LAW OF COMPENSATION OF DAMAGES IN HUNGARY AT THE END OF THE 19TH CENTURY

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In the 19th century Europe witnessed two great waves of commercial codification[1], first in the 1830s and then in the 1860s and 1870s. In the course of drafting the commercial acts a choice had to be made as to codifying commercial law and private law in a single code or in separate enactnments. Most countries adopted separate codes of private law and commercial law.

During the 19th century private law was uncodified in Hungary. Partial draft laws were framed to regulate certain fields of law, but the efforts at codification failed to produce results for different reasons. (It was not until 1959 that private law was covered at the statutory level by the adoption of the Civil Code.) Rapid economic and industrial development in the second part of the 19th century called for a comprehensive legal regulation of commercial relations. The Commercial Code (Act XXXVII) was adopted in 1875.

In drafting the Commercial Code account had to be taken of the non-existence of a Civil Code in Hungary. Therefore, under the pressure of necessity, Part II of the Commercial Code contained numerous rules of private law.

With uncodified private law an added reason, the Commercial Code had to determine its relationship to the private law. Art. 1 therefore stated the sources of commercial law and their hierarchy. Accordingly the sources of commercial law included, moving towards the general sources, the Commercial Code, commercial customs, and general private law. Under Art. 1, the underlying material of commercial law was constituted by private law, i.e. acts on and customs of private law. Commercial law forms part of private law, with the general law constituted by private law and the special law constituted by commercial law.[2]

The courts relied on numerous collections of legal cases. They had to do so for the added reason that customary law was also a source of law. Given the significance of customary law, it was not accidental that law journals kept reciting judicial cases and compiling case-books [e.g. during the 1920s the journal "Polgári jog" (Civil Law) analyzed in depth the the customary law created in a given year]. Customary law was applied by courts. In addition, judges were free to shape and modify it. Thus, among the rules of customary law, they applied the principles set forth in the draft private laws published. The result was that the rules contained in those drafts came to be adopted in judicial practice.

In deciding legal disputes on matters not covered even by customary law judges relied on the analogy of private law principles. In particular cases this meant application

of general private law rules by courts dealing with commercial matters under a uniform concept of commercial law and private law (or by commercial courts until they functioned) and allowed courts hearing private law cases applying on rules of commercial law. All this resulted in general private law incorporating rules of commercial law. That was all the more natural since commercial law, after the adoption of the Commercial Code, ceased to regulate the legal relations of the "order of merchants" and came to govern the law of commercial transactions. The Commercial Code spelled out that its rules were applicable not only to legal transactions of merchants, but also to legal relations arising out of statutorily defined commercial transactions and to persons, whether merchants or non-merchants, involved therein. Thus, with its mixed regulatory regime, the Commercial Code extended its applicability to non-merchants as well. [The mixed regime means that the Code blended subjective regulation (depending on the subject of merchant, on one's condition as merchant) with objective regulation (depending on the object of commerce).][3]

When drafted, the Commercial Act as a Code was expected to contain full coverage of all aspects of commercial law in respect both to participants in commercial transactions and to commercial transactions themselves. Responding to that need and owing to the said mixed regime of regulation, the Commercial Code incorporated not only the rules of private commercial law, but also those of the law of administration relative to merchants (e.g. registration of firms), rules of criminal law (e.g. norms of criminal responsibility relative to directors of joint stock companies) and rules of administrative procedure of commerce (e.g. provisions on the probative force of business books). Under the contemporary approach[4], these rules pertained to the law of commercial administration, commercial criminal law and the law of commercial procedure. Together with private commercial law, they were called commercial law in a broad sense. Since, however, these rules outgrew the frameworks of commercial law, they were supplemented by separate rules. Commercial law was accordingly governed both by the Commercial Code and by other enactments (e.g. Act on Firms). Private commercial law was embodied in commercial law as narrowly understood. In like manner, the material of private commercial law is not found exclusively in the Commercial Code, but is also included in partial enactments on the one hand and in norms relative to general private law on the other.

Commercial law and private law were inter-acting. A very interesting question is that of the effect produced by commercial law (primarily the Commercial Code) on drafts of private law, especially within the narrower province of liability for damage as part of the law of responsibility.

In this discussion of bills I will confine myself to elaborating on the general Draft Civil Code of Hungary, which was published in 1900, because that Draft emerged under the same set of economic conditions[5] as the Commercial Code had and was exposed to the noticeable influence of judicial practice on the Draft applying the Commercial Code for over two decades between 1875 and 1900.

The structure of the Commercial Code is similar to that of the German Commercial Code. The Code consists of two main parts, following the two sections of "general provisions" on interpretation. The parts are divided into titles and the titles into chapters. The two main parts are: I. Marchants and Commercial Companies, II. Commercial Transactions.

On examining this fabric of the Code one finds the lack of a traditional general part on the law of contracts. One of the reasons lies in the fact that, as has been noted, the Code sought to regulate special relations of commercial law only, leaving it to private law as the underlying law to govern questions of general private law (Art. 1 of the Code). Still, for the reasons mentioned above, the Code contains several general rules of contract law, such as those relating to the place of performance of transactions (Arts. 322–325), the time of performance (e.g. Arts. 328–329) and the mode of performance (e.g. Art. 321).

The general provisions of the Commercial Code on compensation of damages are found in Part II (Commercial Transactions) under Title I (Commercial Transactions in General) in Chapters I and II (Definition of Commercial Transactions and General Provisions on Commercial Transactions).

The draft of Hungary's general Civil Code (hereinafter referred to as the Draft) consists of 5 parts, divided into titles subdivided into chapters. The 5 parts are: Part I: Personal Law; Part II: Family Law; Part III: Law of Things; Part IV: Law of Contracts; Part V: Law of Succession.

The Draft's general provisions on compensation of damages are to be found in the Law of Contracts under Title II (Wrongful Acts), under Title III (Content of Obligations) in para. (4) (Damages) of Chapter II (Object of Performance) and under Title XVI (Statutory Obligations).

The statutory rules of commercial law on compensation of damages are as follows.

Compensation is one of the legal consequences of liability under commercial law, mostly a single one, but, precisely because the Commercial Code regulates relations of commercial criminal law and commercial administration as well, it is in some cases coupled with legal consequences under criminal law and the law of administration. Under the Title on Joint Stock Company, for instance, Chapter VII contains the "punitive sanctions" that are outside the province of criminal law. This chapter determines the criminal responsibility and the penalties of founders of joint stock companies, members of the Board of Directors, members of the Board of Supervision, "the executive obliged to convene the general meeting", representatives in Hungary of foreign joint stock companies, and liquidators. Thus, for instance, "members of the Board of Directors shall be committed by the competent court to prison (confinement) for a term of up to 3 months, if they wilfully cause the minutes of the general meeting to be falsified" [⟨Art. 218⟩, para. (4) of ⟨ ⟩, of the Code]. In such cases, damages are payable in addition to criminal consequences (Art. 222).

Under the Code, compensation of damages may be accompanied by other legal consequences. In the case of unlimited partnerships, for instance, the court may order dissolution of a partnership if a member thereof misuses a firm or the property of the partnership for private purposes [para. (4) of Art. 100], or in case of fraud the seller may not invoke the six-month period of prescription established for the buyer's right of action to enforce a claim of warranty (Art. 350).

As in private law, liability in commercial law appears mostly as one for discharge of obligations. For instance, "members of an unlimited partnership shall be fully liable jointly and severally with all theip personal wealth for the obligations of the partnership" (Art. 88).

Liability in this case means discharge of the financial obligations of the partnership. In other cases such as compensation, liability means an obligation to pay damages, to recoup pecuniary loss, or to repair damage caused. The whole Commercial Code is permeated with compensation as a legal consequence of liability under commercial law.

The cases in which liability for damage is incurred are characteristic of the rules of the Commercial Code in Part I on Merchants and Commercial Companies: As regards "merchants", the question most important to the security of transactions concerns the persons considered as merchants in commercial transactions and as obligors in contracts made under the Commercial Code. A guide here is provided by the use of firm name and by action as of a merchant. In the latter case, the pivotal question involves substitution or representation of the merchant by the manager, commercial representatives and the auxiliary staff (Arts. 52–55.). The Commercial Code penalizes unauthorized use or usurpation of firm and permits compensation (Art. 24) in order to protect merchants.

In the case of "commercial companies", compensation in *inter se* relations of members is regulated in connection with fulfilment of obligations associated with membership (default in performance, e.g. Art. 169) on the one hand and, on the other, with the participation of commercial companies in transactions, when the question is who may act on behalf of or representing the company or what happens when the representative oversteps his duty (e.g. Art. 169). Compensation is the most frequent legal consequence in these cases.

The general rule on compensation of damages can be found among those on commercial transactions, and it should be examined in the context of the other general provisions.

Under Art. 272 of the Commercial Code, "the person entitled to claim damages may demand payment of actual damage and payment of profit lost". As this is the only general rule of the Code on compensation, it will be examined in more detail.

"The person entitled to claim damages..."

"The person..." Who? As the Code determines the measure of compensation on the side of the damaged person, still more stress is placed on the function of damages to repair any loss in the property of the damaged person. On the side of the person causing damage, the Code formulates rules on the person causing damage, on causal relations, on exemption from liability and on restriction of compensation in connection with individual legal transactions, with no related provisions found among the general rules.

Anyone may be a damaged person, since the rules of the Code are applicable equally to merchants in subjective transactions and to merchants and nonmerchants as participants in objective transactions. The participants in commercial transactions, including persons either causing or suffering damage, are required by Art. 271 to exercise due care and caution. In commercial law the general criterion of diligence is constituted by "due care and caution", whereas in private law the maxim of "*bonus et diligens paterfamilias*". In view of Art. 264 of the Code this rule may lead to an interesting situation in the relationship between merchants and non-merchants, meaning that in a particular case a merchant is under obligation to show due care and caution in order to prevent and evade damage, while the other party, a non-merchant, is only required to exercise due diligence of a good father of a family. This difference in the measures of

care is a substantial one: the courts expected more of good merchants than of a solicitous father of a family, notably the care and cuation of a good merchant implied a much stricter standard. When the Commercial Code was being revised[6], this rule came under attack from many critics, who claimed that it placed undue expectations on the average individual. At any rate, this rule and its departure from the standard of diligence in private law riveted attention on expectability, the measure of compensation and their eventual interrelationships, and it required judicial practice to determine their substance.

"...damages". The Commercial Code does not specify the legal ground of liability for damages. It fails to consider the causes for compensation in accordance with the view prevalent in jurisprudence at the time, such as contract or delict, *quasi* contract or *quasi* delict. This is not to say, however, that the Code is silent on delictual liability. Usurpation of firm (Art. 24) constitutes a delictual fact relied upon by the Code.

The Commercial Code is not only silent on the legal ground, but also fails to cover the question of whether damage can be caused by action alone or by omission as well. Article 267 merely provides that "in appraising the significance and the legal effect of acts and omissions regard shall be had to the customs and practices accepted in commercial transactions".

Sporadic rules on questions other than the measure of compensation, such as the date and mode of compensation, can only be found in connection with individual legal transactions.

"...entitled to claim". As regards suing for damages, the main procedural question was wether the defendant was a merchant. Under Art. 264 of the Code, this was irrelevant to awarding damages, but procedurally the merchant status of the defendant was decisive because an action was admissible against a merchant only, and it was for the defendant to show proof of damage.

Compensation, too, is governed by Art. 280 of the Code, which provides that "commercial transactions shall not be sued upon for injury beyond one-half of value". This rule probably received special emphasis because private law (also relying on the Austrial Civil Code) allowed the performing party to an onerous transaction to challenge validity of the contract for injury beyond one-half of value, if counter-performance did nor reach half the value of performance. However, this rule was removed from commercial law on the grounds that it ran counter to the profit orientation of commercial law.

"...may demand reparation of actual damage and payment of profit lost". The Commercial Code upholds the principle of full compensation, although an exact definition of the concept of "profit lost" was problematic for the legislators. During the preparatory debates the drafting committee decided to leave it to judicial practice to delfine the substance of "profit lost".

The courts were hard-pressed not only to interpret the term "profit lost", but also to apply the Commercial Code in general. Jurisprudence could do little to help them. It was not until the 1880s and 1890s that the writings of prominent private law scholars began exercising an enormous influence on juridical literature and legal life.

In dealing with cases the courts could rely on various rules of private law. An outstanding role among those rules was played by the Austrian Civil Code (ACC) in the last third of the 19th century. The ACC prevailed in full in the borderlands (Fiume and Tran-

sylvania) and only in part in the rest of the country. University students were taught the ACC, the ACC brought influence to bear on judicial practice as well.

The ACC determines the measure of compensation by the degree of culpability on the part of the person causing damage. As was seen, the only general rule of the Commercial Code on compensation of damages is an objective one, unrelated to culpability, on the measure of compensation.

It strikes one, even in making a comparison with the ACC rules on compensation, that the Commercial Code, as against the body of rules running to pages in ACC and other drafts of private law, contains a single article specifically on compensation among its general rules. What can be the reason? Making allowance for the fact that private law contains also the general rules of private commercial law and that civil codes may over-regulate certain questions, I believe that the answer to minimum regulation is related to the specific features of commercial life and commercial law.

Commercial law governs the legal relations of a mass scale of trade, and it also shapes them in the interest of trade and in accordance with the foals thereof. What is needed is for trade and financial transactions to be handled as easily and as quickly as possible with a view to larger profit and for conclusion of transactions and performance of contracts to meet with the least obstacles. In order to maintain the smooth flow of trade and the solvency of participants in transactions, among other reasons, performance by one party should be coupled with or followed by counter-performance. Should counter-performance as stipulated by contract not be forthcoming for any reason, resort would be had to compensation of damages. Yet, judicial enforcement of claims for damages is time-consuming, costly and uncertain even despite summary proceedings. Merchants therefore surround contracts with various guarantees, and if conclusion of contract or performance comes up against any irregularity handicapping or ruling out conclusion of contract or performance, while causing pecuniary prejudice, recourse to guarantees like penalty, earnest, forfeit, lien or mortgage, etc. allows prompt and appreciable reduction in pecuniary loss. Speedy settlement of disputes and removal of the consequences of any event causing damage are similarly facilitated by a contract of insurance, which has the added advantage that its costs form part of overhead expenses. To the extent possible, merchants seek to avoid judicial settlement of legal disputes. Should that recourse be inevitable, the most important question in case of damages is for them to know the measure of compensation they may claim.

In point of fact, this is determined by the Commercial Code in the general part on legal transactions. Among individual transactions, detailed and special provisions refer to the rules on compensation (e.g. in connection with the measure of compensation, the obligation to minimize damages, exclusion and restriction of liability, stricter liability, fault of the damaged person).

The counterpart of general Code Article 272 on the measure of compensation is Draft Article 1138, providing that "anyone obliged to pay damages shall also recoup any loss of profit, provided that it was likely to occur without the intercurrence of the event causing the damage".

When the Commercial Code was framed, the main difference in compensation between commercial law and private law lay in that the measure of compensation under

private law was either full or not, depending on culpability, whereas under commercial law full compensation was payable regardless of culpability.

The rule of the Code on compensation of damages brought influence to bear on court judgements under private law. By the end of the 19th century judicial practice had taken over the rule of commercial law on the measure of compensation and had allowed payment of full compensation in the case of commercial transactions as well. By formulating draft article 1138 Hungary's general Civil Code intended to give statutory force to that practice. According to the Comments on the Draft, "it is quite indifferent to the person suffering damage whether the person causing damage did so with intent or through negligence, because in either case his interest requires full reparation of any prejudice suffered". Thus the general rule of the Commercial Code on compensation of damages came to gain full recognition in judicial practice as well as in the 1900 Draft of Hungary's general Civil Code.

1 For a history of commercial legislation, see *F. Nagy: A magyar kereskedelmi jog kézikönyve* (Handbook of Hungarian Commercial Law), pp. 12 *et seq.*; *Á. Nemann: A kereskedelmi törvény magyarázata* (Commentary on the Commercial Code), *Bevezetés* (Introduction).

2 This distinction is of relevance, apart from interpretation of legislative texts, because, *inter alia*, of customary law being derogative of legislative enactments.

3 Articles 258–264 of the Commercial Code.

4 E.g. *F. Nagy*: A magyar kereskedelmi jog kézikönyve, különös tekintettel a bírói gyakorlatra. I–II. köt. (Handbook of Hungarian Commercial Law, with Particular Emphasis on Judicial Practice. Vols. I–II), Budapest, 1985, pp. 1 *et seq.*; *G. Szászy-Schwarz*: *Parerga*, Budapest, 1912, p. 363; *Á. Neumann*: *A kereskedelmi törvény magyarázata. I. köt.* (Commentary on the Commercial Code. Vol. I), Budapest, 1985, pp. VII. *et seq.*

5 See. e.g., *L. Asztalos: A magyar burzsoá magánjog rövid története* (A Short History of Hungarian Bourgeois Private Law), *Polgári Jogi Tanulmányok* (Studies on Civil Law), Budapest, 1970, pp. 33 *et. seq.*

6 See, e.g., *M. Mártonfy: A Kereskedelmi törvény 264.§-a a revizió szempontjából* (Article 264 of the Commercial Code from the Angle of Revision), *Kereskedelmi jog* (Commercial Law), Nos. 19–20 of 1913, pp. 378 *et seq.*

REZÜMÉ

Der Schadenersatz in Ungarn am Ende des 19 Jahrhunderts

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Das ungarische Privatrecht war im 19. Jahrhundert trotz mehreren Teilentwürfen des Zivilgesetzbuches unkodifiziert. Das Handelsrecht wurde gesetzlich im Jahre 1875 geregelt, danach die Normen des Privatrechts als subsidiäre Rechtsquelle des Handelsgesetzes angewandt wurden. Das Privatrecht hat gleichzeitig vielen Regeln aus dem Handelsrecht entlehnt. Der Artikel stellt die Normen des Schadenersatzes im Handelsrecht und deren Wirkung auf das privatrechtlichen Schadenersatz am Ende des 19 Jahrhunderts dar.