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**Transnational Litigation and Elements of Fair trial
Some Hungarian Aspects**

I. Preface: „The Socialist Case Management”

In Hungary, a former socialist country, there have been great changes in the idea of *the active role of judges* in the past two decades. It is a well-known fact that the civil jurisdiction of socialist countries was, from the beginning, characterised by over-size *judicial power* and the *inquisitorial process* closely connected with it.

Based on the Soviet model,¹ the Hungarian Code of Civil Procedure of 1952 was characterised by the active role of the judiciary as initiator, which combined the endeavour to reveal the true facts of the case, the formal conduct of proceedings and the duty of clarification by the judge. As a result of the ex officio automatism characterising each phase of the litigious process, the parties were left little freedom of disposition over the course of the proceedings. The summoning, the service of process, the fixing of deadlines and trial dates took place ex officio, the party was allowed to request the extension of the deadline only. The preparation for the trial and the most important element of the conduct of proceedings, the conduct of the trial also formed part of the tasks of the court. As far as the duty of clarification by the judge is concerned,

- it was the official duty of the court to see that the parties exercised their rights properly throughout the procedure and met their obligations in the lawsuit,
- the court was obliged to provide the necessary information to the parties and remind them of their rights and obligations [§ 3 (1) HCCP – former version],
- it was the official duty of the court to see to the thorough and, at the same time, quick trial of cases [§ 3 (2) HCCP – former version],
- the court was entitled to attempt in any phase of a suit to achieve that the parties make a settlement regarding the legal dispute or a part of the matters in dispute. [§ 148 (1) HCCP].

¹ The model to be followed was the Code of Civil Procedure of 1923 of Soviet-Russia.

Between 1952 and 1990 the Hungarian Code of Civil Procedure was amended several times, but the active role of the judge remained unchanged. However, after the change in the political system, “*socialist case management*” meant an increasing burden on the system of civil justice as it seriously limited the principle of party control. In order to strike a reasonable balance between the court and the parties, the over-size power of the judge needed to be reduced. This task was not easy for the former socialist countries as those elements of the “hyperactivity” of the socialist judge had to be preserved that would counterbalance the freedom of disposition regained by the parties.

II. The New General Principles of the Hungarian Code of Civil Procedure

The amendment of 1999 of the Code of Civil Procedure radically transformed Chapter One of the Act containing the *general provisions* of civil procedure. Although the Code of Civil Procedure of 1952 remained in force, by the changing of the purpose of the Act, and by the renewal of the content and formulation of basic principles, the era of socialist civil procedure finally came to its end. The new principles defined in the novel reflect, on the one hand, those social, economic and legal changes that took place in Hungary in the 1990s and, on the other hand, they conform to the provisions of the Chapter on Rights and Liberties of the European Convention on Human Rights.

The Act sums up general principles under the heading *The Duties of the Court in Civil Proceedings*. The Act – for the first time – does not define merely the content of general principles but their purpose as well. Section 1 HCCP states that impartial resolution of legal disputes must be ensured through the *implementation* of general principles defined by the Act. This increases the *normative character* of basic provisions as they are also directly applicable where a statutory legal rule conflicts with the objectives of general principles. Mainly those general principles can become normative that have “become rules” as a result of codification like e.g. the principle of party control or adversary hearing. General principles taken in the real sense such as the principles of fair trial, verbalism or directness rather provide assistance with legal interpretation. Moreover, Section 2 (4) HCCP also lays down that the court may only interpret statutory provisions *in accordance with general principles*.

The principle of party control

Legal literature attributes great importance to the principle of party control, because out of the general principles of civil procedural law it is this principle that expresses most emphatically *the relation of the parties and the court to the subject-matter of the lawsuit*. The principle of party control – as defined by old Hungarian legal literature – means on the one hand, that legal proceedings may be commenced only at the parties' request (that is the court will provide legal protection only if so requested by the party, but in that case, the court is obliged to do so), on the other hand, the court is obliged to carry out certain procedural acts based on the request of the parties (or one of the parties). The counterpart of the principle of party control is the principle of ex officio proceedings (operation of law), when the court carries out the specific procedural acts without (or preceding) the parties' disposition.

The principle of party control, as the most important manifestation in the lawsuit of the parties' right to self-disposition and autonomy of action, has general application in accordance with Section 3 HCCP: Subsection (1) lays down the exclusive right of the party interested in the legal dispute to institute proceedings, which right may only be limited by law. By stating that the court is bound – unless provision is made to the contrary – by the applications and declarations submitted by the parties, Subsection (2) extends the applicability of the principle of party control to the whole proceedings. By this, the Act renders it unambiguous that the „masters of the case” are the litigants; it is them who determine the subject-matter of the lawsuit and, through it, also the court's scope of action during the proceedings.² Nevertheless, the court is obliged to prevent any procedural act on the part of the parties (and their representatives) that contradicts the requirement of the good faith exercise of rights (§ 8 HCCP). Thus, the parties' right to disposition is not *unlimited*, it may only be asserted within the framework of the exercise of rights in good faith.

The parties' freedom of disposition also extends to supplying materials for the lawsuit: the court may take evidence only at the parties' request and to the extent determined by the parties, unless the ex officio taking of evidence is permitted by law. The right of disposition over evidence – with regard to the importance of the issue– is embodied in a separate principle, namely the *principle of adversary hearing*. The right of free disposition over the subject-matter of the lawsuit is also ensured by the possibility to modify the complaint (§ 146 HCCP), the possibility of coming to a settlement (§ 148 HCCP) or abandoning the suit (§ 160 HCCP) or the rule that the court is bound by the relief sought (§ 215 HCCP), etc. The right of

² Comments on Act CX of 1999. Detailed comments on 2. §.

disposition does not extend to first instance proceedings only but also to *appeals*. Thus, for instance, parties proceeding through legal representatives may in advance waive their right to appeal (§ 228 HCCP), the court of second instance must adjudge the appeal out of sessions at the parties' express or tacit request (§ 256/A HCCP) and parties proceeding through legal representatives may also request, in certain circumstances, that their appeal be adjudged directly by the Supreme Court. (§ 235 HCCP).

The principle of adversary hearing

The collection of evidence required for adjudging a civil claim may take place in two ways: Under the *principle of adversary hearing* it is a burden on the parties to disclose the facts and the evidence to the court. If this task is partially or fully taken over by the court, the *inquisitorial principle* is applied in the civil proceedings. Following the decades of socialism, the Hungarian Code of Civil Procedure abandoned the inquisitorial principle and the obligation to supply evidence became unequivocally based on the principle of adversary hearing. In accordance with § 164 (1), the facts required for deciding the claim must usually be proven by the party who is interested in persuading the court to accept those facts to be true. Based on Subsection (2), *the court may order the taking of evidence if it is permitted by the Act*. However, the Act grants such permission only in case of actions relating to status (§ 286 HCCP) and administrative actions (§ 336/A HCCP).

Originally, the Code of Civil Procedure laid down the principle of the freedom of evidence only. No general definition was given for the principle of adversary hearing, its content was inferred by legal literature from scattered provisions of the Act. In the 1990s, the principle of adversary hearing was transformed into a „written statutory rule” and since then Section § 3(3) HCCP has laid down the generally applicable rule that *the burden of supplying the evidence required for adjudging the legal dispute falls on the parties – unless it is provided otherwise by the Act*.

the principle of adversary hearing continues to be laid down by Section 164 (1) HCCP. The legal consequences resulting from failure to motion for the taking of evidence or a delayed motion or the possible failure to prove the case must be borne by the party who has the burden of proof unless provision is made to the contrary. The latter is considered the general rule of the consequence of the failure to prove the case or in other words, the rule of *the burden of proof*, which has also been laid down by the legislator among the general principles of the Section 3 (3) HCCP. In order to implement the principle of adversary hearing, the court must *notify* the parties *in advance* about the facts to be proved, the burden of proof and the

consequences of the failure to prove the case. Failure to notify may be deemed as the violation of an essential procedural rule on the part of the court.

The principle of the efficiency of proceedings

The demand for quick and cheap litigation first arose at the end of the 19th century. In this era litigation became a mass phenomenon characterized by lack of control and unnecessary protraction resulting from the parties' unlimited right to disposition, which could only be prevented by the *concentration* of litigious acts. For this reason, the judge's authority over conducting the lawsuit increased, and at the same time, in the regulation of the parties' procedural acts, the economical aspects were moved more and more to the foreground.

The requirement to end lawsuits within a reasonable period of time³ appeared in the text of the Code of Civil Procedure in 1992 already, but it was filled with real content only by the amendment of 1999. During the reformulation of basic principles, the legislator did not only lay down the parties' right to end the lawsuit within a reasonable period of time, but — with a view to specific judgements of the European Court of Human Rights – he also defined the aspects based on which this reasonable period of time could be determined, moreover, he held out the prospect of sanctioning court omissions.

According to Section 2 HCCP, *the court's duty* is to implement the parties' right to end the lawsuit within a reasonable time. *This reasonable period of time* may be determined by considering the subject-matter and nature of the legal dispute and the particular circumstances of the conduct of proceedings. The party cannot refer to the requirement of the resolution of the case within a reasonable time if he himself has contributed, through his behaviour or omission, to the prolongation of the lawsuit.

The purpose of the resolution of lawsuits within a reasonable time is served by the *new deadlines*, which were established for the *courts* in 1999. Thus the court shall examine the statement of claim within thirty days of receipt at the latest [§ 124(1) HCCP], it shall hold the first trial within four months of the receipt of the statement of claim at the latest [§ 125(3) HCCP], the court shall conduct the reconvened hearing within maximum four months of the day of the adjourned trial [§ 142(2) HCCP], it shall provide for the service of the judgement within 15 days after it is laid down in writing [§ 219(2) HCCP], the court shall refer the

³ In accordance with Article 6 of the European Convention on Human Rights, “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time*”. In its Recommendation R(84) 5, the Committee of Ministers of the Council of Europe provided guidelines for the interpretation of *the settling of disputes within a reasonable time*.

appeal to the second instance court together with all the documents relating to the lawsuit within 8 days [§ 238 (1) HCCP], etc.

If the court *fails to meet* its obligations concerning the fair conduct of proceedings and the termination of the lawsuit within a reasonable period of time, the party may apply for equitable relief with reference to the violation of his basic rights, provided the injury cannot be remedied within the framework of appeal proceedings. The application is adjudged by the court in expedited procedure. It may also be possible to award compensation in the situation where the rights injury was not directly attributable to the fault of the person proceeding on behalf of the court [§ 2 (3) HCCP]. The termination of lawsuits within a reasonable period of time is also served by the institution of *objection*, introduced under Act XIX of 2006, which may be submitted by the parties, the intervening party and the prosecutor involved in the proceedings concerning the protraction of the proceedings.

The principle of equal opportunities in proceedings

The requirements of equality before the law (§ 57 Hungarian Constitution), of the right to a fair trial (European Convention on Human Rights, Article 6) and of the impartial resolution of the legal dispute (§ 1 HCCP) may only be implemented in civil litigation if the law ensures equal opportunities for the interested parties. Section 70/A (3) of the Hungarian Constitution provides: “The Republic of Hungary promotes the realization of equality before the law with measures aiming to eliminate inequalities of opportunity.” Such measures were contained in the Code of Civil Procedure earlier as well, but following the amendment of 1999, the principle of bilateral hearing [§ 3 (6) HCCP], the guarantee of the right of access to courts [§ 7 (1) HCCP], and the possibility of exemption from costs [§ 7 (2) HCCP] were laid down among the general principles. The latter was put on a new footing by Act LXXX of 2003 on Legal Aid, and in five years, the institutional system was established, which “contributes to the elimination of inequalities of opportunity by the means of positive discrimination”.

III. Special Case Management by Judges for Foreign Parties

General Remarks Concerning Regulation

The tendencies outlined above do not change essentially when a foreign party involved in the civil action. The court is bound by the *special rules* laid down by the Code of Civil Procedure in the first place as well as those stated in the *Law-Decree on International Private Law [abbreviated to HIP]*.

Provisions of the Code of Civil Procedure relating to international matters include : regulations concerning jurisdiction relating to foreigners (§ 32), legal capacity (§48), disposing capacity (§ 49), authorizations issued abroad (§ 69), the foreign party's right to exemption from court fees (§ 85), security for court fees (Sections 89–92), service abroad (§ 100), foreign notarial documents (§ 195), private deeds issued abroad (§ 198) and the taking of evidence abroad (§§ 204–205).

The Law-Decree on International Private Law regulates jurisdiction as well as the recognition and enforcement of foreign decisions. It also lays down general procedural provisions. (§§ 54–74/A. HIP)

The Principle of Internal Equality Before the Law

Section 15 HIP declares the principle of internal equality before the law: “Unless a legal rule provides otherwise, the same rules shall apply to the legal capacity and disposing capacity of a foreign or displaced person, as well as to his personal and pecuniary rights and obligations, as to domestic persons.”

The realization of equality before the law *during procedure* is promoted by the court's obligation to provide information, which obligation – considering its importance – constitutes one of the basic principles of the Code of Civil Procedure. The court shall provide the party who has no legal representative with necessary information concerning his procedural rights and obligations relating to the lawsuit (§ 7 HCCP).

Legal and disposing capacity

The legal and disposing capacity of a foreign party during litigation should be adjudged based on his personal right. Thus, in this regard, Law-Decree on Private International Law orders the application of the *lex patriae principle* (§ 64), which constitutes an exception to the generally applied *lex fori principle*. The Hungarian court shall examine *ex officio* the legal and disposing capacity of the parties in any phase of the proceedings (§ 50 HCCP). The foreign party who would lack disposing capacity or have restricted disposing capacity based on his personal right but who would have disposing capacity under Hungarian law *should be considered to have disposing capacity*. As far as legal capacity is concerned, there is no need for such a rule, since legal capacity – concerning natural persons at least – cannot be restricted according to Section 8 HCCP.

Use of Language

The language of court proceedings is Hungarian but no one shall suffer any disadvantage for the lack of knowledge of the Hungarian language (§ 6 HCCP). During court proceedings – within the circle defined by international agreement – everybody is entitled to use his mother tongue, regional or minority language. By joining the European Charter for Regional or Minority Languages of 1992, Hungary committed herself to permitting the use of the mother tongue with regard to the Croatian, German, Romanian, Serbian, Slovakian and Slovenian languages. The resulting additional costs are *borne by the state*.

As far as other languages are concerned, general rules apply. Regarding petitions (requests, etc.) drafted in a foreign language, the court shall take the same measure as if it had been written in the Hungarian language. If the court does not understand the language of the petition or, otherwise, considers it necessary, *an authentic translation* shall be made. With regard to the translator and the interpreter participating in the trial, rules relating to experts shall be applied. In cases falling within the scope of European community law, rules of language use differ from the general rules. However, there are no special rules concerning *the English language*.

Representation

Concerning legal representation – with the exception of cases falling within the scope of European community law – the rules of Hungarian law shall be applied. It is a general principle that only *lawyers registered by the Hungarian Bar Association* may proceed as legal representatives in a Hungarian court. An exception is constituted by European community lawyers who are entered in a register if they meet the conditions laid down in the Hungarian Act on Lawyers (Act XI of 1998) and who, from that time on, are entitled to carry out any type of legal activity including advocacy in court. Lawyers of countries outside the European Union may only act as *foreign legal counsellors* in Hungary. Registered foreign lawyers pursue their activities in a Hungarian lawyer's office or co-operating with a Hungarian lawyer's office. During this, they may give legal advice concerning the law of their countries, international law and practice relating to them, but they are not allowed to provide legal representation.

It should be noted that consular agreements generally enable consular agents of other states to represent the citizens of their state in accordance with the rules and provisions of Hungarian law in case they cannot see to the protection of their rights and interests themselves at the required time because of their absence or for other reasons.

Legal aid

Under Hungarian law there are two types of legal aid: one is linked with the *person* and financial situation of the applicant, the other is linked with the *subject-matter* of the proceedings, and parties are entitled to it independently of their financial situation. Foreign parties – apart from the European Union – are entitled to personal legal aid only in case of an international agreement signed with the Hungarian State or on the basis of reciprocity. In accordance with internal equality before the law mentioned above, foreign parties are entitled to case-specific exemption from court fees even *in the absence* of such agreement or reciprocity (§ 85 HCCP).

Article 20 of the Hague Convention of 1954 lays down that in civil and commercial cases, nationals of each Contracting State are entitled to exemption from legal costs in the other Contracting States on the same basis as nationals of these States in accordance with the legal regulations in force in the State concerned. Chapter IV of the Convention provides detailed regulation concerning the conditions for the issue of a declaration or certificate of need. Rules concerning legal aid are applied by the court only on request, but, within the scope of the obligation to provide information, the party proceeding without a legal representative shall be reminded of this fact.

Security for costs

The foreign claimant is obligated to provide security at the defendant's request to cover the costs arising from the lawsuit unless an international agreement signed by the Hungarian State provides otherwise or there exists a different practice of reciprocity [§ 89(1) HCCP]. According to Article 17 of the Hague Convention of 1954, *no security or deposit of any kind may be imposed* upon nationals of one of the Contracting States having their domicile in one of the Contracting States, who are plaintiffs or parties intervening before the courts of another Contracting State by reason of their foreign nationality or of lack of domicile or residence in the country. The same rule shall apply to any payment required of plaintiffs or intervening parties as security for court fees. As we have already mentioned, both Hungary and Japan are signatory states of the Hague Convention of 1954.⁴

⁴ Beginning from 1 May 2004, neither citizens of any Member State of the European Union nor other citizens lawfully staying in another Member State of the European Union may be obliged to *provide a security for court fees*.

Since 1 May 2004, neither nationals of a Member State of the European Union nor other citizens lawfully staying in a Member State of the European Union may be obligated to *provide security for court fees*.

Service of Process

In Hungary the service of court documents takes place *ex officio*. In case of service abroad, the document is to be submitted to the Minister of Justice for further measures unless an international agreement signed by the Hungarian State provides otherwise. Service abroad is to be deemed valid if it corresponds either to the provisions of domestic legislation or to legislation applied in the country of delivery (§ 100 HCCP). Thus the court has discretionary power in this matter. If service abroad is impossible (e.g. there is no Hungarian foreign representation authority), the court shall apply *fictitious domestic service* in civil cases in accordance with the relating general rules.

In the Member States of the European Union, service of court documents in civil and commercial matters between the Member States is carried out based on Council Regulation 1393/2007/EC.

Service to countries other than the Member States of the European Union is made easier by the Hague Convention of 1965 on *the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, which Hungary joined in 2005. Instead of the obligatory use of diplomatic channels, the Convention enables the Contracting States to serve official documents arriving from another Contracting State or have them served through a “Central Authority”. Joining the Convention is *significant* for Hungary because it renders the service of official documents easier with respect to such countries as the United States of America, Israel, Japan, Canada, Norway, Switzerland, Turkey, etc.

Special time limit

There is only one situation when the Hungarian Code of Civil Procedure lays down a special time limit with regard to foreign litigants. If a default judgment was issued concerning a defendant on whom the complaint was served in accordance with Council Regulation 1393/2007/EC or the Hague Convention of 1965, and in case the defendant *failed to observe* the limitation laid down for challenging a default judgment, he may submit a *justification* within a year [§ 136/A (3) HCCP]. Otherwise, the ordinary limitation is three months.

Concerning service abroad, the Ministry of Justice *suggests* taking the following time limits into consideration when setting the date for trial:

- in case of direct postal delivery: *4 months*,
- in case of direct contact with the foreign court *3 months*,
- if the Ministry of Justice*
- sends the documents directly to the competent foreign “Central Authority”: *5 months*,
- sends the document to a European country through diplomatic channels: *6 months*
- sends the documents to a country outside Europe through diplomatic channels: *9 months*.

It should be noted that service within the European Union has become substantially quicker since the entry into force of Council Regulation 1348/2000/EC⁵.

Evidence: written testimony or deposition

The Hungarian Code of Civil Procedure does not specify *written testimony or deposition* among the means of evidence, but as a consequence of the principle of freedom of proof, there is no objection to the use of such means of evidence originating from abroad. Namely, according to Section 3 (5) HCCP, unless there is a law to the contrary, during the civil lawsuit the court is not bound by formal rules of evidence, a specific method of evidence or the application of specific means of evidence.

The court shall use *written testimony or deposition* in accordance with the rules of documentary evidence and it may freely evaluate their contents. As an oath is unknown in the Section 166 HCCP, there is no possibility to confirm a written testimony under oath. However, there is no objection to any person taking an oath or solemn promise out of court for the purpose of foreign proceedings, about which a certificate shall be issued by the notary public. (§ 69 HIP).

⁵ 31 May 2001