

EXPRESS AND IMPLIED WARRANTY IN HUNGARIAN CONSUMER LAW

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Abstract in original language

Can law be a watchdog for people, who are unable to protect themselves against consumerism? This is indeed a vital question regarding this topic. Consumer protection is really an emphatic policy issued by the European Union. Several rules of Hungarian contract law, among others, have been changed under those EC directives, which focus on the interest of consumers. New contract forms have been established, for instance „door to door sales”, „distance selling”, „time-sharing”, and traditional types have hence changed. I would like to highlight the system of warranties concerning the consumer contract. First of all I will distinguish between the so-called express and implied warranties, and the legal guarantee. After this I wish to draw attention to the practical problems of the regulation through a few cases. Last but not least I will summarize the predictable changes in the new Civil Code of Hungary. How does this topic connect to the section named Securing Obligation? On one hand consumer contract obviously states an obligation, on the other hand express warranty is ruled in the Chapter Accessory Obligations for Securing Contracts of the Civil Code of Hungary (hereinafter HCC). Legal regulation can prescribe obligations to make warranties and can also determine the minimum mandatory extent thereof. (For example the warranty for things designated for long-term use) This is a kind of collateral effect of some special contracts, which is called (legal) guarantee by the 1999/44/EC Directive. Otherwise warranty can not only be based directly on the law, but on the will of the seller or the producer. The parties, merchants and producers shall be entitled to assume obligations to make warranties in contracts as well. (well known commercial guarantee), and to make specific promises including oral representations, written representations, descriptions, or commercials of their provision. Implied warranty is a systematically different legal institution to the former ones. This kind of duty is implied, if not included in detail in the contract, therefore the merchant should be responsible if the goods do not comply with the ordinary purpose for which they are normally used. In fact this one is not an accessory obligation, which secures the contract, but the main obligation, which should have been fulfilled. A couple of other differences can also be found, I have tried to collect these to show the variety of parallel effects of deficient performance. In commercial practice, it causes the consumer a lot of trouble to trace the rights back to the origins because of the duplicated or multiplied regulation and the parallel enforceable obligations. As a closing remark, I would like to include a few sentences about the future. The new HCC, which did not come into force on schedule (May 1st, 2010), simplifies the system of warranties. The Code

does not distinguish between the consumer and the traditional sale contracts regarding deficient performance. The terms, as well as the periods, are the same. Furthermore a new legal institution has been established by the Code, which can be described as an implied „product warranty”. The obligor, in this relation, is the producer itself. Finally, referring back to the prefatory question and concluding my topic, there are different ways in which the legislator can prefer the interest of consumers, but it is not simple to find a satisfactory balance between protecting the weaker party and respecting contract freedom.

Key words in original language

Warranty; guarantee; consumer law; contract law; deficient performance.

1. INTRODUCTION

A lot of traditional legal institutions have been changed in the territory of private law under the EU legislation. The principle, free movement of goods and services, could have side-effects, this is the main reason, why the EU had to issue the consumer protection policy.

The regulation of various forms of warranty is probably the most important part of consumer civil law. (Consumer law consists of both private and public law rules, so I wish to use this distinction thereafter.) These rules were implemented into Hungarian law under Directive 1999/44 EC (hereinafter: Directive). Thus different rules can be detected for consumer and non-consumer contracts.¹ Both of these forms of warranty were established for cases of deficient performance, which I will define later.

First of all, we should distinguish between express warranty and implied warranty. Express warranty, which is an accessory obligation for securing contracts, can be divided into two further categories. One of these is express warranty based on another contract, the other is based on law, in other words, associated guarantee.

The Directive refers to warranty as a special form of liability, but in my opinion it is a duty. Because the obligor does not need to prove a subjective or a mental element (for instance the mens rea or the culpability)

¹ A consumer contract is signed by a consumer and a seller. The reason for a different regulation lies in the relation of the parties. The seller means any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession.

We can find implied warranty in the Hungarian Civil Code (hereinafter: HCC).² It can be traced back to the main obligation itself. The origin of this is the principle „*pacta sunt servanda*”. Implied warranty is actually a legal based duty, not a single obligation.

The aforementioned forms of warranty are very similar, hence the consumer cannot always easily decide, which he or she should invoke. This is the reason, why I wish to point out the main differences and to portray the relationship of these legal institutions.

2. DEFICIENT PERFORMANCE

Deficient performance is, in short, the non-conformity of goods with the contract, which occurs if the parties owe mutual services to one another and the goods or provisions do not, at the time of performance, correspond to the characteristics stipulated by law or by the contract. E.g. contract specifications can be sumptuous as well (for instance special colour or feature of the good).

However a jury can explicate strange duties, *for instance, in the case of the „wet cat”*. *Rumour has it, that an old lady wanted to dry her cat in her brand new microwave oven. The machine obviously killed the animal. The lady claimed damages, arguing that a warning should have been given on the cover or in the manual. The jury found the producer responsible for damages. The conclusion of the case traces back to the problem concerning the allowed level of consumer idiotism.* It is actually a case for product liability, but it highlights the substance of deficient performance too.

The consumer needs to prove that the fault existed at the time of performance. However, the Directive has changed this rule by means of a presumption, which I will review below. Thus who has to prove the time, when the goods became faulty? A rebuttable presumption of non-conformity was established for the first six months after the time of the performance. It is a form of strict liability (to be more exact: a duty), thus the obliged party cannot exculpate himself. However, the conformity can be proved, therefore the presumption can be rebutted, and the duty won't exist at all.

3. RIGHTS OF THE CONSUMER

The obligee shall be entitled to request repair or replacement of the good according to his or her choice. Unless the choice is impossible or its accomplishment causes disproportional costs. If the obligor is unable to fulfil either of the former alternatives, the consumer can request appropriate price reduction or can rescind the contract. Both of these should obviously be fulfilled free of charge.

² Act No. IV of 1959 on the Hungarian Civil Code.

Furthermore, there is special three-day period for replacement in relation to goods designed for long term use. If the consumer bases his claim on this rule, the obligor cannot invoke disproportional costs. Except that the rights are the same regarding express and implied warranty. If the consumer signs a special consumer contract, he or she will be entitled to rescind the contract within a more favourable period without any reasoning.³

Last but not least, the consumer shall be entitled to claim damages, if damage have been caused, because deficient performance is a kind of breach of contract.

There is a special commerce practice in Hungary, according to which the seller should refund the price if the contract is rescinded. But the Hungarian seller typically urges the consumer to purchase another good, because they do not wish to pay back the price. What can the consumer do? Basically nothing, because it is not worth initiating a lawsuit in case of a cheap good.

4. PERIODS OF LIABILITY

How long is the consumer entitled to forward his claim? Different periods were determined for consumer and non-consumer contracts in the HCC, but we are dealing with consumer contracts here only. The period of limitation for claims shall be five years, unless otherwise prescribed by law. (This is the case here, where we can detect a special period.) What is the effect of this? A lapsed claim may not be enforced in court. The period of limitation is two years from the time of performance (unless a standard or a statutory use period is determined), and at least one year for second-hand goods. Parties are not entitled to agree in a shorter period, in order to secure a minimum level of protection. If the obligee is unable to enforce a claim for an excusable reason (if a defect was not detectable due to the character or nature of goods), the period should be three years. Contract terms are forbidden to derogate the aforementioned rights of the consumer.

5. PERIOD OF REPAIR OR REPLACEMENT

There are no terms expressly defined by the Code or other decrees concerning the periods of repair or replacement – only general clauses can be found. Under the HCC, the repair must be accomplished without injuring the interests of the obligee. There is a parallel rule for the same case. The obligor shall aim to repair the product within 15 days. (It has been established by the Decree of the Minister for Economy and Transport No. 49/2003.) It seems to be a loophole, or to be more specific a soft law rule, which can hardly be enforced.

³ This is the so-called "cooling off" period, which lasts for eight days from the time of the performance in cases of e.g. door-to-door sales or distant selling.

6. EXPRESS WARRANTY

It is called associated guarantee by the aforementioned EC Directive, and it is based on the law. The seller or the producer usually uses this against any defect, which becomes apparent within a certain period. On the one hand this is current practice as it stimulates competition (it is useful from the point of view of the EU, but not for the obligor). Therefore it ensures a higher level of protection (it is important from the points of view of consumer interests), but it also raises the demand. Therefore this legal institution is directly used to reach an economic goal. Obviously the price of that higher protection will be paid by the consumers themselves. It is an advantage on the side of the individual, which should be paid collectively, because it is built in the price.

We can detect law-based express warranty in several fields of the Hungarian legal system, for instance concerning consumer goods designated for long term use, e.g. vehicles, electrical appliances with a value over 10 000 HUF. Here the period of limitation shall be one year. Furthermore we can find a six-month period concerning repair services, or a three-year-long period regarding newly built houses and flats.

If the warranty is based on the contract, the producer, seller or importer can freely decide whether or not they want to undertake it. They can also determine, how long, and under what kind of conditions they wish to do so. Only one possibility is forbidden, namely when the obligor wants to derogate the conditions of law-based warranty.

7. PROBLEMS AND SOLUTIONS

Out-of-court settlement of consumer disputes should be officially endorsed (duly stating the financial background and the legal personality of these) as it is usually not worth taking up a lawsuit. For this reason, mediators and specialized *quasi* judicial bodies were created. These solutions are faster, easier and cheaper than the traditional legal procedures. Their decisions cannot be enforced, because they are not real courts. The period of repair and replacement would be strictly determined. There are too many rules, so the regulation is fairly complex, and it can confuse consumers, who are weak and unable to take care of themselves.

Who is the ideal consumer? A German consumer, a Hungarian pensioner, or the reasonable man, perhaps the „*bonus et diligens pater familias*”. It is hard to answer this question because of national peculiarities. Despite that the EU must work with a consumer type.

8. POSSIBLE WAYS OF THE FUTURE

The new Hungarian Civil Code should have made changes, but it will not enter into force owing to a recent decision of the Constitutional Court. The

new Code would have established a new form of implied warranty, called product warranty. The consumer would have been entitled to bring a claim directly against the producer in line with this duty. The period of limitation would not have been different in consumer and non-consumer contracts. The period of limitation would have been extended to three years from the current two-year period, or to a special five-year-long period, if the subject of performance is real estate.

9. CONCLUSION

We can state, that the regulation of warranty is fully harmonized according to the EU law. The consumers have almost the same rights in every memberstate, theoretically. Because national commerce practices, and the way of thinking cannot be changed as fast as the written law. On the other hand traditional private law institutions have been modified, therefore eroded the classical civil law principles and added several public law rules to it. In sum, it is almost impossible to create an artificial balance between the consumers and the sellers in every aspect.

Literature:

- Benacchio, Giannantonio [2003]: *Az Európai Közösség Magánjoga*. Osiris Kiadó. Budapest.
- Cooter, Robert – Ulen, Thomas [2005]: *Jog és közgazdaságtan*. Nemzeti Tankönyvkiadó. Budapest.
- Fazekas Judit: *Fogyasztóvédelmi jog* (Novotni Kiadó, Miskolc 2000.).
- Gárdos Péter (szerk.) [2009]: *Kézikönyv az új Polgári Törvénykönyvhöz*.
- Ziegel, S. Jacob [1998]: *New developments in International Commercial and Consumer Law*. Hart Publishing. Oxford.

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