases, most of which are “non-contentious”, i.e., are not related to resolving an issue of law, however, the court judgments are frequently constitutive in nature;
- the operation of the notaries related to certifying all kinds of circumstances having legal meaning, certifying non-contentious rights and facts, performing protective notarial actions.
- ‘registration operations’ related to registering facts and legal status that are most relevant to private law, providing the pre-requisites for the creation of the majority of subjective rights and obligations. We are referring to the state registration of acts of civil status, registering and maintaining registers of legal entities and other organizations, state registration of property rights.

At the same time, it would be an error to consider its voluntary nature to be a general material element of voluntary jurisdiction. Voluntary recourse to a competent public authority by mutual will of individuals only constitutes a basis of a small category of cases falling within this jurisdiction. Most of the categories of voluntary jurisdiction cases, on the contrary, are of explicitly imperative and public nature ensuing from the need to protect public interests. Frequently, intervention by a court (or another competent authority) into private interests is quite serious and happens against the will of the parties. Hence, the title “voluntary jurisdiction” is rather a tribute to the tradition deeply rooted in the legal doctrine, and nowadays does not reflect the real content of the regulated area of legal relations. This is justly highlighted in many Chapters of this book.

In certain countries, voluntary (non-contentious) jurisdiction is conceived as a general concept not related to jurisdiction only; in other, it is not always truly non-contentious. For instance, in Germany, some contentious cases (family cases) are being considered within the realms of the voluntary jurisdiction. In many countries, writ proceedings constitute a part of the voluntary jurisdiction. At the same time, there are some examples of a classical approach to voluntary jurisdiction, where the courts are considering non-contentious cases only (France). Some jurists propose considering voluntary jurisdiction in a broad aspect, including all non-contentious administrative and even criminal cases (The Chapter on Voluntary Jurisdiction in East Scandinavia). At that, doubtless, the proceedings of the court in all systems of law considered in the book is the main and the most significant part of voluntary jurisdiction, it may even be referred to as the classical part. It is in the courts that the majority of the most complex and important matters are resolved, and those of them falling within the jurisdiction of non-judicial authorities are directly controlled by the courts.

A review of this book’s Chapters allows making a conclusion that three main approaches to the legal regulation of voluntary or non-contentious jurisdiction have been established in the world:

1) The rules of considering voluntary jurisdiction cases are provided for in a Civil Procedure Code, general provisions of which are applied when considering both, contentious and non-contentious cases, and, in some instances, in

other laws (Argentina, Brazil, Venezuela, Italy, Russia, Finland, France, etc). The above tradition is mostly characteristic for the countries with the Roman system of law, and the countries affected by the Soviet law.

2) The rules of considering voluntary jurisdiction cases are stipulated in an individual law specifically regulating this area of public relations (Germany, Slovenia, Sweden).

3) The rules of considering voluntary jurisdiction cases are stipulated in various industry-specific laws, substantive laws, and no general provisions whatsoever exist (Hungary, common law countries).

Information on the present-day legal regulation of voluntary jurisdiction in different countries may be of interest not only to the jurists, but also to politicians planning to reform this area. For instance, recently, a reform of voluntary jurisdiction has been implemented in Germany; in 2015, a new law on voluntary jurisdiction was adopted in Spain. Currently, it is planned to implement a reform in France. The recent reforms in Spain and France are aimed at relieve the judicial system of non-contentious cases. For instance, in France, it is planned to transfer mutual consent divorce cases into the competence of the notaries. The proposals on vesting in non-judicial bodies the authority to consider non-contentious cases are also being discussed in Russia.

It should be noted that most of the issues in this area, both theoretical and practical, are “cross-cutting” ones, shared by many systems of law. For instance, such theoretical issues as the correlation of justice with other types of law enforcement activity – and primarily, with the notarial actions relating to the state registration of rights and statuses; the matters pertaining to the nature and the tasks of the courts in litigation and other proceedings; the concept of the issue of law and many other are relevant to many countries. The structuring of national legislation, as well as the resolution of many practical tasks, for instance, the issue of unburdening the judicial system and enhancing its performance, depend on the adoption of a certain concept.

We hope that the information on the history and the present-day legal regulation of voluntary jurisdiction in different countries will be helpful and useful to scientists, practicing lawyers and politicians.

# SECTION 1

## VOLUNTARY JURISDICTION IN EASTERN EUROPE

### Chapter 1

#### THE COLORFUL MICROCOSMS OF THE HUNGARIAN LEGAL SYSTEM: VOLUNTARY JURISDICTION

Miklós Kengyel – Viktória Harsági – Gergely Czoboly

#### **Abstract**

This paper summarizes the general characteristics of the Hungarian non-litigious procedures in such a way that it allows the reader to compare the Hungarian system with the others examined in this volume.

Presently an approximately hundred non-litigious procedures exists in Hungary and the number of legal acts regulating these procedures is nearing sixty. Only a governmental decree from 1952 can be considered as a common rule. In the majority of the matters of voluntary jurisdiction the courts have got competence, but exceptionally, there are other persons (e.g. notaries public, bailiffs etc.) who have jurisdiction in certain civil matters of voluntary jurisdiction.

One of the mostly used is the order for payment procedure which has been comprehensively reformed in 2009. Because of the importance and innovative solutions of the Hungarian order for payment procedure special attention was paid to it. A remarkable innovation is constituted by the solution – unusual in Europe – that the law delegates the non-litigious procedure traditionally falling within the competence of the courts to the competence of notaries public. The new law established an electronic procedure, which renders it possible to shorten the length of the procedure significantly. Beside the detailed examination of this specific procedure the authors synthesize the general characteristics of the non-litigious procedures in Hungary and highlighted the main differences from controversial jurisdiction procedure. The legal effect and the possible legal remedies of the different procedures were also scrutinized.

The paper provides statistical data about the Hungarian system of non-litigious procedures too. It shows that, while the number of litigious cases of the courts is relatively constant, the number of non-litigious proceedings—which are particularly sensitive to economic processes—increased most dynamically during the years of the economic crisis. In 2010 this process was disrupted, the explanation for which lies—unfortunately—not in the upturn of the economy, but in the fact that order for payment procedures making up the majority of non-litigious proceedings have been transferred from the jurisdiction of courts to the competence of notaries.

## **§ 1.1 The concept of voluntary jurisdiction in Hungary and a brief sketch of its history**

### *1.1.1 Difficulties of concept formation*

Long-existing endeavours on the part of the Hungarian science of civil procedure to provide an *independent* definition for the concept of voluntary jurisdiction, irrespectively of the notion of litigious proceedings, have usually met with failure or such attempts have remained at the level of generalities. The cause of the failure may primarily be traced back to the fact that voluntary jurisdiction proceedings do not have such common rules based on which it would be possible to formulate a definition similar to that of civil litigation proceedings. Even today it is not possible to tell more about the *nearly one hundred types* of voluntary jurisdiction proceedings regulated by Hungarian civil procedural law at present than what was stated by Salamon Beck, according to whom *a)* voluntary jurisdiction proceedings consist of consecutive procedural acts *b)* the subjects of which are the court (notary public) and the parties concerned, *c)* the subject-matter of the proceedings is a civil matter, *d)* the purpose of the proceedings is to administer justice, *e)* based on the form of procedure prescribed for it<sup>1</sup>. A similar conclusion has been drawn by the Austrian *Dolinar* too, according to whom voluntary jurisdiction proceedings are characterized by such varied forms of appearance that it is possible to define their concept only formally. Based on this definition, voluntary jurisdiction proceedings are proceedings regulated by the State and aimed at disposing of legal matters<sup>2</sup>.

The above formulation, however, differs only slightly from the – Prussian – definition created one and a half centuries ago that classifies under voluntary jurisdiction the activity of the court that is not considered litigation and that is

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<sup>1</sup> Beck, Salamon. 1959. A nempere eljárásjog. In *Magyar polgári eljárásjog*, ed. János Bacsó, Salamon Beck, and Mihály Móra, 633. Budapest: ELTE Állam – és Jogtudományi Kar. 633.

<sup>2</sup> Dolinar, Hans. 1982. *Österreichisches Außerstreitverfahrensrecht. Allgemeiner Teil*. Wien: Springer-Verlag. 10.

carried out by it in accordance with the provisions of law, at the request of the parties in the interests of legal security<sup>3</sup>.

One may get closer to the concept of voluntary jurisdiction only if one tries to reveal those shared criteria that distinguish the individual voluntary jurisdiction proceedings from civil litigation proceedings.

At the beginning of the century, Hungarian academic legal literature considered the *lack of adversarial hearing* and the *absence of substantive legal effect* attached to the judgment as the most relevant differences between litigation and voluntary jurisdiction proceedings. However, in due course, jurisprudence has discarded both distinguishing features with reference to the fact that there are such voluntary jurisdiction proceedings where adversarial hearing does take place and some orders made in certain voluntary jurisdiction proceedings may give rise to substantive legal effect.

In the 1930s Richter enumerated twelve characteristic features of civil litigation proceedings, but finally he came to the conclusion that none of these features were suitable for distinguishing litigation proceedings from voluntary jurisdiction proceedings. A distinction can only be made based on the “legal rules defining the procedural acts and governing the order of such acts”, which “can be traced back to the legislator’s will”. Therefore, the fact whether a proceeding is a litigation proceeding or a voluntary jurisdiction proceeding is determined solely by the *way of regulation*<sup>4</sup>. The same pragmatic approach was used by Sárffy as well, in whose opinion proceedings governed by the rules of the Code of Civil Procedure relating to civil litigation are called litigious proceedings, while proceedings not regulated under such rules are called voluntary jurisdiction proceedings<sup>5</sup>.

The same pragmatic approach dominates German academic legal literature too. According to the prevailing view, voluntary jurisdiction covers matters concerning which the law directly or indirectly provides for voluntary jurisdiction proceedings. Each proceeding has its own substance and its own procedural rules. The activity carried out within the frames of voluntary jurisdiction is partly administration of justice, partly administration, partly an activity aimed at resolving a dispute and partly one that does not decide a case, it is partly of private law and partly of public law nature etc<sup>6</sup>. Austrian legal terminology uses the term “Außerstreitverfahren” for voluntary jurisdiction, which means *non-contentious procedure*, which in Fasching’s view refers not only to the lack of a dis-

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<sup>3</sup> Allgemeine Gerichtsordnung für die Preussischen Staaten von 1793. Teil 2 Titel 1. §

<sup>4</sup> Richter, Béla. 1932. A peres és a peren kívüli eljárás viszonya. *Magyar Jogi Szemle* 13: 132–137.

<sup>5</sup> Sárffy, Andor. 1930. *A peráradat csökkentése*. Budapest: Magyar Jogászegylet. 11–12.

<sup>6</sup> Weirich, Hans-Armin. 1981. *Freiwillige Gerichtsbarkeit. Eine Einführung in die Systematik und Praxis*. Stuttgart: Kohlhammer W. 37–38.; Schmidt, Gerd. 1991. *Handbuch der freiwilligen Gerichtsbarkeit*. München: Rehm. 1.; Rosenberg, Leo, Schwab, Karl-Heinz, and Gottwald, Peter. 2010. *Zivilprozessrecht*. München: C. H. Beck. 61–63.

pute, but also to the lack of litigation<sup>7</sup>. According to Rechberger, the sole criterion for distinction lies in regulation. Those civil cases fall within the range of *non-contentious procedures* that are specifically regulated as being subject to such procedure by law<sup>8</sup>.

In Hungarian academic legal literature it can be considered a generally held view that voluntary jurisdiction proceedings are regarded as atypical forms of procedure. In Magyary's opinion, civil litigation is the most important instrument for enforcing private law interests, at the same time, "there are also other proceedings that, although having a different structure, serve the same purpose"<sup>9</sup>. In Beck's view, within the unified system of civil procedural law litigation is the typical form, and voluntary jurisdiction proceedings are characterized by a different "world of rules"<sup>10</sup>. The scope of voluntary jurisdiction was given a negative definition by Farkas, according to whom voluntary jurisdiction covers all civil proceedings that are not conducted in the strictly regulated form of a civil lawsuit<sup>11</sup>.

The *positive* definition encountered in Hungarian academic legal literature comes from János Németh, who considers voluntary jurisdiction to cover

- consecutive acts defined by law carried out in a peculiar procedural form (that is usually less complicated than the one prescribed for a civil lawsuit),
- by the court, or some other person attached to or classified as identical with the court from a defined aspect, or
- by another person entitled to be involved in the procedure,
- in order to administer justice, or
- in order to certify facts or rights, or have them recognized etc,
- as well as the procedural legal relations connected with such acts<sup>12</sup>.

A positive approach to the concept may also be encountered in the analytical essay written by Gáspárdy in 2000<sup>13</sup>, as well as in the one authored by Juhász in 2010<sup>14</sup>.

<sup>7</sup> Fasching, Hans W. 1989. *Zivilprozessrecht. Lehr- und Handbuch*. Wien: Manz'sche. 66.

<sup>8</sup> Rechberger, Walter H., and Simotta Daphne A. 2009. *Zivilprozessrecht*. Wien: Manz'sche. 214–215.

<sup>9</sup> Magyary, Géza, and Nizsalovszky, Endre. 1939. *Magyar polgári perjog*. Budapest: Franklin Társulat. 18.

<sup>10</sup> Beck, Salamon. 1959. A nemperes eljárásjog. In *Magyar polgári eljárásjog*, ed. János Bacsó, Salamon Beck, and Mihály Móra, 633. Budapest: ELTE Állam – és Jogtudományi Kar. 634.

<sup>11</sup> Farkas, József. 1978. Bírósági és közjegyzői nemperes eljárások. In *Polgári eljárásjog*, ed. Jenő Szilbereky, Budapest: Tankönyvkiadó. 177–178.

<sup>12</sup> Németh, János. 2002. A polgári nemperes eljárásokról. In *A bírósági nemperes eljárások magyarázata*, ed. János Németh and Daisy Kiss. Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó. 32.

<sup>13</sup> Gáspárdy, László. 2000. *Polgári nemperes eljárások*. Miskolc: Novotni Alapítvány. 25.

<sup>14</sup> Juhász, Imre. 2010. A polgári nemperes eljárások fogalma és általános jellemzése. In *A polgári nemperes eljárások joga*, ed. István Varga. Budapest: ELTE Eötvös Kiadó. 35.

*1.1.2 The history of voluntary jurisdiction in Hungary*

The modernization of the Hungarian legal system took place in the last third of the 19<sup>th</sup> century. The term “voluntary jurisdiction” appeared in the legal literature at that time, which was replaced in the second half of the 20<sup>th</sup> century by the term “non-litigious procedures”<sup>15</sup>.

No comprehensive regulation of voluntary jurisdiction proceedings took place either in the 19<sup>th</sup> or the 20<sup>th</sup> centuries, although such regulation had been carried out already in the 19<sup>th</sup> century in German and Austrian law, exerting a substantial influence on the development of the Hungarian legal system. In Austria the Non-Contentious Proceedings Act was adopted in 1854<sup>16</sup>. In Germany, in turn, the Act on Voluntary Jurisdiction entered into force – following lengthy preparatory work – on 1 January 1900 simultaneously with the Civil Code and the Land Registration Act<sup>17</sup>. In contrast with other sources of law, these two codes *did not* have a *stimulating effect* on Hungarian legal development.

In Hungary the regulation of voluntary jurisdiction has always been considered a question of secondary importance compared to the regulation of litigious proceedings. During the codification of the civil procedure codes of 1911 and 1952, non-litigious procedures were incorporated into acts the purpose of which was to put the civil procedure codes into force. Nevertheless, in 1952 the result was a voluminous regulation, Decree 105/1952. (XII. 28.) MT of the Council of Ministers. It contained in 58 paragraphs the rules of the courts’ non-litigious procedures<sup>18</sup> and the regulation of notary public procedures, including the general provisions of non-litigious procedures.

It could have been the starting point for a unified regulation, if there had been will for the codification. Instead of this, a separate regulation of these procedures had begun<sup>19</sup>. The number of non-litigious procedures increased quickly due to separate legal acts, but the legal regulation did not lose its clarity. By this time the unified regulation did not seem as hopeless as twenty years later, when the explosive growth of the procedures of voluntary jurisdiction took place in several waves. The first wave – after the political changes – brought back those non-litigious procedures, which had existed in our legal system before too, but during the

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<sup>15</sup> The term “non-litigious” was first mentioned by Sárffy, Andor. 1946. *Magyar polgári perjog*. Budapest: Grill Károly Könyvkiadó. 9–11. After this the use of term became common.

<sup>16</sup> Gesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Kaiserliches Patent 9. 8. 1854)

<sup>17</sup> Reichsgesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit vom 17. Mai 1898.

<sup>18</sup> Regulation on provisional measures, termination of the matrimonial community property, declaration of death, order for payment procedure, annulment of securities and documents and succession procedure.

<sup>19</sup> E.g. Decree No. 6/1958. (VII. 4.) IM of the Minister of Justice on the succession procedure, Decree No. 1/1960. (IV. 13) IM of the Minister of Justice on the declaration of death, Decree No. 9/1969 (XII. 28.) IM of the Minister of Justice on the procedures concerning the industrial property rights.

decades of socialism, had atrophied or emptied (e.g. Act XLIX of 1991 on bankruptcy proceedings and liquidation proceedings, Act CXLV of 1997 on the Register of Companies, Public Company Information and Court Registration Proceedings etc.) The second wave was the result of deliberate codification, when procedures of voluntary jurisdiction were created by dozens of major substantive and procedural legal acts (e.g. Act XXII of 1992 on the Labour Code, Act LXXI of 1994 on Arbitration, Act LIII of 1994 on Judicial Enforcement, etc.). A similar consciousness can be detected in the fact that the registration of various – private and public law – bodies and, in some cases, the supervision over their operation is carried out in the form of non-litigious proceedings (e.g. Act CLXXXI of 2011 on the registration of civil organizations). The effective legal regulation uses non-litigious proceedings extensively concerning the judicial review of the decisions of various authorities (e.g. the court reviews decisions of the Hungarian Intellectual Property Office under Act XXXIII of 1995 on the protection of inventions by patents and decisions of the refugee authority under Act LXXX of 2007 on Asylum within the frames of non-litigious proceedings). Finally a “stealth” codification must be mentioned, which means that the legislator created non-litigious procedures in the most unexpected situations due to considerations of legal policy. As a result of the most recent legal development the presumption of paternity can also be challenged in non-contentious proceedings (Act V of 2013 on Civil Code Section 4:114).

## § 1.2 The voluntary jurisdiction in the legal system: doctrine and legislation

### 1.2.1 Legal nature of voluntary jurisdiction

#### **Voluntary jurisdiction and the administration of justice**

Voluntary jurisdiction is characterized primarily by the *jurisdictional activity of authorities*. An exception is constituted by cases where the task of the court – even within the frames of voluntary jurisdiction – is to decide the legal dispute. (Out of the voluntary jurisdiction proceedings that are referred to as *litigation-substituting proceedings*<sup>20</sup> such cases include administrative and industrial rights protection proceedings as well as non-litigious proceedings for the termination of matrimonial community property and proceedings relating to suffrage.)

The majority of voluntary jurisdiction proceedings are aimed not at the resolution of a legal dispute, but at

- changing legal status,
- avoiding or preparing litigation,

<sup>20</sup> Farkas, József. 1978. Bírósági és közjegyzői nemperes eljárások. In *Polgári eljárásjog*, ed. Jenő Szilbereky, Budapest: Tankönyvkiadó. 180–181.

- promoting the exercise of rights, including the certification of facts and rights, as well as,
- enforcing rights through legal compulsion<sup>21</sup>.

The enumerated activities, as *jurisdictional tasks*, do not fall under the monopoly of the courts. Pursuant to Article 25 (2) of the Fundamental Law, other bodies may also be authorized by law to proceed concerning specific legal disputes. The legislator has discretion to decide whether to assign proceedings not classified as civil litigation to the competence of the court or to some person attached to the court who, however, has no judicial power (e.g. court clerk, court administrator, enforcement administrator), or some other judicial body, e.g. notary public or court bailiff.

The legislator's decision may be based on expediency, the aim of ensuring a simpler and more flexible form of procedure, or on the traditions of the legal system as well<sup>22</sup>.

### **Compliance with procedural guarantees**

Deciding whether the adjudication of a civil case should fall within contentious or voluntary jurisdiction is a question of legal policy primarily. Therefore the dividing line between the two procedures is rather *unfixed*<sup>23</sup>, since as a result of a legislative decision litigation proceedings can easily become voluntary jurisdiction proceedings or the other way round. Despite the possible legal policy considerations there are matters “that are rather to be dealt with within the frames of litigation and there are cases that are rather to be dealt with under voluntary jurisdiction”<sup>24</sup>. The latter mainly include such proceedings that are aimed not at the resolution of a legal dispute, but rather its prevention or the promotion of the enforcement of rights. Mention should also be made of the fact that voluntary jurisdiction proceedings (due to the limited nature or lack of adversarial hearing, trial and demonstration of evidence) provide fewer guarantees for the right-seeking person compared to civil litigation, therefore in every case the legislator must weigh whether the regulation of a civil matter under voluntary jurisdiction would conflict with Article XXVIII (1) of the Fundamental Law providing for the right of access to

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<sup>21</sup> A similar approach may be encountered in German academic legal literature as well. Rosenberg, Leo, Schwab, Karl-Heinz, and Gottwald, Peter. 2010. *Zivilprozessrecht*. München: C. H. Beck. 61–62.

<sup>22</sup> See II.1. (Authorities responsible for considering voluntary jurisdiction cases)

<sup>23</sup> Fasching, Hans W. 1989. *Zivilprozessrecht. Lehr- und Handbuch*. Wien: Manz'sche. 66.

<sup>24</sup> German academic legal literature considers the delimitation of litigation and voluntary jurisdiction proceedings merely as a question of regulation. The legal regulation in force prescribes voluntary jurisdiction proceedings—for reasons of expediency and out of other considerations—also concerning matters which would otherwise be dealt with within the frames of litigation, and the other way round, it regulates as litigious proceedings matters that could also be disposed of under voluntary jurisdiction. Cp. Rosenberg, Leo, Schwab, Karl-Heinz, and Gottwald, Peter. 2010. *Zivilprozessrecht*. München: C. H. Beck. 63.

the courts or Article 6 of the European Convention on Human Rights relating to the right to a fair trial.

This fact is emphasized by Decision 36/2000. (X. 27.) AB of the Constitutional Court, according to which “it may be decided only based on the characteristics of the individual proceedings whether: there is such interest attached to the given proceeding that justifies its regulation outside litigation and whether within that range the nature of the proceeding (e.g. court proceeding or out-of-court proceeding) is well-suited to the rights sought to be enforced and protected by the proceeding, and whether the proceeding complies with the relevant guarantees.”

### *1.2.2 The regulative basis*

The current situation can be summarized as follows: at present approximately *one hundred* non-litigious procedures exist in Hungary, and the number of legal acts regulating these procedures is nearing *sixty*. Only Article 13 of Decree 105/1952. (XII. 28.) MT of the Council of Ministers can be considered as a common rule, according to which, unless the specific legal act which regulates the procedure of voluntary jurisdiction provides otherwise, or it follows otherwise from the nature of the procedure, the provisions of the Code of Civil Procedure shall be duly applied.

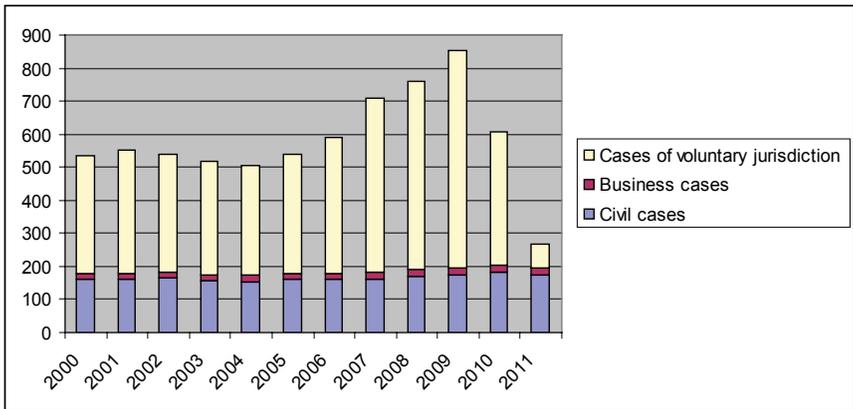
The Hungarian code of civil procedure – except some cases – does not regulate the procedures of voluntary jurisdiction. Approximately sixty legal acts contain provisions on these procedures. The most important sources are the followings:

- judicial deposit [27/2003. (VII. 2.) IM rend.];
- company registration (2006: V. tv.);
- registration of civil society organizations (1989: II. tv. 15. § , 2011: CLXXV. tv. 13. § );
- bankruptcy (reorganization) procedure(2006: VI. tv.);
- annulment of securities and documents (2008: XLV. tv. 28–36. § );
- liquidation procedure (2006: VI. tv.);
- order for payment procedure (Pp. 313–323. § , 2009: L. tv.);
- succession procedure [2010: XXXVIII. tv.];
- declaration of death [1/1960. (IV.16.) IM rend.];
- procedures of voluntary jurisdiction concerning industrial property rights (1995: XXXIII. tv. 85–103. § , 1997: XI. tv. 77–94. § , 1991: XXXVIII. tv. 37. § , 1991: XXXIX. tv. 23. § ); 2001: XLVIII. tv. 61–62. § ;
- procedures of voluntary jurisdiction for the review of administrative decisions [e.g. 1996: LVII. tv. 82. § ; 2003: LXXX. tv. 32. § ; 2007: LXXX. tv. 17. § ; 2009: LXII. tv. 21., 12. § stb.];
- procedures of the notaries public (1991: XLI. tv. 172., 175. § , 2008. évi XLV. tv.)
- procedure of voluntary jurisdiction for the review of the local governments’ decrees (2011: CLXI. tv. 46–56. § ),

- procedure of voluntary jurisdiction concerning suffrage (1997: C. tv. 82–85. § );
- procedures of voluntary jurisdiction related to arbitration (1994: LXXI. tv. 53. § )
- dissolution proceeding (2006: V. tv.);
- judicial enforcement (1994: LIII. tv. 1–224. § ).

### 1.2.3 The scope and viability of non-contentious jurisdiction

Exact statistical data are available on the number of proceedings of voluntary jurisdiction. The following diagram contains the number of litigious (civil and business) and non-litigious proceedings of the courts between 2000 and 2011. It shows that the number of non-litigious proceedings is much higher than the litigious ones. While the number of litigious cases is relatively constant, the number of non-litigious proceedings—which are particularly sensitive to economic processes—increased most dynamically during the years of the economic crisis, which affected Hungary also. In 2010 this process was disrupted, the explanation for which lies—*unfortunately*—not in the upturn of the economy, but in the fact that order for payment procedures making up the majority of non-litigious proceedings have been transferred from the jurisdiction of courts to the competence of notaries.



The number civil cases at first instance courts and cases of voluntary jurisdiction in Hungary after the millennium (thousand cases)<sup>25</sup>

<sup>25</sup> Kengyel, Miklós. 2013. Economic Analysis of Civil Litigation in Hungary. In *Recent Trends in Economy and Efficiency of Civil Procedure*, ed. Vytautas Nekrosius, 112–129. Vilnius: Vilnius University

*1.2.4 Judicial procedure for considering voluntary jurisdiction cases and its main differences from the procedure for considering contentious cases*

The general opinion of the Hungarian legal literature is that the procedures of voluntary jurisdiction are atypical compared to the litigious procedure. According to J. Farkas procedures of voluntary jurisdiction are all of those civil procedures which are not proceeded in the strict form of the litigious procedure. The strict form requires that *a)* only courts can proceed, *b)* there are two opposing parties in the procedure, *c)* it begins with claim, *d)* the court is obliged to hear both parties, *e)* in order to prove facts the court takes evidence, *f)* the court decides on the merits with the requirement of finality and their decisions are legally binding. If any of these criteria is lacking the procedure cannot be considered a litigious procedure<sup>26</sup>.

In procedures of voluntary jurisdiction:

- instead of a court, a notary public or a bailiff can proceed as well (e.g. succession procedure or judicial enforcement procedure);
- the opposite party may be missing (e.g. declaration of death);
- the procedure can be commenced by motion, request or other submission (e.g. the judicial enforcement procedure is commenced by a certificate of enforcement issued by the court or a notary public);
- the procedure is not adversarial (e.g. the notary public does not hear the other party in the case of an order for payment procedure);
- the court or notary public does not prove facts, or it does not takes evidence (e.g. order for payment procedure);
- the court decides with a ruling, or with other types of decisions which are not similar to judgment, but to rulings (e.g. enforcement clause issued by the court).

*1.2.5 The decisions taken as a result of considering of voluntary jurisdiction cases: the problem of res judicata*

According to their form, different decisions exist in non-litigious procedures: they can be rulings, orders, or other decisions (e.g. certificate of enforcement, or enforcement clause), according to their subject, they can be decisions on the merit, or decisions taken during the procedure. In non-litigious procedures judgments cannot be delivered.

Between decisions taken in litigious or non-litigious procedures, there is no difference in their so called “formal legal force” which means that the decision is unimpeachable. Legally binding decisions taken in non-litigious procedures are also unimpeachable.

<sup>26</sup> Farkas, József. 1978. *Bírósági és közjegyzői nemperes eljárások*. In *Polgári eljárásjog*, ed. Jenő Szilbereky, Budapest: Tankönyvkiadó. 177–178.

Among the legally binding decisions the judgment, the order and some rulings have force of *res judicata* too. In non-litigious procedures the law provides force of *res judicata* to the following decisions: order for payment (Act L of 2009, 36. §) and the court-approved settlement (Civil procedure code, 148. §). Other legal acts does not regulate the legal effect of the decisions made on the merit in non-litigious procedure, hence their legal nature should be taken into consideration. The following decisions have force of *res judicata* due to their nature: decision on cancellation of a company, decisions taken in the non-litigious procedures concerning industrial property rights, rulings taken on the merit, and among the non-litigious procedures of the notary public, the decisions on the annulment of securities and documents.

### *1.2.6 The specificity of appeal and reconsideration procedures*

Similarly to the litigious procedure, distinction is made between the ordinary and the extraordinary legal remedies. Ordinary remedies are the appeal, the opposition and the objection; extraordinary remedies are the revision and the retrial. It is possible to correct or supplement the decision in non-litigious procedures too and – unless otherwise provided by law – the party may file a motion for justification, if he or his legal counsel failed to appear on a certain date without any fault on his part, or missed a deadline for reasons beyond his control. Due to the nature of non-litigious procedures, there are special remedies too, e.g. withdrawal of the certificate of enforcement (Act on judicial enforcement, 211–212. §), or in the succession procedure the motion for repeat the procedure. (Act XXXVIII of 2010, 105. §).

In non-litigious procedure, appeal and revision is permitted against the decision on the merit. Legally binding rulings may be considered as decisions on the merit if the court (or other authority) decides on the initial application. But revision is not only permitted against legally binding rulings which finish the procedure, but against all other rulings in which the court (or other authority) decides on the merit. However in other cases the law explicitly excludes revision. Legal literature estimates that there are circa eighty rulings against which revision is permitted.

In case of the jurisdiction of a notary public or a bailiff, the parties may address a remedy against the decision of the notary public or the activity of the bailiff. For example the decision of the notary public in probate procedure can be challenged by the appeal court.

There are a great number of possible remedies available concerning the civil enforcement proceedings. These remedies may be divided in two main groups: non-litigious remedies (which may be sought within the framework of the enforcement proceedings) and litigious remedies. Within the two above-mentioned main groups, we may distinguish further categories.

The court is to cancel the writ of execution if the court issued the writ of execution on a document in violation of the law. Either party (the debtor and al-

so the creditor) may apply for this remedy, but in practice, in the majority of cases, it is the debtor that applies for the withdrawal or cancellation. The court may also cancel the writ based on the bailiff's report. This is a special procedure also in the sense that there is no time limit concerning the application for remedy. The petition for the cancellation of the writ may be successful if some legal condition was not met regarding the issue of the enforcement order at the time of ordering the enforcement. Such deficiency may be if the notarial document does not contain or does not contain precisely the conditions specified under Section 21 of the Enforcement Act and therefore judicial enforcement of the document is not possible<sup>27</sup>. The ground for the cancellation of the writ of execution could also be the lapse of the right of enforcement concerning the claim to be enforced<sup>28</sup>.

After the initiation of the enforcement proceedings, the debtor may provide documentary proof that it is probable that he no longer owes a debt or that the claim is unfounded. Such announcement has to be submitted to the bailiff accompanied by the appropriate document, who will set a 15-day deadline for the person requesting the enforcement to make a statement. If the person requesting the enforcement acknowledges the cessation of the claim and pays the costs incurred, the enforcement is terminated. However, it is more common that the person requesting the enforcement does not acknowledge that the debtor has fully performed his obligation. The controversy between the parties is usually concerning the amount. In such cases the dispute may be resolved within the framework of an enforcement action.

A special remedy relating to the implementation of enforcement is the demurrer of enforcement. The demurrer of enforcement cannot be linked to the person of the notary public drafting the notarial document or his actions. The demurrer of enforcement as an institution of remedy is always based on the bailiff's unlawful actions or his failure to take action. The demurrer may be submitted either by the debtor or the creditor to the court effectuating the enforcement. The demurrer of enforcement has to be filed within 15 days after the actions carried out by the bailiff. If the person filing the demurrer learnt about the actions only later or he was hindered from submitting the demurrer even after the 15 days from the bailiff's action, limitation for the submission of the demurrer of enforcement runs from the time when the person learnt about the bailiff's actions or when the obstacle was removed. More than six months after the bailiff's actions, it is not possible to file a demurrer of enforcement. No justification is accepted for the failure to meet the deadline [§ 217 Enforcement Act].

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<sup>27</sup> Rudolf, László. 2001. A közjegyzői okirat bírósági végrehajtása. *Közjegyzők Közlönye* 7–8: 12–14.

<sup>28</sup> Vida, István. 2004. A végrehajtás elrendelésével kapcsolatos jogorvoslatok. In *A bírósági végrehajtás magyarázata*, ed. János Németh and Daisy Kiss, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó. 88.

The special nature of the demurrer is constituted by the fact that it is a non-du-  
table remedy and has no suspensory effect on the actions. If it is successful, the  
court suspends the bailiff's actions or orders him to take different action<sup>29</sup>.

An appeal may be lodged against any court order passed in the course of the  
implementation of enforcement.

### § 1.3 Particular procedures

#### 1.3.1 Order for payment procedure

The main purpose of the order for payment procedure is to ensure the settling  
of such presumably uncontested claims by means of a rapid non-litigious proce-  
dure, which does not merely reduce the workload of the court but also provides  
the parties with a time – and cost-efficient solution. The order for payment proce-  
dure is one of the few non-litigious procedures the rules of which – for a long  
time – were not contained in a separate statute or other legal instrument but in the  
Code of Civil Procedure (HCCP) itself. Mostly non-litigious procedures closely  
connected with litigious procedures were afforded space in the HCCP<sup>30</sup>. By now  
the regulatory technique used by legislators has become different. Rules relating  
to the order for payment procedure have basically been placed in a separate Act  
(Act Nr. 50 of 2009); at the same time, the same Act has amended Chapter XIX  
of the HCCP, the content of which has been reduced to “the court's tasks per-  
taining to the order for payment procedure”<sup>31</sup>.

The institution of the order for payment procedure was introduced into the  
Hungarian legal system by Act Nr. 19 of 1893. It was subsequently regulated by Act  
Nr 3 of 1952 on the Code of Civil Procedure, and has undergone numerous mod-  
ifications since then. Although there was no change in the essence of the legal  
institution for a century<sup>32</sup>, the detailed rules, including in particular the regula-  
tion relating to the value limit and the conditions of the statement of opposition,  
were amended several times<sup>33</sup>. A few years ago a real turning point was brought

<sup>29</sup> Kengyel, Miklós, and Harsági, Viktória. 2010. *Civil Justice in Hungary. Nagoya University Comparative Study of Civil Justice. Vol. 4*. Tokyo: Jigakusha. 199–200.

<sup>30</sup> For more detail on the earlier regulation, see: Németh János. 2003. Das Mahnverfahren im ungarischen Zivilverfahrensrecht. In *Festschrift für Kostas E. Beys dem Rechtsdenker in attischer Dialektik*, ed. Nakamura Hideo, 1125–1138. Athen: Sakkulas.

<sup>31</sup> Harsági, Viktória. 2012. The notarial order for payment procedure as a Hungarian peculiarity. In *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag*, ed. Reinhold Geimer, and Rolf A. Schütze, München: Sellier, 343. p.

<sup>32</sup> Gáspárdy, László. 1994. A magyar fizetési meghagyásos eljárás – nyugat-európai összehason-  
lításban. *Jogtudományi Közöny* 4–5: 151–158.; Szécsényi-Nagy, Kristóf. 2012. *Nagykommentár a fizetési meghagyásos eljárásról szóló törvényhez*. Budapest: Complex Kiadó. 30–34. p.; Harsági, Viktória. 2012. A magyar fizetési meghagyásos eljárás fejlődéstörténetének áttekintése. *Ius-tum Aequum Salutare* 3–4: 223–237. [www.jak.ppk.hu/hir/ias/ias.htm](http://www.jak.ppk.hu/hir/ias/ias.htm). Accessed 25 April 2015.

<sup>33</sup> Kengyel, Miklós. 2010. *Magyar polgári eljárásjog*. Budapest: Osiris. 521.

about by Act Nr. 30 of 2008 and Act Nr. 50 of 2009. These two Acts served as a basis for the comprehensive reform of the Hungarian order for payment procedure. The former Act, on the one hand, concerned the structure of the procedure to some extent, on the other hand, created the possibility of electronic processing. Although the amendment of 2008 opened the way to the introduction of the electronic order for payment procedure, it did not elaborate the detailed regulation. The Act carried out alterations that simplified paper-based administration of affairs to a great extent and rendered it possible for legal practice to carry out the subsequent transition to electronic order for payment procedures smoothly. The automated order for payment procedures at the courts has not been set up. The practical implementation of electronic processing is ensured by the regulation contained in Act Nr. 50 of 2009. This Act delegates the procedure within the competence of notaries public and contains the detailed rules required for establishing the electronic procedure<sup>34</sup>.

Act Nr. 50 of 2009 provided the order for payment procedure with completely new foundations. In Hungary – similarly to most European countries – since the entry into force of these provisions, it has been possible to have recourse to the order for payment procedure *exclusively in order to enforce pecuniary claims*<sup>35</sup>. The order for payment procedure has become transformed into such a non-litigious procedure, where the issue of the order for payment may take place *without the examination of the legal basis or evidentiary proof of the claim*<sup>36</sup>. After the order for payment has acquired legal force, it also falls within the competence of the notary public to order its enforcement.

An innovation which has an essential influence on the character of the procedure is constituted by *electronic, automated processing*. The explanation to the Act refers to the computer system to be set up as a “nationally uniform computer system”, which “contains and mechanically processes declarations and documents relating to order for payment procedures”. All notaries public are granted direct access to the computer system. They carry out their procedural acts through this system, electronically. The automated system creates the decisions during the procedure always on behalf of the “proceeding” notary public, and the decisions bear the name and imprint of the stamp of the given notary public. According to the explanation, the notary public is liable for the decision so issued in his name.

<sup>34</sup> Harsági, Viktória. 2010. A fizetési meghagyásos eljárás. In *Polgári eljárásjog*, ed. Petrik Ferenc, Budapest: HVG–ORAC, D/85.

<sup>35</sup> In accordance with the Hungarian regulation, for a long time, it was possible to enforce two types of claims by the order for payment procedure: firstly, pecuniary claims and secondly, claims directed at the surrender of personal property. This latter was not a common solution in international comparison.

<sup>36</sup> Lugosi, József. 2010. *Kézikönyv a fizetési meghagyásos eljárásról*. Budapest: HVG–ORAC. 16.; For more detail, see: Szécsényi-Nagy, Kristóf. 2010. A fizetési meghagyásos eljárás. In *A polgári nemperes eljárások joga*, ed. Varga István, Budapest: ELTE Eötvös Kiadó. 853.; Harsági, Viktória. 2010. A fizetési meghagyásos eljárás. In *Polgári eljárásjog*, ed. Petrik Ferenc, Budapest: HVG–ORAC. D/102/13–14.

The parties and their representatives are also granted access to the system in order that they can directly register their submissions in the internet-based system (on a Web surface). The processing of applications is automated, in other words, the computer system can carry out the procedural acts without requiring human participation if the statutory conditions for this are met. The acts performed in this way are to be regarded as measures taken by the proceeding notary public.

The electronic procedure renders it possible to shorten the length of the procedure significantly. Applications that have been submitted electronically must be disposed of within three working days. As opposed to this, the time limit relating to oral or paper-based applications is a lot longer, 15 days. This is explained by the fact that in the latter case on the basis of the oral or paper-based petition the data will be registered by the notary public in the system of the Hungarian Chamber of Civil Law Notaries (Magyar Országos Közjegyzői Kamara, hereinafter: MOKK), then they will be processed by the system automatically, similarly to applications registered by the party through the internet<sup>37</sup>.

The cases in which an order for payment may be issued have been defined by the legislator in conformity with the regulation relating to small claims. Diverging from the earlier Hungarian tradition *only pecuniary claims that have fallen due* may be enforced within this procedure. The Act lays down one million forints as the statutory limit<sup>38</sup>, so claims not exceeding this amount can be enforced exclusively by means of an order for payment procedure. If in his action the claimant is exclusively asserting a claim that may only be enforced by way of an order for payment procedure, on dismissing the statement of claim without the issue of summons, the court will inform him about the possibility and ways of starting an order for payment procedure. Originally the Act did not lay down a maximum value limit, but in practice typically claims of a lesser value are enforced this way. In 2012 was introduced a maximum value limit of 400 million forints.

However, it should be noted that in cross-border cases the party is not prevented from enforcing his claim within the framework of the procedure defined by Regulation (EC) № 861/2007 establishing a cross-border European Small Claims Procedure or in arbitration proceedings. The European order for payment procedure is not mentioned among these alternatives by the legislator. As a matter of course – if the conditions laid down by Regulation (EC) № 1896/2006 are met – this procedure can also constitute an alternative for the order for payment procedure regulated by national law<sup>39</sup>.

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<sup>37</sup> Harsági, Viktória. Az elektronikus fizetési meghagyásos eljárások problematikája – hazai, valamint német és osztrák példákon keresztül. *Infokommunikáció és Jog* 5–6: 179–184.; Molnár, Judit. 2014. *A magyar fizetési meghagyásos eljárás az európai megoldások tükrében*. Budapest: Közjegyzői Akadémiai Kiadó, 157–168.

<sup>38</sup> For more detail, see: Szécsényi-Nagy, Kristóf. 2008. A fizetési meghagyásos eljárás reformja. In *A fizetési meghagyásos eljárás átalakulása*. Budapest: MOKK .17. p

<sup>39</sup> Kengyel, Miklós, and Harsági, Viktória. 2009. *Európai polgári eljárásjog*. Budapest: Osiris. 321.

If the defendant does not have a known Hungarian domicile or place of habitual residence or seat or representation (collectively: a Hungarian address for service of process), it is not possible to conduct a Hungarian order for payment procedure. In such a case the claimant may enforce the claim within the framework of litigious proceedings. Obviously, this restriction cannot be applied in the European order for payment procedure. This restriction relating to the Hungarian order for payment procedure points back in time: it could also be detected in the earlier regulation falling within the jurisdiction of the courts at the time. The reason for the provision lies in the fact that in such a situation service by public notice would be required, which, on due application of § 102 (3) of the Code of Civil Procedure would lead to the appointment of a guardian ad litem. Then in turn, the guardian ad litem would be obliged to submit a statement of opposition, as a result of which all order for payment procedures initiated under such circumstances would, in the order of things, be transferred into civil court proceedings. Consequently, in such a construction the order for payment procedure could not fulfil its function<sup>40</sup>.

A pecuniary claim arising from an employment relation can be enforced by way of an order for payment procedure only if the subject-matter of the case is not constituted by the establishment, modification or termination of the legal relation or a penalty applied as a result of the culpable breach by the employee of his obligations relating to the employment relation, or a penalty applied in the case of a breach of discipline. In other cases it is possible to commence legal proceedings directly<sup>41</sup>.

Similarly to the drafting of notarial documents, concerning order for payment procedures as well, the competence of the notary public extends to the whole country. As a result of this, a jurisdiction clause is not possible. In such a construction inequalities in the territorial distribution of cases may be balanced better, as a result of which the efficiency of the system can be increased. However, it should also be noted that this solution is rendered possible by electronic processing, since from the aspect of disposing of applications submitted electronically in the “virtual space”, in an automatic system, the seat and geographical location of the office of the notary do not have much significance.

In the case of applications lodged via the internet, the distribution of cases takes place in an automatic system, electronically. In order to avoid a situation serving as a ground for disqualification, the notary public is required to register the names of his relatives in the system. Identity of names is screened by the distribution system<sup>42</sup>.

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<sup>40</sup> Harsági, Viktória. 2010. A fizetési meghagyásos eljárás. In *Polgári eljárásjog*, ed. Petrik Ferenc, Budapest: HVG–ORAC. D/102/17.

<sup>41</sup> Asbóth-Hermányi, Lőrinc. 2012. *Módszertani útmutató a fizetési meghagyásos eljáráshoz*. Budapest: HVG–Orac. 98–104.

<sup>42</sup> Szécsényi-Nagy, Kristóf. 2012. *Nagykommentár a fizetési meghagyásos eljárásról szóló törvényhez*. Budapest: Complex Kiadó. 106–112.

The party (if the party is a natural person and does not have a legal representative) may lodge his application in paper form or orally with any notary public. Basically, the notary with whom the application has been lodged will proceed in such a situation. As a matter of fact, this regulation ensures a choice of forum for the claimant; however, it is of little practical significance because of automatic processing. Choosing one or another notary may, at most, mean a relatively quicker procedure within the 15-day limit prescribed for disposing of such cases, depending on the momentary workload of the chosen notary.

Electronic application must be submitted on a standard form or electronically via an internet surface. The processing of applications will take place automatically – regardless of the method of their submission. For this very reason, it is enough to submit one copy in the case of an application filed in the traditional paper form as well. The notary will immediately record the data of the application in the computer system. It also results from digital data processing that it is not necessary or possible to attach annexes to the applications basically. An application filed electronically may be submitted on an electronic standard form laid down in the order of the Minister of Justice via the system of the MOKK. The qualified electronic signature guarantees that the application has been made by the claimant, and the qualified time stamp certifies the date of submission. The system will send an error message to the submitting person about the deficiencies of the applications intended for electronic submission. The data of the application may be entered in the system of the MOKK after the they have been completed or rectified. The person submitting the application will receive an automatically generated feedback on the registration of the application<sup>43</sup>.

Service may take place in paper form or electronically. The paper-based document is centrally printed out and prepared for postal delivery by the computer system of the MOKK. At the request of the claimant, the order for payment must be served on the defendant by way of service by a bailiff.

If the claimant does not have a Hungarian address for service of process, he is required to appoint an agent for service of process. In case of failure to comply with this requirement, service by public notice is applicable. It is worth noting the modern solution laid down by § 15 (6) of the Act, which allows the realization of service by public notice via the internet. Obviously, publication of the document itself on the website of the MOKK is excluded because of the wide access to it, as in this case data protection could not be ensured<sup>44</sup>.

Concerning the rules relating to the issue of the order for payment, relatively few changes may be encountered. However, time limits relating to the administration of affairs have been modified significantly. The notary public must issue the order for payment within 15 days in the case of an application submitted in paper

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<sup>43</sup> Lugosi, József. 2010. *Kézikönyv a fizetési meghagyásos eljárásról*. Budapest: HVG-ORAC. 165–166.

<sup>44</sup> Szécsényi-Nagy, Kristóf. 2012. *Nagykommentár a fizetési meghagyásos eljárásról szóló törvényhez*. Budapest: Complex Kiadó. 151.

form and within 3 days in the case of an application filed electronically. The difference between the two time limits may encourage parties to submit their applications electronically even if they are otherwise not required to do so.

The detailed explanation for the bill emphasizes that the regulation relating to time limits is only of theoretical significance, since if the notary should fail to observe the time limit, the computer system of the MOKK would automatically issue the order for payment on the notary's behalf on the next working day following the expiry of the deadline<sup>45</sup>. In such a case – if the order for payment has been issued deficiently and it has not been possible to remedy the deficiency as a result of the notary's omission – the notary must bear the (professional and financial) liability.

The defendant may file a statement of opposition against the order for payment with the notary public within 15 days from service. If the statement of opposition is directed at only one part or provision of the order for payment, the part (provision) of the order for payment not concerned by the statement of opposition will enter into force.

If in the statement of opposition the defendant refers to the fact that he had performed the enforced claim already prior to the service of the order for payment, at the same time as the notary public serves the notification of statement of opposition on the claimant, he will call upon him to make a declaration about the existence of the claim to the notary public within 15 days. If the claimant accepts the defendant's allegation or he fails to make a declaration after having been called upon to do so, the notary public will terminate the procedure.

It cannot be considered as contesting the order for payment if the defendant argues that he performed the enforced claim following the receipt of the order for payment; in this case the order will enter into force on the day following the deadline for the filing of a statement of opposition. Following the receipt of the defendant's declaration, at the same time as the notary public serves the notification of the declaration on the claimant, he will call upon him to make a declaration about the existence of the claim. If the claimant accepts the defendant's allegation or does not make a declaration as required, the notary will indicate in the *res judicata* clause that the claim – or its part concerned by the declaration or acceptance – is not subject to enforcement<sup>46</sup>.

Compared to the earlier situation, it may be evaluated as a novelty that the defendant proceeding in person may also present his statement of opposition orally; moreover, he may not only do so before the notary proceeding in his case but before any notary. He may submit his statement of opposition in writing either to the notary or directly to the computer system of the MOKK. In order to alleviate the defendant's situation, he receives the standard form relating to the statement of opposition together with the order for payment, accompanied by a reply envelope.

<sup>45</sup> Lugosi, József. 2010. *Kézikönyv a fizetési meghagyásos eljárásról*. Budapest: HVG-ORAC. 150.

<sup>46</sup> Szécsényi-Nagy, Kristóf. 2012. *Nagykommentár a fizetési meghagyásos eljárásról szóló törvényhez*. Budapest: Complex Kiadó. 287–297.

As a result of the statement of opposition filed in due time, the order for payment procedure – in its part concerned by the statement of opposition – is transferred to ordinary court proceedings. At the same time as serving the notification of the statement of opposition on the claimant, the notary calls upon the claimant to pay the court fees relating to the proceedings in a submission filed with the court within 15 days of the service of the notification and to present his detailed allegations of fact pertaining to the case together with the supporting evidence. In his call the notary includes a warning that if the claimant fails to carry out its contents, the court will discontinue the civil proceedings. Following the service on the claimant of the notification about the statement of opposition, the notary sends a copy – printed through the system of the MOKK – of the documents recorded in the system of the MOKK pertaining to the order for payment procedure to the court specified in the application for the order for payment by the claimant<sup>47</sup>.

The order for payment that is not challenged by a statement of opposition within the time limit laid down by law enters into force, and it has the same effect as a final judgment. Against a final order for payment one may have recourse to retrial as extraordinary remedy; however, review is not possible. The court having jurisdiction to conduct retrial proceedings is the one that – in the case of a statement of opposition – would have had jurisdiction as a first instance court to conduct the civil proceedings to which the procedure has been transferred.

With regard to orders for payment having entered into force, the Act delegates the ordering of enforcement to the competence of notaries. Both written and oral application for enforcement may be submitted to any notary, while electronic applications are forwarded to the proceeding notary by the case distribution system. No application for enforcement may be submitted more than 10 years after the entry into force of the order for payment; failure to comply with this time limit results in forfeiture of the right. The certificate of enforcement is issued in the form of an electronic document and it is forwarded electronically to the bailiff, via the electronic system of the MOKK and the Hungarian Chamber of Court Bailiffs.

If the defendant has not taken delivery of the order for payment and, therefore, it must be deemed as delivered on application of the presumption of service contained in § 99 (2) of the HCCP, the notary will inform the claimant about the fact that the defendant may submit a statement of opposition within 15 days of the service of the enforcement order. If the claimant has requested service by a bailiff in such a case, the time limit must be calculated from the point in time when the document containing the final order for payment was successfully delivered by the bailiff. If the final order for payment is challenged by a statement of opposition within the defined time limit, the order will cease to have effect.

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<sup>47</sup> Lugosi, József. 2010. *Kézikönyv a fizetési meghagyásos eljárásról*. Budapest: HVG-ORAC. 283–286.

The beginning of the time limit relating to the second possibility of statement of opposition may be brought forward by the claimant to the time preceding the enforcement proceeding, thus the claimant may spare the costs of enforcement, which are useless expenses in the case of a statement of opposition<sup>48</sup>.

### 1.3.2 Enforcement Procedure

The enforcement procedure consists of the totality of substantive and procedural legal relations. In order to commence enforcement proceedings, a legal title is required, which enforcement, in a narrow sense, means the right to commence enforcement proceedings, and in a broader sense, it refers to the totality of substantive and procedural legal consequences originating from the legal relation, which affect the rights and obligations of the participants of the enforcement proceedings.<sup>49</sup> A characteristic element of enforcement is constituted by the application of sanctions, which may be directed against persons or property. Basically, two types of enforcement may be distinguished: criminal enforcement, where sanctions are predominantly directed against persons and judicial enforcement, which is primarily directed against the debtor's assets, but the application of coercive measures against persons is not excluded either. Judicial enforcement may serve the purpose of enforcing both private law and public law claims (e.g. outstanding tax liabilities). The Enforcement Act of 1994 contains procedural rules and provisions relating to enforcement agencies. Rules of substantive law may be found primarily in the new Civil Code, which also incorporates two formerly independent codes – the Act on Business Associations and the Family Law Act.

The rights afforded in the Civil Code may be enforced by way of judicial process – unless otherwise provided for by law (Section 1:6, Civil Code). If the claim awarded by the court is not voluntarily performed by the debtor, *the court will order enforcement*, at the creditor's request, if the writ of execution *a)* contains an obligation (ruling against the judgment debtor), *b)* is definitive or is subject to preliminary enforcement, and *c)* the deadline of performance has expired (Section 13 Enforcement Act). The judgment creditor shall, within the framework of this Act, have the privilege to specify the type of property of the judgment debtor from which to secure enforcement of his claim (Section 8). In the course of judicial enforcement, executive force may be employed to force a party compelled for payment of money or for some other conduct to fulfill such obligation (Section 5).

“The essence of judicial enforcement lies in the application of executive force. This takes place only in the event of the lack of voluntary performance; executive force is resorted to, in any case, secondarily, with a subsidiary character. In its

<sup>48</sup> Szécsényi-Nagy, Kristóf. 2010. A fizetési meghagyásos eljárás. In *A polgári nemperes eljárások joga*, ed. Varga István, Budapest: ELTE Eötvös Kiadó. 897.

<sup>49</sup> Vida, István. 2004. A végrehajtás elrendelésével kapcsolatos jogorvoslatok. In *A bírósági végrehajtás magyarázata*, ed. János Németh and Daisy Kiss, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó. 166.

decision the Regional Court of Appeal of Budapest pointed out: executive force applied against the debtor on justified grounds – in the lack of voluntary performance – does not constitute an injury to personal rights and therefore it does not serve as a ground for the award of damages.”<sup>50</sup> In the view of the Constitutional Court, it is a provision expressly serving the purpose of the protection of creditors and the general interests of the rule of law that the bailiff does not send a second, completely unnecessary warning to the debtor to perform voluntarily, but instead he or she appears at the debtor’s apartment and seizes the debtor’s personal assets to cover the debt [Decision No. 46/1991. (IX. 10.) AB of the Constitutional Court].

Judicial enforcement is a way of *singular assets enforcement*, not the whole property of the debtor is subjected to enforcement, but his specifically defined assets or pecuniary rights. However, these measures do not concern the debtor as a legal subject. Universal enforcement takes place during liquidation proceedings, where the liability of the business undertaking for its debts extends to all of the assets of the undertaking. As a result of liquidation proceedings the business undertaking ceases as a legal subject. In the case of private individuals no liquidation can take place, nevertheless, it is to be noted that the Hungarian Parliament is soon going to debate the bill on private bankruptcy.

Among the Basic Provisions of the Enforcement Act one may find several provisions relating to the protection of debtors. They include, e.g. that *executive force* may, within the framework of the Act, be used primarily to restrict the pecuniary rights of the judgment debtor, and may affect the judgment debtor’s civil rights only exceptionally in justified cases (Section 5, Enforcement Act).

During judicial enforcement, money claims are to be collected, *in the first place*, from the funds on the debtor’s account administered by the financial institution and, *in the second place*, from the debtor’s wages. If it is foreseeable that the enforcement directed at the funds deposited in a financial institution in the name of the debtor or at his wages will not lead to success within a relatively short period of time, *any asset of the debtor* may be subject to enforcement. However, the seized *real property* may be sold only if the claim is not fully covered by other assets of the debtor or it could be satisfied in a disproportionately long period of time [*Gradus executionis* – Section 7 Enforcement Act].

As we have already pointed out concerning the previous point, the judgment creditor shall have the privilege to specify the type of property of the judgment debtor from which to secure enforcement of his claim. For the purpose of proportionate and/or gradual application of coercive enforcement, *the court may deviate from the disposition of the judgment creditor* in the interest of the judgment debtor (Section 8 Enforcement Act).

In contrary to some other European states (e.g. Germany, Italy and Poland), in Hungary there is not any debtor’s assets declaration. Consequently, information

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<sup>50</sup> Gyekiczky, Tamás. 2009. A végrehajtási kényszer alkalmazása. In *A bírósági végrehajtás magyarázata*, ed. Tamás Gyekiczky, Budapest: Complex, 103.

about the debtor's assets may be obtained from public registers. It can be obtained by the enforcement organs. Apart from creditors and their lawyers, this task is mainly shouldered by court bailiffs, to whom the authorities can refuse to provide the required information free of charge. Some of the public registers are electronic; therefore, those entitled to it may easily access the required information. The situation of creditors who have free access only to population registers has become more difficult.

The debtor's financial situation may be revealed based on various public registers. It is the bailiff's task to obtain, if necessary, the data relating to the debtor's income and his assets that may be subjected to enforcement. Authorities and organizations administering registers must comply with the bailiff's request within eight days without charging procedural duty or a fee.

The gathering, verification and processing of the data of the debtor and other persons involved in enforcement proceedings is regulated by Section 47 Hungarian Enforcement Act. In according to it in the interest of carrying out the enforcement procedure successfully, the bailiff shall obtain information for the identification of the judgment debtor, and other particulars such as permanent or habitual residence, head office, place of business, place of employment (or self employment), income and any property that can be seized (movable or immovable property, payment account, deposit, securities, partnership share or other interest in a business association etc.).

The bailiff shall be entitled to approach the authorities and organizations so as to obtain the above mentioned information, such as the police, departments of motor vehicle registration, agencies for personal data and address records, document bureaus, pension insurance administration agencies and health insurance administration agencies tax authorities, courts of registry, payment service providers, investment firms, the real estate supervisory authority, agencies of water and aircraft passenger records, telecommunications organizations, the records office of liens on movable properties (hereinafter referred to as "lien records"), notaries public, and the Chamber so as to review its files on debtor economic operators.

The above-specified authorities and organizations shall satisfy the bailiff's request for information within 8 days free of any dues or charges.

In its request for information the bailiff shall indicate the case number or the number of the writ of execution to which the information pertains. The bailiff shall safeguard all data and information obtained in his official capacity from any unauthorized access, from publication, and from any illegal use or use for the purpose of any criminal act. The circumstance when such data and information can be contained in any executory documents or can be disclosed to third parties are governed by law.

If the bailiff has in his possession any data and information on the judgment debtor other than those contained in the relevant documents, it shall be recorded in a protocol when the case is closed and filed, and a copy shall be attached to the file. The data and information can be retained for ten years after the en-

forcement case is closed and filed, following which the bailiff shall destroy the documents containing any such data or shall provide for having the data erased some other way.

The bailiff may request the data by way of electronic means from the authorities and bodies keeping electronic records of such data (e.g. land register).

According to Section 47/A the bailiff may consult the personal data and address records, the register of driver's licenses, and/or the authority maintaining the register of travel documents or the body operating the central immigration register: *a)* to verify the data provided in proof of the identity and home address; *b)* to confirm the validity of the identification document or residence document (hereinafter referred to collectively as "identification document") of the person. The verification may involve the personal data of the judgment debtor, if a natural person, other debtors, and other persons involved in the enforcement proceedings, whose identity the bailiff has established. The bailiff shall inform the person affected, and attending the act of enforcement, other than the judgment debtor, before commencing the verification procedure indicating its purpose, methodology and contents, the obligation to refuse cooperation, the obligation of notification, and concerning the processing of the data obtained.

Data and information for the above-specified control shall be requested by way of electronic means, with the bailiff's official electronic signature affixed to the request.

Coercive enforcement may restrict the debtor's pecuniary rights in the first place but, in exceptional cases, it may also concern his civil rights. Coercive action against the person of the debtor is implemented by the police based on the measures taken by the bailiff.

The proportionate and gradual application of coercive enforcement (*Gradus executionis*). In accordance with the Enforcement Act, during judicial enforcement, money claims are to be collected, in the first place, from the funds on the debtor's account administered by the financial institution, in the second place, from the debtor's wages. If it is foreseeable that the enforcement directed at the funds deposited in a financial institution in the name of the debtor or at his wages will not lead to success within a relatively short period of time, any asset of the debtor may be subject to enforcement. However, the seized real property may be sold only if the claim is not fully covered by other assets of the debtor or it could be satisfied in a disproportionately long period of time (§ 7 Enforcement Act).

The creditor's right to disposition. It depends on the creditor's disposition from what type of asset of the debtor he wishes to secure enforcement of his claim. However, this right may only be exercised within lawful limits, thus e.g. it cannot be directed at pointing out specific assets during the seizure (§ 8 Enforcement Act).

In case of the jurisdiction of a notary public or a bailiff, the parties may address a remedy against the decision of the notary public or the activity of the

bailiff. For example the decision of the notary public in probate procedure can be challenged by the appeal court. There are a great number of possible remedies available concerning the civil enforcement proceedings. These remedies may be divided in two main groups: non-litigious remedies (which may be sought within the framework of the enforcement proceedings) and litigious remedies. Within the two above-mentioned main groups, we may distinguish further categories.

The court is to cancel the writ of execution if the court issued the writ of execution on a document in violation of the law. Either party (the debtor and also the creditor) may apply for this remedy, but in practice, in the majority of cases, it is the debtor that applies for the withdrawal or cancellation. The court may also cancel the writ based on the bailiff's report. This is a special procedure also in the sense that there is no time limit concerning the application for remedy. The petition for the cancellation of the writ may be successful if some legal condition was not met regarding the issue of the enforcement order at the time of ordering the enforcement. Such deficiency may be if the notarial document does not contain or does not contain precisely the conditions specified under Section 21 of the Enforcement Act and therefore judicial enforcement of the document is not possible<sup>51</sup>. The ground for the cancellation of the writ of execution could also be the lapse of the right of enforcement concerning the claim to be enforced<sup>52</sup>.

After the initiation of the enforcement proceedings, the debtor may provide documentary proof that it is probable that he no longer owes a debt or that the claim is unfounded. Such announcement has to be submitted to the bailiff accompanied by the appropriate document, who will set a 15-day deadline for the person requesting the enforcement to make a statement. If the person requesting the enforcement acknowledges the cessation of the claim and pays the costs incurred, the enforcement is terminated. However, it is more common that the person requesting the enforcement does not acknowledge that the debtor has fully performed his obligation. The controversy between the parties is usually concerning the amount. In such cases the dispute may be resolved within the framework of an enforcement action.

A special remedy relating to the implementation of enforcement is the demurrer of enforcement. The demurrer of enforcement cannot be linked to the person of the notary public drafting the notarial document or his actions. The demurrer of enforcement as an institution of remedy is always based on the bailiff's unlawful actions or his failure to take action. The demurrer may be submitted either by the debtor or the creditor to the court effectuating the enforce-

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<sup>51</sup> Rudolf, László. 2001. A közjegyzői okirat bírósági végrehajtása. *Közjegyzők Közlönye* 7–8: 12–14.

<sup>52</sup> Vida, István. 2004. A végrehajtás elrendelésével kapcsolatos jogorvoslatok. In *A bírósági végrehajtás magyarázata*, ed. János Németh and Daisy Kiss, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó. 88.

ment. The demurrer of enforcement has to be filed within 15 days after the actions carried out by the bailiff. If the person filing the demurrer learnt about the actions only later or he was hindered from submitting the demurrer even after the 15 days from the bailiff's action, limitation for the submission of the demurrer of enforcement runs from the time when the person learnt about the bailiff's actions or when the obstacle was removed. More than six months after the bailiff's actions, it is not possible to file a demurrer of enforcement. No justification is accepted for the failure to meet the deadline [§ 217 Enforcement Act].

The special nature of the demurrer is constituted by the fact that it is a non-durable remedy and has no suspensory effect on the actions. If it is successful, the court suspends the bailiff's actions or orders him to take different action<sup>53</sup>.

An appeal may be lodged against any court order passed in the course of the implementation of enforcement.

The Hungarian Enforcement Act regulates the order of enforcement in a rather complicated way. The final court judgement, the settlement or the notarial document are not sufficient for the enforcement, the creditor has to apply to the court for the issue of an enforcement order. Based on its own decision or the approved settlement, the court issues a certificate of enforcement and to the notarial document, it affixes a certificate of enforcement. The "certificate of enforcement" was taken over by Hungary from Soviet law in the 50 s and we have not been able to get rid of it even since the political transformation<sup>54</sup>.

General conditions of enforcement: An enforcement order may be issued only if the decision to be enforced or the claim based on a document a) contains an obligation (ruling against the debtor), b) it is final or may be preliminarily enforced and c) the deadline for performance has expired. On the basis of a court-approved settlement, an enforcement order may be issued even if the writ of approval has been contested.

Below is given a non-exhaustive list of enforcement titles, based on which the court issues a certificate of enforcement:

- a court ruling against the debtor in a civil case,
- a court ruling against the defendant passed in a criminal case with regard to the civil law claim
- a court-approved settlement
- a decision adopted by a notary public against the debtor
- a settlement approved by a notary public
- judgements of various disciplinary tribunals
- a judgement by a foreign court

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<sup>53</sup> See: Kengyel, Miklós, and Harsági, Viktória. 2010. *Civil Justice in Hungary*. Nagoya University Comparative Study of Civil Justice. Vol. 4. Tokyo: Jigakusha. 199–200.

<sup>54</sup> Vida, István. 2004. A végrehajtás elrendelésével kapcsolatos jogorvoslatok. In *A bírósági végrehajtás magyarázata*, ed. János Németh and Daisy Kiss, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó. 213.

- a foreign or Hungarian arbitration award (§ 15 Enforcement Act).

The court or the notary affixes a writ of execution to notarial documents and the decisions of various disciplinary authorities and also to specific decisions by employers.

The enforcement order is usually sent to the bailiff. However, if the claim has to be satisfied exclusively from the debtor's wages, the court passes an order for garnishment of wages, in which it calls upon the employer to deduct the amount indicated in the order from the debtor's wages and pay it to the creditor without delay (§ 24 Enforcement Act).

### **§ 1.4 The future of voluntary jurisdiction: planned reforms**

In the last five years many non-litigious procedures have been renewed. This reform process started with the Act XLV of 2008 on certain non-litigious procedures of the notary public, which was followed by the Act L of 2009 on the order for payment procedure. This act – in a unique way in Europe – gave jurisdiction to the notary public, instead of courts, to issue the order for payment. In 2010, one of the oldest procedures, the succession procedure has been reformed as well. After the change of government, the focus of legislation shifted to the issues of the public law (Basic Law, the organization of the courts, the public administration). In the field of private law, the re-codification of the Civil Code has to be mentioned. The Act CLXXV of 2011 has introduced some relevant changes in the registration of civil society organizations. Due to the needs of the economy, the judicial enforcement and the insolvency procedures were also reformed. As a general trend, the introduction of e-justice in the field of non-litigious procedures has to be emphasized.

After the enactment of the new Civil Code (Act V of 2013), preparatory work of the civil procedure code's codification has begun. Neither in the legal literature, nor in the legal practice has the need arisen for the integration of the non-litigious procedures into the civil procedure code. The number of legal acts regulating the non-litigious procedures, and the differences between these procedures make the integration practically impossible.

However, it would be essential to declare as a legal policy, which civil cases are litigious and non-litigious. The current borderline is very unsteady, because it can change any time due to a legislative decision. Despite reasons of legal policy, there are cases "which can better be decided in a litigious procedure, and others, which are better suited to a non-litigious one". These latter would include those which do not aim to decide the legal dispute, but which seek to prevent them, or to promote the enforcement of claims. Finally we have to refer to the fact that non-litigious procedures (due to the lack or the limited nature of the trial, the taking of evidence, or the right to an equal and reasonable opportunity for all parties to present a case) provide fewer guarantees than the litigious procedures. Because of this, the legislator has to decide if the nature of the procedure is not controversial

with the right to access to court, provided by the General Law of Hungary (Article XXVIII), or with the right to a fair trial, provided by Article 6 of the European Convention of Human Rights.

In 2013 preparations started for the codification of the new Code of Civil Procedure, during which the issue of the regulation of voluntary jurisdiction proceedings was also raised. The conception revealed to the public in 2014 does not wish to make considerable changes to the existing situation; it continues to take a stand in favour of regulating non-litigious proceedings separately. At the same time, the conception proposes creating a chapter in the new Code of Civil Procedure that would provide guidance for those conducting non-litigious proceedings concerning the application of the rules of the Code of Civil Procedure. [...] The chapter would exclude or provide for the applicability of the other chapters or detailed rules of the Code of Civil Procedure concerning non-litigious proceedings by making a reference to specific, uniformly applicable characteristic rules of non-litigious proceedings<sup>55</sup>. However, all this is merely a conception, the possible realization of which may be expected in 2017 at the earliest.

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<sup>55</sup> Varga, István. 2014. Egység és sokféleség a perrend kodifikálásában In *Egy új polgári perrendtartás alapjai*, ed. János Németh and István Varga, Budapest: HVG-ORAC. 33.