Conflict of Laws Characterization of Product Guarantee in Europe, with Special Emphasis on Hungarian Law*

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Abstract. This article investigates how product guarantee fits into the regulatory framework of European private international law. It describes the institution trough Regulation (EC) No 593/2008 (Rome I) and Regulation (EC) No. 864/2007 (Rome II), as well as the Hungarian meaning of product guarantee. It analyses the challenges posed by the conflict of laws characterization of this non-contractual obligation.

Keywords: product guarantee, European Union, Regulation (EC) No. 864/2007 (Rome II).

Caracterización del conflicto de leyes en materia de garantía de productos en Europa, con especial énfasis en la legislación húngara

Resumen. Este artículo investiga cómo encaja la garantía de producto en el marco normativo del Derecho internacional privado europeo. Describe la institución a través del Reglamento (CE) n.º 593/2008 (Roma I) y el Reglamento (CE) n.º 864/2007 (Roma II), así como el significado húngaro de garantía de producto. Analiza los retos que plantea el carácter de conflicto de leyes de esta obligación extracontractual.

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SUMMARY: Introduction. I. Product guarantee, as a non-contractual obligation. II. Practical modelling of characterization by analogy with Article 5 of the Rome II Regulation. III. Application of the "escape clause". Conclusions. References.

Introduction

Paragraph 18 of the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC states, that this Directive should not affect national laws providing for non-contractual remedies for the consumer, in the event of lack of conformity of goods, against persons in previous links of the chain of transactions, for example manufacturers, or other persons that fulfil the obligations of such persons. No harmonisation of EU law on this subject was ever achieved.

Following the example of certain European legal systems, such as Spanish and Portuguese law, in Hungary, Act V of 2013 on the Civil Code introduced a direct liability of the producer to the consumer for defective products. The essence of the product guarantee is, that the producer of the product is liable for defects existing at the time the product was placed on the market[1].

Product guarantee is undoubtedly a hybrid. A "hybrid" is the biological term for a plant or animal variety created by cross-breeding that differs from its parents in at least one heritable trait. One of the "parents" of product guarantee is, as it were, that of accessory liability, a new legal instrument that can be used to claim for repair or replacement. The role of the "other parent" should presumably be assigned to product liability, since the manufacturer (or distributor) is the addressee of the claim, and the defendant may be exempted from product liability if he excuses himself on the basis of circumstances which also justify exemption in the case of product guarantee. It is not by chance that hybrids have attracted the intense interest of individual or collective authors (and readers) of myths and tales. Hybrids include the centaur, the satyr and even the beautiful mermaid. The hybrid nature of a real, fairy-tale or mythological creature does not in itself imply any value, just as it is true of many fairy-tale or mythological characters, so it is true of all kinds of hybrids: there are 'good' and bad.

The phenomenon of hybridisation is also remarkable from the point of view of jurisprudence, including civil law: it can be experienced at different levels of analysis of the subject matter of the science. We can speak of hybrid legal systems (e.g.

1 Kemenes, I., "Termékszavatosság", in Vékás, L., and Gárdos, P. (coord.), *Kommentár a Polgári Törvénykönyvhöz,* Budapest, 2014, 1596-1600.

mixed legal systems which for historical reasons bear the characteristics of both the continental legal system and the common law); of hybrid laws which are the result of the combined influence of different legal traditions (e.g. the influence of both the German and the Anglo-Saxon tradition of company law can be seen in Hungarian company law); and last but not least, of legal institutions of hybrid origin, such as product guarantee.

The product guarantee covers movable goods (products) put on the market by a business and, although there is no contractual relationship between the parties involved, it ensures that the consumer can pursue certain claims for defective products directly against the producer. The product guarantee is intended solely to remedy the defect in kind: it gives the consumer a right to repair in the first place and, if repair is not possible, replacement in the second place. As in the case of product liability rules, the law considers the producer to be not only the manufacturer of the product, but also the distributor.

Nevertheless, in view of the globalizing economy, especially the borderless internal market of the European Union, it is likely that there will often be an international element in the legal relationship between the consumer and the producer (distributor), e.g. a German citizen buying a chattel in Hungary, which under Hungarian law would be said to be defective in terms of product guarantee. An important (preliminary) question in resolving the case is which law should be applied. Similarly: does the Hungarian consumer have a product guarantee claim if the product was produced in Germany, for example, or if he bought it from a German distributor in Germany or from someone else elsewhere. German law does not recognise the possibility of direct action against the producer (in the absence of a voluntary warranty), whereas Hungarian law does. It is therefore not indifferent for the consumer whether German or Hungarian law applies. In about half of the cases the Hungarian consumer will be confronted with a non-Hungarian producer (distributor), so that the characterization of the legal relationship and the claim as a private international law claim, which we consider and call a "product guarantee" under Hungarian law, will arise quite often[2].

I. Product guarantee, as a non-contractual obligation

Regulation (EC) No 593/2008 (Rome I) sets out EU-wide rules for determining which national law should apply to contractual obligations in civil and commercial matters involving more than one country. Regulation (EC) No 864/2007 (Rome II) brings greater legal certainty as to the law applicable with respect to non-contractual obligations, in particular in cases of tort (a wrong under civil law) and delict (civil liability).

2 Fuglinszky, Á., *Fogyasztói adásvétel, kellék- és termékszavatosság*, Budapest, Wolters Kluwer, 2016, 204.

Characterization - as a substantive legal instrument - is also present in private international law, and there is a specific private international law question linked to it: under which law of the state should characterization be made. It is one of the most complex legal instruments in the general field of private international law. It is a question of interpretation of the law, which can be determined from several approaches. From the point of view of the legal relationship, characterization is the translation of a given legal act into the language of the law. The definition of the legal instrument that appears in the specific case. It is in fact a matter of classifying the legal instrument in the case in question, first in substantive law and then in conflict of laws, namely by selecting the rule of jurisdiction or conflict of laws which contains the substantive legal instrument found. Approached from the side of the norm, characterization means the determination of the interpretative content and the limits of meaning of the legal instrument appearing in the rule of jurisdiction or the conflict-of-law rule, the determination of which practical cases and facts can be included in the conceptual scope of the given legal instrument. In the case of characterization, the main question is which law is to be used as the basis for translating the specific legal relationship into the language of the law and for interpreting the legal instrument contained in the connecting rule, since private international legal relationships contain an essential international element and are therefore linked to several legal systems, and the law of several States may be applicable to the legal relationship in question. The need for characterization arises from the fact that different legal systems recognize legal instruments with different meanings, or that a particular legal instrument is known in one legal system but unknown in another. Characterization is therefore a case of conflict of laws, where the conflict rules of the forum in question and the foreign law with which it is connected in terms of the elements of the legal relationship in question conflict. In legal regulation, jurisprudence and scholarship, the most common solution is for the legal practitioner to classify the case according to the categories and concepts of his own legal system. Characterization according to presumed substantive law is also accepted as an auxiliary tool[3].

In the private international law sense, characterization must be made autonomously, not according to the *lex fori*, but by interpreting the applicable conflict of laws. From the point of view of private international law, therefore, we are not talking about a product guarantee claim, but the legal instrument must be circumscribed and examined functionally. From this point of view, it is a claim for repair or replacement directly against the producer or distributor, based on the law, with an exception in certain cases similar to product liability.

The above analysis shows that there is no contractual relationship between the claimant and the recipient (except where the producer or distributor is the same person as the one who sold the goods directly to the consumer). It would therefore

3 Császár, M., "Minősítés" [online], *Internetes Jogtudományi Enciklopédia*, vol. 1, 2019, available at: https://ijoten.hu/szocikk/minosites [last visited: February 25, 2024].

follow that the Rome II Regulation applies. The first sentence of Article 1 of the Regulation states, that this Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.

There is no doubt that the claim directly against the producer falls within the field of civil (commercial) matters, which is the reason for the application of the Regulation. However, the Rome II Regulation does not contain, as a non-contractual obligation, a legal instrument such as product guarantee: namely, a statutory claim directly against the producer, but not expressly for liability, but for repair or replacement. The first sentence of Article 2 states, that for the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. However, the kind of claim that the Hungarian Civil Code calls product guarantee cannot be subsumed under any of these headings. It is the closest to product liability as regulated in Article 5 of the Regulation, but it is also distinctly differentiated from it by the fact that its object is not compensation but repair or replacement[4].

The second sentence of Article 2 of the Regulation states, that this Regulation shall apply also to non-contractual obligations that are likely to arise. According to paragraph (11) of the preamble of the Regulation, the concept of a non-contractual obligation varies from one Member State to another. Therefore, for the purposes of the Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in the Regulation should also cover non-contractual obligations arising out of strict liability, which is very similar to the Hungarian product guarantee. It is stressed in the literature that the list in Article 2 of the Rome II Regulation is not a characterization rule, but only an explanation and clarification of Article 1, which would imply that it is not a taxative list, so that non-contractual obligations not mentioned there are also covered by the Regulation. However, there is also a (different) view that the scope of the Regulation is not necessarily limited by Article 2, but it is by the headings of the chapters of the Regulation. These chapter headings also include the legal instruments listed in Article 2.

The other fundamental structural question is whether cross-contractual claims, such as the French *action directe* or the product guarantee (or more precisely, claims which are called such and in some way qualified as such by the laws of the Member States), should not be qualified and connected on the basis of the Rome I Regulation because of their connection with a contract.

To determine the scope of application of the Rome II Regulation, it is first necessary to consider the very nature of the tort / delict or as defined by the Regulation "non-contractual obligation". Depending on the grounds of occurrence, obligations are usually divided into contractual and non-contractual, whilst contractual obliga-

4 Fuglinszky, Á., "A termékszavatosság kollíziós jogi minősítése" [online], *Polgári Jog*, vol. 4, 2016, available at: https://uj.jogtar.hu/#doc/db/193/id/A1600401.POJ/ts/10000101/ [last visited: February 4, 2024].

tions arise, as a rule, by agreement of the parties from the contracts, and non-contractual obligations arise from the grounds provided by law. Non-contractual liability is established by mandatory rules of law, while contractual liability is established both by law and by agreement of the parties on the basis of the contract[5].

In the judgment of the European Court of Justice in case C-26/91. 17 (Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA.) the Court stated that the phrase "matters relating to a contract" is to be interpreted independently, in order to ensure that it is applied uniformly in all the Contracting States (see the judgment in Case 34/82 Martin Peters Bauunternehmung v Zuid Nederlandse Aannemers Vereniging [1983] ECR 987, paragraphs 9 and 10, and the judgment in Case 9/87 Arcado v Haviland [1988] ECR 1539, paragraphs 10 and 11). The phrase should not therefore be taken as referring to how the legal relationship in question before the national court is classified by the relevant national law. The phrase "matters relating to a contract" is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another. Where a sub-buyer of goods purchased from an intermediate seller brings an action against the manufacturer for damages on the ground that the goods are not in conformity, it must be observed that there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former. Furthermore, particularly where there is a chain of international contracts, the parties' contractual obligations may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer. Apart from the fact that the manufacturer has no contractual relationship with the sub-buyer and undertakes no contractual obligation towards that buyer, whose identity and domicile may, quite reasonably, be unknown to him, it appears that in the great majority of Contracting States the liability of a manufacturer towards a sub-buyer for defects in the goods sold is not regarded as being of a contractual nature. It follows that the answer to the question submitted by the national court must be that Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1) is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.

The above argument sounds convincing, but there is no doubt that it was also influenced by the fact that jurisdiction, or the lack of it, was at stake, which is indeed

5 Rudenko, O., "The Significance of the Rome II Regulation in the Unification Process of the European Union", *European Journal of Law and Public Administration*, n.º 1, 2019, 51-63.

closely linked to legal certainty: can a manufacturer be sued in another state by a person whom he does not know, and of whose existence and nationality he is not aware? It should be added that predictability and legal certainty are also important from a conflict-of-law point of view. The question can therefore also be transposed to the applicable law: can the producer be sued under a law which he could not have foreseen and therefore had no reason to know (or to seek to know), nor could he have anticipated the consequences of its application. In addition, the trust and proximity of the persons concerned also play a role in the qualification. A further aspect worth considering in this context may be whether, if there was a contract in the background, the claim can be traced back to that contract, whether the claim is asserted on the basis of that contract[6].

If the preamble to Rome II states that a "non-contractual obligation should be understood as an autonomous concept",' the underlying corollary of this rule is an autonomous concept of a "contractual obligation" in terms of Rome I. Therefore, in order to differentiate between contract, tort, unjust enrichment and other categories set up by Rome I and Rome II, one should not use criteria already established in the private law of a particular state. This should be borne in mind in order not to put the notion of "contract" in the meaning of the Rome I and Rome II Regulations on the same footing as that of "contract" in English, French, Bulgarian or any other national law. What is a contract is determined by a system of internal (domestic, national) laws, whereas the applicable system of internal law is to be determined by the rules of private international law. The latter does not address the issues of the case directly by means of adjudication as national law does, but rather indirectly i.e. by designating the law applicable to the case[7].

In our view, the law applicable to a product guarantee claim, or more precisely the law which shows whether the consumer has a direct right of redress against the producer or distributor for repair or replacement, must be determined on the basis of Article 5 of the Rome II Regulation (product liability). The reasons for this are as follows. Under the EU's autonomous interpretation, this is a legal obligation, not a voluntary one. The majority view is that even the French *action directe* - irrespective of its characterization in the Member States, which under French law is a derivative claim that "passes through" the distribution chain with the goods - must be classified as a non-contractual claim, than this is particularly true of product guarantee, which is based on a statutory provision and is in fact created by the placing of the goods on the market as a kind of anticipatory obligation which is 'activated' when

6 Martiny, D., "Zur Einordnung und Anknüpfung der Ansprüche und der Haftung Dritter im internationalen Schuldrecht", in Mankowski, P., and Wurmnest, W. (coord.), *Festschrift für Ulrich Magnus zum 70. Geburtstag*, München, Sellier, 2014, 483-500.

7 Czepelak, M., "Concurrent Causes of Action in the Rome I and II Regulations", *Journal of Private International Law*, n.º 2, 2011, 393-410.

the consumer brings an action against the producer (distributor) for the defective nature of the product.

We have therefore excluded the application of the Rome I Regulation above. The next question is whether the scope of the Rome II Regulation extends to product guarantees, or more correctly to claims corresponding in substance to product guarantees, given that the Regulation does not contain an express conflict of laws rule. In our view, there are multiple arguments in favour of the correct application of the Rome II Regulation, namely Article 5 thereof.

On the one hand, product guarantee, by its hybrid nature, has several similarities with product liability, namely: product guarantee is also a direct, non-contractual claim against the producer (distributor), and - at least in Hungarian law - the grounds for exculpation have also been taken over from product liability rules.

On the other hand, although it is not correct to support the argument from the point of view of its result, we believe that by applying the Rome II regulation correctly, we can reach a coherent and logical solution with greater certainty than if we conclude that, due to the absence of a conflict rule and the absence of analogy, neither Rome I nor Rome II. and therefore, the Hungarian court would have to apply Act XXVIII of 2017 on Private International Law. The latter does not contain a corresponding conflict of laws rule either, not even "so much" as the Rome II Regulation, which at least contains a specific rule on product liability, the regulatory principles and aspects of which can presumably be transposed to product guarantee[8].

Paragraph (20) of the preamble of the Rome II Regulation states, that "the conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives." Because of its number of similarities with product liability, this has to be the case with product guarantee, as well, which is also a direct, non-contractual claim against the producer (distributor). Article 5 would allow a reasonable balance to be struck between the interests at stake in case of product guarantee. It would meet the objective of fairly spreading the risks between consumer and producer.

All these arguments support the correct application of the Rome II Regulation, namely Article 5 thereof.

8 Fuglinszky, Á., "A termékszavatosság kollíziós jogi minősítése" [online], *Polgári Jog*, vol. 4, 2016, available at: https://uj.jogtar.hu/#doc/db/193/id/A1600401.POJ/ts/10000101/ [last visited: February 4, 2024].

II. Practical modelling of characterization by analogy with Article 5 of the Rome II Regulation

In the case of product liability, particular emphasis should be placed on the specific interests of both parties, the producer and the consumer. From the consumer's point of view, it is reasonable to expect that the product he buys should provide the safety he is entitled to expect, and that the producer or importer should compensate him for any damage caused by a defect in the product. At the same time, the producer or importer has a legitimate interest in foreseeing and accounting for the risks associated with the product, including the damage resulting from its defect. The primary consideration in determining the legal risks is the law of the country under which liability for damage caused by a defective product will be assessed. The consumer's legitimate interest in his own right, supported by his confidence in the market, is therefore limited by the foreseeability from the point of view of the producer or importer[9].

In the light of the above considerations, the Rome II Regulation sets out the following hierarchy of conflict-of-law connecting factors. According to Article 5(1), without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

Article 4(2) states, that where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. This means that the above three-step test is supplemented by a "zero" step: the primary consideration is whether the claimant and the defendant are (jointly) domiciled in the same country. If the answer to this question is yes, then this conflict of laws rule should be applied and not the three-step test.

9 Nagy, C. I., "A jogellenes károkozás kollíziós szabályai a Róma II Rendeletben", *Magyar Jog*, n.º 8, 2008, 542-549.

According to Article 23, for the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

First of all, it must therefore be examined whether the person to whom the claim is addressed (i.e. the producer or distributor) or the person entitled to the benefit (i.e. the consumer) has his habitual residence in the same country, because if so, the law of that country is applicable by virtue of Article 4(2), which is applicable by virtue of the rule of reference in Article 5(1), irrespective of where the product is placed on the market and where it is not.

Therefore, if a consumer whose habitual residence is Germany buys a product of a German manufacturer in Hungary, German law applies (i.e. there is no product guarantee, at least not under the law, because German law does not recognise such a claim). We should note, that in most of the European legal systems there is no product guarantee. But if the same person asserts a claim against a distributor in Hungary, this rule does not apply, and the next conflict of laws rule applies.

And if the tourist, whose habitual residence is in Hungary, targets a distributor in Germany, this conflict of laws rule applies neither, and the next rule must be applied.

According to point (a) of Article 5(1), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country.

Thus, if a movable object bought by a German tourist in Hungary and manufactured there is also marketed in Germany, German law will be applicable, provided that the tourist has his habitual residence in Germany. This means that there will be no product guarantee claim, neither against the Hungarian producer nor against the Hungarian distributor. If the product is not marketed in Germany, the next conflict of laws rule applies.

If a Hungarian tourist buys a product in Germany or even does the same in Hungary, but the producer of the product has his habitual residence in Germany, Hungarian law applies, provided, in the first case, that the same product is also marketed in Hungary. If a Hungarian consumer wishes to take action against the Hungarian distributor (while the producer is German), the solution is either that there is no international element in the legal relationship and it is clear that Hungarian law applies, or, since the product is also distributed in Hungary, the law of the consumer's habitual residence, i.e. Hungarian law, applies.

To give another example, if a Hungarian consumer (whose habitual residence is in Hungary) buys a product in Austria, the producer of which is, say, Canadian, but the product (e.g. a medicine) is also marketed in Hungary, Hungarian law must also be applied.

If the consumer has his habitual residence in Germany but has purchased the product in Hungary and wishes to pursue a product guarantee claim against the Hungarian distributor, the applicable law depends on whether the same product is distrib-

uted in Germany. If so, German law applies, i.e. there is no product guarantee claim. If they are not marketed in Germany, then the next conflict of laws rule applies[10].

That is point (b) of Article 5(1), and the law applicable is the law of the country in which the product was acquired, if the product was marketed in that country.

It must be pointed out, that Article 5(1) suffers from sloppy drafting. The objective connecting factors demand that "the product" was marketed in one of the countries enumerated in article 5(1)(a)-(c), whereas the subjective requirement is formulated more broadly: it suffices that the person claimed to be liable "could reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c). Thus, it is unclear whether the foreseeability test is intentionally stricter than the objective requirement or whether the objective requirement is satisfied at stages (a), (b), and (c) if a product of the same type was marketed in the respective countries[11].

The first question is whether 'product' refers to the particular item or good that actually caused the damage, or whether it also covers other goods of the same type. For example, if the harm was caused by contamination in a can of beer, must it be proved that the can that was contaminated was marketed in the country in question, or is it enough that other cans of the same kind were marketed there? As a matter of plain English and common sense, the latter should be the answer. If the manufacturer sells the identical product in the country in question, it should not make any difference if the can was purchased by the claimant in another country while he was on holiday there. However, the fact that the 'however' clause refers to marketing of the product, 'or a product of the same type', suggests that the commonsense answer is not the correct one. If the proviso to sub-paragraphs (a), (b) and (c) was intended to cover products of the same type, those additional words would have been repeated there too. The next question is the meaning of 'marketed'. This cannot mean the same as 'acquired', since the latter is used in sub-paragraph (b) to mean something different. On the other hand, the product does not have to be marketed by the defendant, since the 'however' clause indicates that the product might be marketed without the knowledge of the defendant. It is suggested that marketing requires the organized, mass selling of a standardized product. This need not be by the defendant or with his consent[12].

If the Hungarian consumer has purchased the defective product (manufactured by a German company) in Portugal and it is not marketed in Hungary ("Hungarian" in the example case also means a person whose habitual residence is in Hungary),

10 Fuglinszky, Á., "A termékszavatosság kollíziós jogi minősítése" [online], *Polgári Jog*, vol. 4, 2016, available at: https://uj.jogtar.hu/#doc/db/193/id/A1600401.POJ/ts/10000101/ [last visited: February 4, 2024].

11 von Hein, J., "Something Old and Something Borrowed, but Nothing New - Rome II and the European Choice-of-Law Evolution", *Tulane Law Review*, n.º 5, 2008, 1663-1708.

12 Hartley, T. C., "Choice of Law for Non-Contractual Liability: Selected Problems under the Rome II Regulation", *International and Comparative Law Quarterly*, n.º 4, 2008, 899-908.

then the producer and the consumer do not have a common habitual residence and since the product is not marketed in Hungary, the connecting rule under (a) cannot be invoked. Thus, if the product is marketed in Portugal (which is highly probable, one might say certain, in the example, since the consumer bought it there), Portuguese law applies, which is fortunate for the consumer, because Portuguese law, like Hungarian law, also recognizes product guarantee[13]. (The same is true if the place of purchase is, for example, Spain, Finland or Sweden.) But if the consumer bought the product in Germany, he is "out of luck" because German law will have to be applied, which does not recognize product guarantee, or more precisely the statutory right to repair or replacement directly against the producer. If, on the other hand, a German consumer buys a product in Hungary which is not marketed in Germany, i.e. in his place of habitual residence (and the manufacturer is not German, so that the common habitual residence rule would apply), Hungarian law will apply, so he has a product guarantee claim.

Finally, in the unlikely event that the product is not marketed in the country of acquisition, the law of the country in which the damage occurred applies under Article 5(1)(c) if the product was marketed in that country. Since the object of a product guarantee claim is not compensation but the repair or replacement of the goods, the analogous application requires that the relevant moment or date of the occurrence of the damage be found. This can be the time when the defect occurred, but it can also be the time when the consumer acquired the defective product instead of the faultless one, because the loss of value (which he seeks to remedy in kind by means of a product guarantee claim, i.e. by repair or replacement) actually occurred to him at that moment, or, if the cause of the defect is already present in the movable thing but its concrete consequences occur at a later moment, then this is the later moment[14].

III. Application of the "escape clause"

Article 5(2) of the Regulation states, that where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Thus, all of paragraph 1 (including the cross-reference to the common-residence rule) is subject to the "manifestly closer connection" escape contained in paragraph

13 Pinto, P. M., "Direct Producers' Liability and the Sellers' Right of Redress in Portugal", in Ebers, M., and Janssen, A. (coord.), *European Perspective on Producers' Liability, Direct Producers' Liability of Non-conformity and the Sellers' Right of Redress*, München, Sellier, 2009, 491-503.

14 Fuglinszky, Á., "A termékszavatosság kollíziós jogi minősítése" [online], *Polgári Jog*, vol. 4, 2016, available at: https://uj.jogtar.hu/#doc/db/193/id/A1600401.POJ/ts/10000101/ [last visited: February 4, 2024].

2 of Article 5. This escape authorizes a court to either: (a) deviate from the order established in paragraph 1 and apply the law of one of the countries listed there; or (b) apply the law of a country not listed in paragraph 1, such as the country of the product's manufacture, upon showing that the country has a manifestly closer connection than the country whose law would normally govern under paragraph 1[15].

There are several cases where it is clear from the circumstances of the case that the relevant non-contractual obligation was manifestly closely connected with another country in which case the law of that other country shall apply. The question arises: what is required to be established to enable a court to give effect to the escape clause? On its face, the use of the phrase 'manifestly more closely connected with' may suggest the bar is a high one and can only be applied in exceptional circumstances[16].

As we have seen, the above rule, which is in fact a four-step rule, may lead to the application of a law under which the consumer has no direct claim against the producer for repair or replacement. For example, if the consumer has his habitual residence in Germany and the producer or distributor also has his habitual residence in Germany, then, if there is an international element in the legal relationship, German law applies, i.e. the consumer cannot claim under product guarantee, even though the consumer bought the defective product in Hungary and would be entitled to product guarantee under Hungarian law. The result is the same if a consumer habitually resident in Germany buys a product manufactured by a Hungarian manufacturer, say in Hungary, but that product (or more precisely a similar product) is also marketed in Germany, because the law of the consumer's habitual residence, which in this case is also German law, applies. If, on the other hand, a Hungarian consumer purchases a movable good in Germany which was not produced by a Hungarian producer and is not even marketed in Hungary, the law of the country of purchase, i.e. German law, will again apply, which also means that the consumer will have no statutory right of repair or replacement against the producer.

In this context the importance of the escape clause becomes clear, and the possibility of its application in product guarantee cases may arise. Can it be said, in particular in the case of the first two examples above, that a product guarantee claim, or more precisely the claim in question, which Hungarian law recognises and regulates as a product guarantee, has a closer connection with another legal system than that which the conflict rule in Article 5(1) of the Rome II Regulation makes applicable? In particular, is the link with the law of a Member State other than the law of the forum manifestly closer, e.g. with Hungarian law, since the purchase of the product took place in Hungary, particularly in view of the fact that the basis of the product guarantee claim is, after all, a contract of sale (of movable goods) concluded

15 Symeonides, S.C., "Rome II and Tort Conflicts: A Missed Opportunity", *American Journal of Comparative Law*, n.º 1, 2008, 173-222.

16 Gwynne, R., "Rome II Regulation", *Business Law International*, n.º 3, 2011, 293-316.

between the consumer and the company; moreover, the fact that such a contract has been concluded is a legal precondition for the product guarantee itself (at least under the *lex fori*); and - although this approach is contrary to the requirement of an autonomous interpretation of the regulations, because it is based on the law of a Member State - Hungarian law considers product guarantee (although it is not a contractual claim) as a claim under the rules on breach of contract, more specifically under the provisions of Article XXIV of the Hungarian Civil Code on Defective Performance. In the case of defective performance, it is located in the law of the country of origin. Can we speak of a manifestly closer connection in Hungarian law, in particular of a pre-existing legal relationship between the parties, e.g. a contract under Article 5(2) of the Regulation?

In our view, the application of the escape clause may be more justified if the addressee of the claim is a Hungarian producer or a distributor in Hungary, since legal entities resident in Hungary must reckon with the product guarantee obligation, and it would be strange if the consumer-customer of the movable thing would only be excluded from this claim because, for example, he has his habitual residence in Germany (and the product happens to be distributed there). This is especially true if the product was purchased in Hungary, which also links the legal relationship to the Hungarian legal system, especially in view of the fact, as mentioned above, that the legal precondition for product guarantee is the contract between the consumer and the business by which the consumer acquired the movable good.

From our perspective, the application of the escape clause may be particularly justified if the consumer intends to bring an action not only against the producer or the distributor "further down" in the distribution chain, but also against the seller of the defective product. Since the same product and the same defect may be at issue, it seems appropriate, in order to ensure a uniform treatment of the case, to decide whether the consumer is entitled to a claim under what is known under Hungarian law as product guarantee, on the basis of the law designated by the Rome I Regulation[17].

The escape clause is drafted in a manner that suggests it is to be deployed exceptionally; the escape clause in Rome II operates in an intermediate way. A pre-existing relationship is singled out as a very important factor, and it is submitted here that it should be a decisive factor where it governs the contractual relationship of all the parties in the case. However, the court should not deploy the escape clause where the law governing the pre-existing relationship does not protect the weaker party under the contract[18].

17 Fuglinszky, Á., "A termékszavatosság kollíziós jogi minősítése" [online], *Polgári Jog*, vol. 4, 2016, available oat: https://uj.jogtar.hu/#doc/db/193/id/A1600401.POJ/ts/10000101/ [last visited: February 4, 2024].

18 Okoli, C. S. A., and Arishe, G. O., "The Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation", *Journal of Private International Law*, n.º 3, 2012, 513-546.

Conclusions

In the globalised world, in the single internal market of the European Union, we often have to deal with cross-border disputes related to defective products, i.e. cases where there is an international element in the facts. Thus, it is necessary to examine which law should be applied to a claim in cases with a foreign element, i.e., applying the autonomous approach of private international law, independent of the *lex fori*, to the question of which law should be applied to a claim which can be brought directly against the producer (distributor) under the law for the repair or replacement of a defective product, and which can only be exonerated by proving one of three conditions similar to those of product liability exculpation.

In principle, the Rome II Regulation does not cover non-contractual obligations in general, but only non-contractual obligations in civil and commercial matters which are connected to the law of several States[19]. Nevertheless, in our view, since product guarantee is not a voluntary commitment, the relevant conflict of laws rule should be sought in the Rome II Regulation on non-contractual obligations.

Within this, the correct application of Article 5 on product liability seems to be the most appropriate. While it is true that the product guarantee claim is not for damages, which does not allow for direct application, several factors support the correct application of Article 5 by analogy.

On the one hand, like product liability, it is a legal obligation and claim. On the other hand, some of the objectives set out in the preamble to the Rome II Regulation in relation to Article 5 can be applied to all claims relating to defects in the product. Thus, it seems acceptable that the producer should be under a certain obligation of responsibility if the producer could have foreseen the enforcement of these rules against him, which is the case in particular if his product was placed on the market in a country whose legal system recognises this type of responsibility. This aspect is consistently reflected in the conflict-of-law rules in Article 5 of the Rome II Regulation.

Nevertheless, it cannot be ruled out that in certain cases the so-called "escape clause" provided for in Article 5(2) may be applicable, which may, for example, also link the legal relationship to Hungarian law because of the obviously closer connection; or, some kind of ancillary connection may be established under the Rome I Regulation if the consumer asserts a claim for a warranty against the seller and a claim for product guarantee against the producer at the same time.

Finally, it should be pointed out that the conflict rule "says nothing" about the legal instrument itself, about its application, but "merely" designates the applicable law. Nor can it be ruled out that the applicable law will ultimately classify the legal instrument in a way quite different from the conflict rule leading to the substantive law in question. To illustrate this with an example: in our view, a product guarantee claim, or more precisely a claim for repair or replacement directly against the pro-

19 Császár, M., "Róma II. v. magyar Kódex", *Európai Jog*, n.º 2, 2008, 18-27.

ducer or distributor, not under a contract but under a statute, must be classified as non-contractual and the applicable law must be determined by analogy with Article 5 of the Rome II Regulation. If Article 5 of the Rome II Regulation refers to French law, the claim itself must be classified under French law, i.e. it must be considered a derivative, contractually based claim in accordance with the French interpretation and practice of *action directe*. It must also be determined on the basis of the applicable French law as to the precise claim which the claimant may assert under this title[20].

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20 Fuglinszky, Á., "A termékszavatosság kollíziós jogi minősítése" [online], *Polgári Jog*, vol. 4, 2016, available at: https://uj.jogtar.hu/#doc/db/193/id/A1600401.POJ/ts/10000101/ [last visited: February 4, 2024].

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