Iustum Aequum Salutare
XVIII. 2022. 2. • 101–119.

EU CHOICE-OF-LAW RULES BEFORE HUNGARIAN COURTS: CONTRACTUAL AND NON-CONTRACTUAL OBLIGATIONS

Csongor István Nagy
professor of law (University of Szeged)

1. Introduction

This article is based on the Hungarian strand of the multiyear CEPIL project ("Cross-Border Litigation in Central-Europe: EU Private International Law before National Courts") carried out with the generous support of the European Commission Directorate General Justice and Consumers.[1] One of the leading considerations behind the CEPIL project was that the value of private international law (PIL) unification can be preserved only if EU private international law (EU PIL) instruments are applied correctly and uniformly, hence, the European endeavours in the field should not and cannot stop at statutory unification but need to embrace the judicial practice and make sure that besides the vertical communication between the CJEU and national courts, there is also a horizontal communication between national courts, authorities and the legal community in general. The purpose of this publication is to contribute to this horizontal communication between Member State courts by providing an analytical insight into the Hungarian case-law on the Rome I and the Rome II Regulations.

EU PIL instruments, including the Rome I and the Rome II Regulations, are regularly applied by the Hungarian judiciary. The survey carried out as part of the CEPIL identified 76 cases where the Rome I Regulation and 20 cases where the Rome II Regulation was applied. The overwhelming majority of these cases raised no substantive issues of interpretation, which suggests that Hungarian courts apply the Rome I and the Rome II Regulations smoothly and no substantial conceptual issues arise.

[1] This publication was funded by the European Union's Justice Programme (2014–2020) (800789 – CEPIL – JUST-AG-2017/JUST-JCOO-AG-2017). The content of this publication represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

2. Law applicable to contractual relations: application of the Rome I Regulation

The survey produced 76 Hungarian cases where a reference was made to the Rome I Regulation.[2] In the overwhelming majority of these cases, no substantive issues of interpretation emerged: in 61 cases the interpretation of the Regulation was clear. The Hungarian case-law deals with various aspects of the Rome I Regulation, including conceptual issues, party autonomy, objective connecting factors and the escape clause.

2.1. Scope of application

The Rome I Regulation has universal application, which means that it determines the applicable law irrespective of whether the cases has an EU element or not. This principle has been consistently followed by Hungarian courts. Nonetheless, in an early case the Győr Regional Court refused to apply the Regulation to a cases where it found no EU element. In Case *G.20348/2013/83*, the Rome I Regulation was not applicable *ratione temporis*. However, the Győr Regional Court, as *obiter dicta*, indicated that the Rome I Regulation would not apply anyway: one of the contracting parties was Austrian but the other one was from the Cayman Islands. It seems that the court conceived the scope of the Rome I Regulation as applying only to EU matters. This stance is flawed, since the Rome I Regulation has universal application and is applicable irrespective of whether the case has an EU element or not (Article 2 of the Rome I Regulation).

Interesting questions of interpretation and characterization emerged concerning the right of representation. On the one hand, this is a question excluded from the scope of the Rome I Regulation. On the other hand, in some contexts the right of representation may be a contractual issues under Hungarian law, for instance, in case the represented company is, in some way, liable for the false pretense concerning the existence of the right of representation. In Case *Gf.40063/2017/13*,[3] the contractual dispute centered around the right of representation. The parties concluded a guarantee agreement, however, the signatory on the side of the guarantor had no right of representation. The employee who signed the contract (Mr. B. R.) was not a statutory representative of the guarantor and had no power of attorney. The question was whether the action of Mr. B. R. bound the defendant on account of implicit approval. This question appears to fall out of the scope of the Rome I Regulation: Article 1(2)(f) excludes, from the scope of the Regulation, "questions governed by the law of companies", while Article 1(2)(g) excludes "the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party." Nonetheless, the High Court of Appeal of Budapest affirmed the Budapest-Capital Regional Court's judgment which extended the *lex contractus* established under the Rome I Regulation (Hungarian law) to the question of representation. Under Hungarian

[2] For a general overview, *see* Csöndes, Mónika: A szerződésekre alkalmazandó jog meghatározása a Róma I. rendelet alapján. *Kúriai Döntések,* 2018/9. 1242–1250.

[3] Appealed from Case G.42206/2012/102 (Budapest-Capital Regional Court).

law, the above issue qualifies as a contractual question,[4] hence, may come under the *lex contractus*. Nonetheless, the rules limiting the scope of the Rome I Regulation, that is, the exclusions listed in Article 1(2), should have an autonomous EU law meaning and the reference to "the question whether an agent is able to bind a principal" seems to embrace the issue of implicit approval of the actions of a non-representative.

It has to be noted that the above error concerned solely the reasoning of the judgment and had no bearing on the substantive outcome. Namely, if the question of implicit approval is not covered by the Rome I Regulation, the applicable law has to be established on the basis of national conflicts rules, which also point to the application of Hungarian law as the *lex contractus*. The court considered that the parties chose Hungarian law to govern their contractual relation and this choice was valid also under Hungarian conflicts rules.[5] The question of characterization, under Hungarian conflicts rules, was governed, in principle, by Hungarian law[6] and, in Hungarian law, the question of implicit approval qualifies as a contractual issue.[7] Accordingly, the question of implicit approval would have come under Hungarian law even in case the court had found that the Rome I Regulation did not apply and established the applicable law on the basis of Hungarian conflicts rules.

2.2. Party autonomy

Party autonomy in contractual matters is a traditional concept of Hungarian private international law.[8] Most questions of interpretation are raised by implicit choices. In principle, a reference in a contract to a specific statute of a legal system, especially if this is the civil code, implies the choice of that legal system. In Case *Pfv.I.21.730/2019*,[9] the Supreme Court held that implicit choice of law can be established, if the parties made a choice in an earlier contract and it cannot be inferred from the circumstances that their intentions changed; furthermore, if, in the context of the contractual rights and obligations, the parties refer to a law or other piece of legislation of a given country

[4] Under Hungarian law, the actions of a person may bind the principal even if the former has not right of representation if the principal approves them either explicitly, or implicitly (that is, by indicative behavior). See Section 221(1) of the old Civil Code, which was applied in this case, and Section 6:14 of the Civil Code, the currently effective provision.

[5] Section 25 of the 1979 Act on Private International Law, the provision effective during the relevant time, and Section 50 of the 2017 Act on Private International Law, the currently effective provision.

[6] Section 3 of the 1979 Act on Private International Law, the provision effective p during the relevant time, and Section 4 of the 2017 Act on Private International Law, the currently effective provision.

[7] One the one hand, this question is regulated among the rules on contracts. See Section 221(1) of the old Civil Code, and Section 6:14 of the Civil Code. On the other hand, Hungarian conflict rules regard solely statutory representation (but not contract-based power of attorney) as a question coming under personal law. See Section 18(1) of the 1979 Act on Private International Law and Section 22(4)(c) of the 2017 Act on Private International Law.

[8] *See* Szabó, Sarolta: A nemzetközi szerződésekre alkalmazandó jog meghatározása, különös tekintettel a Róma I. rendelet alkalmazási körére és a jogválasztásra. *Külgazdaság*, 2017/3–4. 25–51.

[9] Reported as BH 2020.9.267. Appealed from Pf.20753/2019/4 (High Court of Appeal of Budapest), appealed from Case P.22918/2018/45 (Budapest-Capital Regional Court).

or if they refer to concepts of substantive law that exist only in a given country.[10] The parties choice-of-court agreement can also indicate that they envisaged the law of the chosen court, however, forum selection, in itself, cannot be considered to imply the choice of the *lex fori*.[11]

In *Case Gf.40321/2014/9*,[12] the parties stipulated the application of the Hungarian Civil Code. The High Court of Appeal of Budapest considered this to be an implicit choice of Hungarian law.

On the other hand, in Case *Gf.40051/2014/8*,[13] the High Court of Appeal of Pécs, when examining whether the parties chose German law, found the references to the German Civil Code (BGB) insufficient, because the contract also referred to the Hungarian Civil Code.

The parties were Hungarian companies (seated and registered in Hungary) and entered into a construction contract, which used the "Vergabe- und Vertragsordnung für Bauleistungen" (VOB), a German standard contract worked out for construction projects. The VOB contains references to German law. The High Court of Appeal of Pécs held that that the references of the VOB to the provisions of the BGB were not sufficient to establish the choice of German law, as the contract contained references also to certain sources of Hungarian law.

In Case *Pf.20370/2013/6*, the High Court of Appeal of Pécs apparently misconceived party autonomy and ignored the parties' choice of law without any detailed analysis. It found that the contract was invalid, because the choice of Austrian law went counter to the Rome I Regulation and the general principle of law that the law of the country has to be applied to which the case is most closely connected.

In Case *Pf.20024/2016/3*, the parties chose Austrian law in the contract but, during the civil procedure, jointly asked to the court to apply Hungarian law concerning the question of validity. The High Court of Appeal of Pécs confirmed that the parties are free to choose different laws as to different parts of the contract or different contractual questions: they had the right to choose Hungarian law to govern the existence and validity of the contract without impairing the applicability of Austrian law to the rest of the contractual issues.

In Case *Gf.40063/2017/13*,[14] examined above, the High Court of Appeal of Budapest encountered a case where the parties failed to explicitly choose the applicable law and examined whether such a choice may be inferred from the circumstances. The dispute emerged in the context of a distribution contract concluded between an Austrian producer's subsidiary in Hungary and a Polish distributor. The defendant, as the distributor's parent company (owning 50% of the shares), provided a guarantee (suretyship) to the supplier concerning the supplier's unpaid invoices. The guarantee agreement was separate from the distribution contract, although it explicitly confirmed

10 Para 61.

11 Paras 62 and 64–66.

12 Appealed from Case G.40368/2012/52 (Budapest-Capital Regional Court).

13 Appealed from Case G.40161/2013/47 (Zalaegerszeg Regional Court).

14 Appealed from Case G.42206/2012/102 (Budapest-Capital Regional Court).

that the parties were familiar with the terms of the latter and the distribution contract was also attached to the agreement. In the distribution agreement the parties chose Austrian courts and Austrian law. The guarantee agreement was, however, less explicit. While here the parties stipulated the exclusive jurisdiction of Hungarian courts, as to the applicable law, they simply referred to the "Act of the Civil Code." Since the guarantee agreement was in English, it could not be argued that this reference implied the choice of Hungarian law, as – at least theoretically – this expression could refer to any civil code.

The Budapest-Capital Regional Court, affirmed by the High Court of Appeal of Budapest, found that, taking into account the circumstances of the case, the above clause embedded an implicit choice of Hungarian law. First, the choice of law clause of the distribution contract did not extend to the guarantee agreement, because the parties of the latter specifically addressed the issues of jurisdiction and applicable law. Second, given that the parties chose Hungarian courts and one of them, the party seeking a security, was Hungarian, it could be reasonably inferred that the term "Act of the Civil Code" referred to the Hungarian Civil Code and, in turn, the parties implicitly chose Hungarian law.

The effects of party choice on non-signatory third parties raises interesting conceptual issues. Does the parties' choice have the same nature as objective connecting factors in terms of determining the applicable law *erga omnes* or it features the privity of contract? In Case *P.25471/2015/47*, the Budapest-Capital Regional Court dealt with the effects of choice-of-law and choice-of-court agreements on third parties. It held that while forum selection clauses may not bind non-parties, the law chosen by the parties does. Choice-of-court agreements involve the derogation of jurisdiction, which, as a waiver of right, cannot bind non-parties. On the other hand, in choice of law, the parties' agreement cannot be conceived as a mutual waiver of a right and it qualifies as a connecting factor and, as such, determines the applicable law *erga omnes*.

In Case *Pfv. V. 20.067/2019*,[15] the Supreme Court established that the Rome I Regulation does not time-bar the parties' freedom to choose the applicable law and they may make use of this freedom after the conclusion of the contract, even after the emergence of the legal dispute, during the court or arbitral procedure. The choice of the applicable law may also be tacit. In this case, it is a requirement that it be clearly demonstrated by the terms of the contract or the circumstances of the case and the parties' will can be established without doubt. At the same time, the choice of the court, in itself, does not, imply the tacit choice of the law. In this case, the plaintiff, in his statement of claim, relied on Hungarian law (expressly referred to the provisions of the then-effective Hungarian Civil Code) and the defendant responded to this in a detailed and substantive manner in his submission and presented his defense with reference to the provisions of Hungarian law. The Supreme Court considered this to be a choice of Hungarian law by indicative behavior. The Court stressed that the application of

[15] BH 2020.3.72. Appealed Case Gf.40107/2018/8 (High Court of Appeal of Budapest), appealed from Case G.40375/2016/32 (Budapest-Capital Regional Court).

Hungarian law was not based on the parties' hypothetical will but on their clear and specific concurrence of wills.

2.3. Objective connecting factors

In Case *43.Pf.632341/2019/4*,[16] the Budapest-Capital Regional Court held that a loan contract does not qualify as a contract for the provision of services under Article 4(1)(b) of the Rome I Regulation (which provides for the application of "the law of the country where the service provider has his habitual residence"), but comes under Article 4(2) of the Regulation, which provides for the application of the "law of the country where the party required to effect the characteristic performance of the contract has his habitual residence." The Court held that the characteristic performance is effected by the creditor, hence, the two provisions pointed to the same applicable law.

In Case *Gf.20100/2017/5*,[17] the defendant, a Hungarian company, was a contractor of a construction project in Romania and hired the plaintiff, a German company, as sub-contractor. The works contract between the contractor and the Romanian customer stipulated Romanian law, however, the contract between the contractor and the sub-contractor contained no choice-of-law clause.

The High Court of Appeal of Győr held that the works contract between the Hungarian contractor and the German sub-contractor was governed by German law, as this was the law of the party providing the characteristic performance. It found that the circumstances that the contract was concluded in Hungary and the construction was coordinated by the Hungarian company and it was related, in economic terms, to another construction contract were irrelevant. Interestingly, although, as a contract for the provision of services, the works contract arguably came under Article 4(1)(b) of the Rome I Regulation, the Court based its conclusion on Article 4(2), which provides that "the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence."

In Case *Pfv.I.21.730/2019*,[18] the parties, as part of an English language settlement concluded in London, agreed that the defendants, as a form of indemnification, would offer, in a certain value and time-limit, real estates located in Hungary and confer title on the plaintiffs over the real estates chosen by the latter. Nonetheless, the parties did not agree to transfer ownership over specific real estates. The Supreme Court found that this agreement came under none of the points of Article 4(1) of the Rome I Regulation. Because it did not involve the transfer of ownership of specific real estates, it did not come under Article 4(1)(c) of the Rome I Regulation ("contract relating to a right *in rem* in immovable property […] shall be governed by the law of the country where the property is situated"). Instead, the Court applied Article 4(2) of the Rome I Regulation

[16] Appealed from Case P.21637/2016/78 (Budapest District Court for the XX, XXI and XXIII Districts) and affirmed by Case Pfv.20211/2020/3 (Supreme Court).

[17] Appealed from Case G.20969/2014/61 (Győr Regional Court).

[18] Reported as BH 2020.9.267. Appealed from Pf.20753/2019/4 (High Court of Appeal of Budapest), appealed from Case P.22918/2018/45 (Budapest-Capital Regional Court).

(principle of characteristic performance) and concluded that as the habitual residence of the obligor (defendant), who promised to transfer the ownership over the immovable assets, was in Hungary, Hungarian law applied. The Court noted that Article 4(3) of the Rome I Regulation also pointed to Hungarian law (most closely connected law).

2.4. Escape clause

The escape clause embedded in Article 4(3) of the Rome I Regulation gives the necessary flexibility to national courts to apply the proper law. Nonetheless, this may also give floor to their endeavors to apply their own law. Hungarian courts apply this exception narrowly and their case-law confutes this fear.

In Case *Pfv.V.20.594/2017/6*,[19] the plaintiff, a German national, and a Hungarian company concluded a contract where the plaintiff promised to establish a company in Russia and become the managing director of this company (including the acquisition of a work permit). The plaintiff's place of living could not be ascertained, it was either Germany or Russia. The parties did not choose the applicable law. The plaintiff sued for his fee, while the defendant refused to pay, arguing that although the company was registered, the plaintiff did not acquire a work permit and, thus, could not become the company's managing director.

The Budapest-Capital Regional Court[20] affirmed the first instance court's decision[21] to apply Hungarian law. The Supreme Court affirmed the judgment. Article 4(1)(b) of the Rome I Regulation provides that "a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence." Article 19(1) of the Rome I Regulation defines "[t]he habitual residence of a natural person acting in the course of his business activity" as "his principal place of business." On the basis of this, either Russian or German law should have been applied. Nonetheless, the plaintiff's place of business could not be clearly ascertained. On the one hand, in the contract, the plaintiff gave an address in Moscow as his place of living and his duties were to be carried out in Russia. On the other hand, should his place of living have been in Russia, the plaintiff would have needed no work permit there. Nonetheless, this question was jumped as all courts found that "the contract [was] manifestly more closely connected with" Hungary and, hence, due to Article 4(3) of the Rome I Regulation, Hungarian law applied.

The Supreme Court, in line with the Budapest-Capital Regional Court, reasoned that the contract had no connection to either German or Russian law. The parties envisaged entering into an employment contract under Russian law once the plaintiff acquired the necessary work permit and concluded the service contract for the interim period. When concluding the contract, the parties were aware of the possibility to choose the applicable law. For the employment contract to be concluded after the acquisition of the work permit, they wished to stipulate Russian law but did not choose the applicable

[19] Reported as BH 2018.9.250.

[20] Case Pf.638807/2016/4 (Budapest-Capital Regional Court).

[21] Case P.22689/2012/57 (Buda Central District Court).

law for the provisional service agreement. In fact, the purpose of the latter was to avoid breaching the Russian rules on employment (the contract was concluded between the plaintiff and the defendant and not the plaintiff and the Russian company that was supposed to be his later employer). The Supreme Court established that the parties wanted to make use of the possibilities offered by the internal market and, at the time the contract was concluded, none of them wished to have Russian law applied. The Court inferred that the reason why the parties did not choose the applicable law for the service contract was that they considered it to be truly provisional and considered the choice of the applicable law not to be relevant. The Supreme Court noted that this also underpinned the conclusion that the business relationship between the parties and the contractual construction was more closely connected to the defendant's personal law, that is, Hungarian law.[22]

In Case *Gf.20090/2020/5*, the parties concluded a service contract. The High Court of Appeal of Győr established that, due to Articles 4(1)(b) and 19 of the Rome I Regulation, Hungarian law applied, because the service provider's principal place of business was in Hungary. The Court stressed that the fact that the service was provided in Austria (place of performance) could, in itself, not give rise to the application of the escape clause embedded in Article 4(3) of the Regulation.

2.5. Public policy and imperative norms

Hungarian courts rarely refuse the application of a foreign law for public policy considerations,[23] especially if that is the law of an EU sister state.

In Case *Gf.20062/2015/8*,[24] the 1980 Rome Convention was applied but the High Court of Appeal of Győr also referred to the Rome I Regulation when interpreting the Convention, specifically the concept of imperative norms.

Austrian law was applicable to the case. Contrary to the defendants' allegations, the court established that the Hungarian rules on the coming into existence, form, validity, substantive elements, rights and obligations, performance and termination of the legal relationship did not meet the requirements of Article 9(1) of the Rome I Regulation. Furthermore, the court also held that the application of imperative rules is warranted chiefly in cases where the parties choose the law of a state the fact pattern has no

22 Para 52.

23 As to the concept of public policy in Hungary, *see* Palásti, Gábor Péter: Közrendi, imperatív, kógens és diszpozitív szabályok. *Magyar Jog*, 2006/2. 65–77.; Raffai, Katalin: A szerződéses kötelmekre alkalmazandó jog meghatározásáról szóló Római Egyezmény és Róma I. rendelet közrendi szabályai. In: Palásti, Gábor – Vörös, Imre (eds.): *Európai kollíziós kötelmi jog: A szerződésekre és a szerződésen kívüli jogviszonyokra alkalmazandó európai jog.* Budapest, Krim Bt., 2009. 92–118.; Raffai, Katalin: A közrendi záradék a magyar bírói gyakorlatban. In: Fleck, Zoltán (ed.): *Igazságszolgáltatás a tudomány tükrében.* Budapest, ELTE Eötvös, 2010. 219.; Raffai, Katalin: A közrendi klauzula a nemzetközi magánjogi törvényerejű rendeletben és javaslatok a hatályos szabályozás átalakítására. In: Berke, Barna – Nemessányi, Zoltán (eds.): *Az új nemzetközi magánjogi törvény alapjai: Kodifikációs előtanulmányok.* Budapest, HVG-ORAC, 2016. 18–27.

24 Appealed from Case G.20918/2011/115 (Győr Regional Court).

connection to. This condition was not met either, since the fact pattern, through the plaintiff and its business activity, was connected to Austria.

In Case *Gfv.V.30.045/2019/9*,[25] the plaintiff sought a declaratory judgment establishing that due to the civil war in Libya and the embargo measures adopted by the European Union against Libya, it was freed from the duties emerging from the bank guarantee it issued. Although, in the declaration, the bank chose Libyan law to be applied to the bank guarantee, in its statement of claim, it relied exclusively on the European embargo measures without any reference to Libyan law and argued that the latter was irrelevant in relation to its request for a declaratory judgment.

The Budapest-Capital Regional Court decided for the plaintiff on the basis of the Libyan Embargo Regulation,[26] without ascertaining the content of Libyan law.[27]

The High Court of Appeal of Budapest overturned the judgment. It held that although the provisions of the Libyan Embargo Regulation qualified as imperative norms under Article 9 of the Rome I Regulation and, as such, replaced the rules of the applicable law without any further, the impact of these rules on the plaintiff's contractual obligations could be established only on the basis of the joint interpretation of these imperative norms and the rules of *lex causae*. According to the Court, the provisions of the Libyan Embargo Regulation affected the execution of contracts but, in itself, did not change substantive law, because, as far as unconditional application was concerned, it interfered with civil law relationships only as regards the execution of performance, in order to provisionally prevent the enhancement of the pecuniary assets of the persons concerned. The rules of embargo regulated the execution of performance but did not concern the legal effects of the fact that underlay the legal relationship.

The High Court of Appeal of Budapest also held that the public policy exception enshrined in Article 21 of the Rome I Regulation does not rule out the application of the *lex causae* in its totality, it merely excludes its application to specific facts. It may not be reasonably supposed that the Libyan rules applicable to the legal relationship based on the bank guarantee would, due to the prevailing political situation, clearly violate Hungarian public policy.

On appeal, the Supreme Court overturned the judgment of the High Court of Appeal of Budapest and reinstated the judgment of the Budapest-Capital Regional Court.

The Supreme Court established that the scope of the imperative norms is not affected by the choice-of-law norms and, hence, they impact substantive law relationships.[28] The payment of the bank guarantee came under the prohibition of the imperative norm and, hence, the latter had not only paramount importance in the case[29] but, according to the Supreme Court, it was not inevitable to ascertain the content of Libyan law

[25] Appealed from Case Gf.40608/2017/12 (High Court of Appeal of Budapest), appealed from Case 29.G.42.778/2016/38 (Budapest-Capital Regional Court).

[26] Regulation 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya. OJ L 58, 3.3.2011, p. 1–13.

[27] Ibid.

[28] Para 49.

[29] Para 52.

to adjudicate the plaintiff's petition. Because of the Libyan Embargo Regulation, no payment could be made during the time the bank guarantee was open and the payment obligation could not linger on after that, as the embargo did not aim to extend the legal relationships concerned. Hence, the Court could establish that the bank guarantee expired and the bank had no payment obligations anymore.[30]

As to the ascertainment of the content of foreign law, the Supreme Court noted that this is not the responsibility of the parties but of the court, which has to apply the foreign law *ex officio*. While the parties may certainly make submissions and submit evidence, this does not reveal the court of its responsibility. In case of a civil war in the country concerned, which makes the intercourse with the foreign state complicated and encumbers the ascertainment of the content of foreign law, the court may conclude, with reference to Section 5(3) of the APIL, that the content of the foreign law cannot be determined and, hence, Hungarian law has to be applied.[31]

2.6. Procedural issues

In Case *Gfv.VII.30.130/2016*,[32] in relation to a claim that was submitted in the frame of an insolvency procedure, the Supreme Court established that it was the party's duty to refer to any choice-of-law agreement and submit the pertinent evidence; this implies that in case, according to the applicable rules of procedure, no new fact may be raised, the party is barred from referring to the choice-of-law agreement. According to the facts of the case, the creditor submitted a claim to the liquidator, which was rejected. The creditor attacked the decision before the court, which also rejected the claim. The creditor appealed and in the appeal referred to the parties' choice of Austrian law and attached the pertinent contractual documentation. The Supreme Court affirmed the second instance court's refusal to consider this evidence. According to the rules of civil procedure, no new facts may be raised in the appeal, except the party learned the new fact or obtained the new evidence after the first instance decision was made. The circumstance that, instead of the law of the seller (Hungarian law), Austrian law was applicable due to the parties' choice qualified as such a new fact. The Supreme Court noted that the court can get knowledge of the choice only from the parties' submissions and it is the party's duty to inform the court that the case is governed by a law different from the one applicable under the general rules.[33]

2.7. Conclusions

Hungarian courts have encountered the Rome I Regulation in numerous cases and applied it without substantive issues.

30 Para 64.

31 Paras 53–54.

32 Reported as BH 2017.3.97.

33 Para 23.

In Case *G.20348/2013/83*, the Győr Regional Court erroneously suggested that the Rome I Regulation would not apply to cases with a significant non-EU element. A similar error can be perceived in Case *Pf.20370/2013/6*, where the High Court of Appeal of Pécs suggested that the parties may choose only the law that is connected to the matter.

A similar issue emerged as to the question of characterization. While the exclusions from the scope of the Rome I Regulation should be given an autonomous EU law meaning, in Case *Gf.40063/2017/13*, the High Court of Appeal of Budapest interpreted the terms in Article 1(2) on the basis of national law.

3. Law applicable to non-contractual relations: application of the Rome II Regulation

The survey produced 20 Hungarian cases where a reference was made to the Rome II Regulation. In more than half of these cases (12), no substantive issue of interpretation emerged.[34]

3.1. Scope of application

The distinction between contractual and delictual matters may raise questions of interpretation in matters where the plaintiff's claim may be considered both contractual and delictual.[35]

In Case *P.24487/2012/47*, the Hungarian plaintiff sued a Greek hospital for medical malpractice that occurred in Greece. The plaintiff was spending his vacation in Greece and suffered serious injuries in a traffic accident. In the hospital, he was mistreated, which resulted in his permanent bodily injury. The case could have given rise to both contractual and delictual claims against the hospital. The Budapest-Capital Regional Court avoided deciding the issue of whether the claim was contractual or delictual in nature (or both). It identified the applicable law under both the Rome II Regulation and the conflicts rules of contracts (the case occurred before the Rome I Regulation's entry into force) and concluded that both led to the same law (Greek law).

Issues of characterization and scope emerged in cases involving traffic accidents. The courts have considered the law applicable to delictual liability to extend to the rules on compulsory motor vehicle liability insurance. While in the cases encountered by the courts this entailed no practical problems (because the *lex contractus* as to the insurance contract and the law applicable to the tort were the same), this summary approach will have to be rectified in cases where the wrongdoer' insurance contract is governed by a law different from that of the tort.

---

[34] On the Hungarian case-law, *see* Nagyné Sándor, Ildikó: Külföldi jog alkalmazása a polgári perben – kártérítési peres kitekintéssel. *Eljárásjogi Szemle*, 2018/3. 9–16.

[35] For an analysis of some of the Rome II Regulation's questions of charecterization, see Palásti, Gábor: Micsoda madár ez? Néhány minősítéssel kapcsolatos észrevétel a Róma II. rendelet kapcsán. *Jogtudományi Közlöny*, 2009/6. 249–259.

In Case *Pfv.20852/2014/6*,[36] although both the tortfeasor and the victim were Hungarian citizens and the accident happened in Hungary, the Supreme Court examined the question of applicable law, as the car owned by the plaintiff was registered in Germany. The Supreme Court held that Hungarian law was applicable to the claim and, as part of that, also applied Act LXII of 2009 on mandatory motor vehicle liability insurance. Interestingly, Act LXII of 2009 addresses various issues related to the motor vehicle liability insurance contract: the duty to have insurance coverage, the conclusion and termination of the insurance contract, the insurance company's payment obligation and extent, the geographical and temporal scope of the insurance contract, the payment of the insurance fee, the insurance company's right of subrogation etc.

Although in the case concerned this entailed no substantive difference, it has to be noted that the Court's reference appears to have been excessive and treating the rules on mandatory motor vehicle insurance as delictual in nature may be regarded as an error of characterization. Namely, the Rome II Regulation determines the law applicable to non-contractual obligations (the relationship between the tortfeasor and the injured person) and does not apply to contractual obligations (the relationship between the tortfeasor and the insurance company it has a contract with). It may have made a difference (that may have made the Supreme Court engage in a more detailed characterization), if the wrongdoer's motor vehicle had been stationed in another Member State and he had had a contract with a foreign insurance company.

The same was established in Case *Pf.641647/2013/4*,[37] where the Budapest-Capital Regional Court applied Hungarian law (as the place of the accident) and the Hungarian rules on mandatory motor vehicle liability insurance.

In Case *Pfv.VIII.20.109/2019*,[38] the Supreme Court encountered an interesting question of characterization. Article 1(2)(g) excludes non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation from the scope of the Rome II Regulation. In Hungarian law, personality rights (rights related to personality) have a wider meaning and extend to protection against various illicit acts entailing non-monetary damages (e.g. personal injury). In this case, the parents claimed non-monetary damages, because their child was killed in a traffic accident, as this impaired their personality right to the protection of private and family life.[39] As a corollary, under Hungarian law, the legal basis of the claim for damages was the violation of a personality right. Nonetheless, the Supreme Court held that the terms used in Article 1(2)(g) of the Rome II Regulation have to be given an autonomous meaning and the term "personality rights" has a narrower import under the Regulation than under Hungarian law. The Supreme Court established that a closer look

[36] Appealed from Case Pf.640701/2013/4 (Budapest-Capital Regional Court), appealed from Case P.87875/2012/31 (Pest Central District Court.

[37] Appealed from Case P.101521/2011/42 (Pest Central District Court). Affirmed in Case Pfv.21135/2014/4 (Supreme Court).

[38] Reported as BH 2020.8.242, appealed from Case Pf.633945/2018/6 (Budapest-Capital Regional Court), appealed from Case P.89585/2015/55 (Pest Central District Court).

[39] Para 22.

to the legislative process demonstrates that Article 1(2)(g) of the Rome II Regulation is destined to address the violations of personality rights committed via the media and the EU legislator aimed to create a uniform regime for the delictual claims emerging from traffic accidents both as to personal injuries and monetary damages. This finds reflection also in various parts of the preamble and the provisions of the Regulation, such as recitals (17) and (33) and Articles 2(1) and 4(1).[40] This was confirmed also in Case C-350/14 *Florin Lazar v Allianz SpA*.[41] As a corollary, the Supreme Court applied English law.[42]

3.2. Party autonomy

Hungarian courts have been very permissive as to party autonomy.

In Case *P.21013/2011/49*, the parties requested the court to apply Hungarian law. The Győr Regional Court treated this as a choice-of-law agreement under Article 14(1) of the Rome II Regulation.

In Case *Pf.631007/2014/3*,[43] the parties chose Hungarian law in the second instance procedure and the Budapest-Capital Regional Court considered this a valid choice. It has to be noted that the court of first instance applied Hungarian law, as the law applicable absent the parties' choice; the court of second instance disagreed with the first instance court on this but accepted the parties' agreement on the application of Hungarian law. The sanctioning of this belated party choice goes against the scholarship's majority opinion that the applicable law can be chosen the latest until the first instance judgment is entered.[44] Furthermore, the 2017 APIL, adopted since then, specifically limits the choice of the applicable law to the preliminary stage of the first instance procedure.[45]

3.3. Objective connecting factors

In Case *P.24487/2012/47,* when it came to the application of the principle of *lex loci damni*, the Budapest-Capital Regional Court, in line with preamble (17) of the Rome II Regulation, took solely the direct damages into account (personal injury in Greece) and considered the indirect (consequential) damages occurring in Hungary to be irrelevant in the context of determining the applicable law. This is noteworthy in the light of the circumstance that, concerning jurisdiction, the Court found that the indirect damages sustained in Hungary gave rise to Hungarian jurisdiction under the Brussels I Regulation and otherwise did establish the liability of the Greek defendant for these indirect damages on the basis of Greek substantive law.

---

40 Para 24.

41 ECLI:EU:C:2015:802, paras 25-26.

42 Para 27.

43 Appealed from Case *P.8921013/2012/31* (Pest Central District Court)

44 Csongor István Nagy: *Private International Law in Hungary*. Kluwer Law International, 2012. 76–77., para 158.

45 Section 50(2) of the 2017 APIL.

On the contrary, in Case *P.24479/2015/96*,[46] the Budapest District Court for the II and III Districts erroneously construed the principle of *lex loci damni*. The Hungarian plaintiff suffered serious injuries in a traffic accident abroad. The Court applied Hungarian law, because the plaintiff's place of living was in Hungary, thus, the bulk of damages emerged in Hungary (permanent bodily injury, medical treatment, loss of earnings). This goes against preamble (17) of the Rome II Regulation, which provides that when determining the place of loss with the purpose of determining the applicable law, solely direct damages are to be taken into account.

In Case *Pfv.V.20.490/2018/10*,[47] the Supreme Court held, in the context of a traffic accident occurred in Germany, that the existence and extent of delictual liability is governed by the Rome II Regulation and, hence, German law applies irrespective of whether the injured person sues the tortfeasor or the insurer directly.

As to the purview of the law applicable under the Rome II Regulation, the Supreme Court interpreted Article 15 of the Regulation. It held that the notions contained in this provision shall have an autonomous EU law meaning. As regards Article 15(c), which provides that the law to be applied under the Rome II Regulation extends to "the existence, the nature and the assessment of damage or the remedy claimed", the Supreme Court established that this provision embraces the question whether in-kind or pecuniary compensation has to be awarded and, in the latter case, which rules apply in the event there is a delay in payment. As a corollary, the Court concluded that default interests come under Article 15(c) of the Rome II Regulation and, hence, in this case they were governed by German law.

3.4. Conclusions

Issues of characterization emerged in matters involving traffic accidents (distinction between the tort and the motor vehicle liability insurance). Hungarian courts have treated these issues in a rather summary manner, as the characterization appeared to have no impact on the final outcome of the case.

Hungarian courts have been very permissive as to party autonomy. The parties could choose the applicable law during the procedure and in a case the court sanctioned a choice-of-law agreement concluded during the second instance procedure (this is no longer possible due to a specific provision of the 2017 APIL, which was adopted since then).

[46] The judgment was appealed but the question of applicable law was not revisited. Case Pf.632162/2019/4 (Budapest-Capital Regional Court).

[47] Reported as BH 2019.10.270.

4. Final conclusions

Hungarian experiences with EU choice-of-law instruments suggest that the choice-of-law framework made up by the Rome I and the Rome II Regulations is sufficiently effective. Evidently, in comparison to purely domestic matters, international elements entail an added level of complexity, which may inflate costs and affect the length of proceedings, especially if foreign law applies, given that judges are obviously more comfortable with applying Hungarian law. Still, the application of the EU choice-of-law rules instruments raises no major conceptual issues, which is due to the fact that Hungary is a civil-law country and the Rome I and the Rome II Regulations follows a conceptual structure peculiar to civil-law. In the rare cases where conceptual issues emerge, Hungarian courts generally construe EU choice-of-law rules on the basis of the principle of autonomous interpretation and give the relevant terms an autonomous EU law meaning. It has to be noted that, because of the lack of conceptual difficulties, the overwhelming majority of the cases raised no substantive issues of interpretation. This demonstrates their quality and the importance of the contribution EU choice-of-law rules is making to the effective settlement of cross-border cases and the creation of a European area of justice. The importance and role of EU choice-of-law rules is also showcased by the exponentially growing number of cases where Hungarian courts apply the Rome I and the Rome II Regulation.

Table of cases

Roma I Regulation

Case Pf.20271/2014/3 (High Court of Appeal of Budapest), appealed from Case P.20648/2011/40 (Budapest-Capital Regional Court)

Case Pfv.20187/2016/6 (Supreme Court), appealed from Case Gf.40013/2015/15 (High Court of Appeal of Pécs), appealed from Case G.40110/2013/45 (Zalaegerszeg Regional Court)

Case Pf.639898/2014/5 (Budapest-Capital Regional Court), appealed from Case P.20986/2014/12 (Budapest District Court for the II and III Districts)

Case Gf.40100/2013/8 (High Court of Appeal of Budapest)

Case Pf.20267/2013/3 (High Court of Appeal of Győr), appealed from Case P.20336/2012/42 (Győr Regional Court)

Case B.12/2012/144 (Budapest Regional Court)

Case G.20348/2013/83 Győr Regional Court)

Case G.40138/2010/64 (Budapest Regional Court)

Case Gf.30372/2012/7 (High Court of Appeal of Debrecen)

Case P.22877/2012/10 (Budapest-Capital Regional Court)

Case Pfv.20919/2015/6 (Supreme Court)

Case Pfv.22111/2015/12 (Supreme Court)

Case Pfv.V.20.366/2016/11 (Supreme Court), reported as BH 2017.5.155

Case Pfv.20932/2017/12 (Supreme Court)
Case Pf.20691/2017/10 (High Court of Appeal of Budapest), appealed from Case P.25618/2014/45 (Budapest-Capital Regional Court)
Case Gf.30010/2011/7 (High Court of Appeal of Pécs), appealed from Case G.40024/2010/21 (Kaposvár Regional Court)
Case Gf.40333/2015/5 (High Court of Appeal of Budapest), appealed from Case G.42072/2014/17 (Budapest-Capital Regional Court)
Case Pf.20074/2011/5 (High Court of Appeal of Győr), also reported as Case ÍH 2012.66
Case Gf.20013/2015/4 (High Court of Appeal of Győr), appealed from Case G.40031/2014/8 (Veszprém Court of Appeal)
Case Pf.20095/2015/5 (High Court of Appeal of Budapest), appealed from Case P.20298/2013/22 (Budapest-Capital Regional Court)
Case Pf.20168/2013/5 (High Court of Appeal of Győr), appeal from Case P.20197/2012/33 (Győr Regional Court)
Case Gf.30587/2013/4 (High Court of Appeal of Debrecen), appealed from Case G.40186/2011/34 (Debrecen Regional Court)
Case Gf.40117/2013/7 (High Court of Appeal of Budapest)
Case G.40864/2008/169 (Budapest-Capital Regional Court)
Case G.40685/2012/38 (Budapest-Capital Regional Court)
Case Pf.20234/2014/2 (Kaposvár Regional Court)
Case Gf.40496/2012/5 (High Court of Appeal of Budapest), appealed from Case G.40313/2011/27 (Budapest Regional Court)
Case Gfv.30222/2013/6 (Supreme Court), appealed from Case Gf.30147/2013/5 (High Court of Appeal of Szeged), appealed from Case G.40097/2012/59 (Kecskemét Regional Court)
Case G.40464/2015/16 (Budapest Regional Court)
Case Mfv.10003/2017/5 (Supreme Court)
Case Gf.30475/2017/7 (High Court of Appeal of Debrecen)
Case Pfv.20200/2019/4 (Supreme Court), appealed from Case Pf.20053/2018/13 (High Court of Appeal of Pécs)
Case G.40006/2017/35 (Szombathely Regional Court)
Case 1.Mf.31.089/2020/10 (High Court of Appeal of Budapest), appealed from Case 56.M.1577/2016/89 (Budapest-Capital Administrative and Labor Court)
Case 19.Gf.40.273/2019/12 (High Court of Appeal of Budapest), appealed from Case G.40064/2018/18 (Budapest Regional Court)
Case Gf.IV.30.173/2019/5 (High Court of Appeal of Szeged)
Case G.20411/2016/100 (Gyula Regional Court)
Case Pfv.IV.21.511/2015/5 (Supreme Court), appealed from Case 16. Gpkf.43.770/2015/2 (High Court of Appeal of Budapest), appealed from Case 19.G.41.978/2014/23 (Budapest-Capital Regional Court)
Case B.12/2012/144 (Budapest Regional Court)
Case Gf.40290/2017/4 (High Court of Appeal of Budapest), appealed from Case G.42113/2010/136 (Budapest-Capital Regional Court)
Case Gf.II.20.108/2020/5/I (High Court of Appeal of Győr)

Case Pfv.21232/2019/13 (Supreme Court), appealed from Case Pf.20173/2019/9 (High Court of Appeal of Debrecen), appealed from Case P.20353/2017/90 (Eger Regional Court)
Case Pf.20680/2018/6 (High Court of Appeal of Szeged), appealed from Case P.20899/2017/25 (Kecskemét Regional Court)
Case Pfv.VI.21.752/2016/4 (Supreme Court)
Case Mf.V.30.033/2020/12/I (High Court of Appeal of Győr)
Case Pf.20193/2020/5 (High Court of Appeal of Debrecen), appealed from Case P.20916/2019/24 (Miskolc Regional Court)
Case P.20442/2012/77 (Komárom Local Court)
Case Pfv.21469/2015/5 (Supreme Court), appealed from Case Pf.25150/2015/4 (Gyula Regional Court), appealed from Case P.20930/2013/37 (Békéscsaba Local Court)
Case Gf.40203/2015/5 (High Court of Appeal of Budapest), appealed from Case G.41232/2013/44 (Budapest-Capital Regional Court)
Case Gfv.30768/2016/1 (Supreme Court), appealed from Case Gf.40086/2015/4 (High Court of Appeal of Budapest), appealed from Case G.40411/2012/27 (Budapest Regional Court)
Case Gf.40132/2016/6 (High Court of Appeal of Budapest), appealed from Case G.40306/2015/23 (Budapest-Capital Regional Court)
Case Pf.20949/2017/9 (Győr Regional Court), appealed from Case P.20677/2017/7 (Győr Local Court)
Case Gfv.30189/2018/7 (Supreme Court), appealed from Case Gf.75485/2017/13 (Budapest-Capital Regional Court), appealed from Case G.302051/2015/9 (Budapest Central District Court)
Case Pfv.21208/2016/5 (Supreme Court), appealed from Case Pf.20006/2016/4 (Szekszárd Regional Court), appealed from Case P.20025/2015/36 (Dombóvár Local Court)
Case Pf.20949/2017/9 (Győr Regional Court), appealed from Case P.20677/2017/7 (Győr Local Court)
Case Gf.40727/2018/8 (High Court of Appeal of Budapest), appealed from Case G.44072/2017/26 (Budapest-Capital Regional Court)
Case Gf.20082/2019/11 (High Court of Appeal of Budapest), appealed from Case G.40034/2017/91 (Szombathely Regional Court)
Case Gf.40488/2019/5 (High Court of Appeal of Budapest), appealed from Case G.43118/2016/70 (Budapest-Capital Regional Court)
Case Pfv.21522/2019/9 (Supreme Court), appealed from Case Pf.21309/2018/3 (High Court of Appeal of Budapest), appealed from Case P.24740/2015/59 (Budapest-Capital Regional Court)
Case Pf.20053/2018/13 (High Court of Appeal of Pécs), appealed from Case P.20365/2015/82 (Kaposvár Regional Court)
Case Gf.40402/2020/6 (High Court of Appeal of Budapest), appealed from Case G.40647/2016/55 (Budapest Regional Court)
Case Gf.40063/2017/13 (High Court of Appeal of Budapest), appealed from Case G.42206/2012/102 (Budapest-Capital Regional Court)

Case Gf.40321/2014/9 (High Court of Appeal of Budapest), appealed from Case G.40368/2012/52 (Budapest-Capital Regional Court)
Case Gf.40051/2014/8 (High Court of Appeal of Pécs), appealed from Case G.40161/2013/47 (Zalaegerszeg Regional Court)
Case Pf.20370/2013/6 (High Court of Appeal of Pécs)
Case Pf.20024/2016/3 (High Court of Appeal of Pécs)
Case P.25471/2015/47 (Budapest-Capital Regional Court)
Case Pfv.V.20.067/2019 (Supreme Court), BH 2020.3.72, appealed Case Gf.40107/2018/8 (High Court of Appeal of Budapest), appealed from Case G.40375/2016/32 (Budapest-Capital Regional Court)
Case Pfv.I.21.730/2019 (Supreme Court), reported as BH 2020.9.267.
Case Pfv.20211/2020/3 (Supreme Court), appealed from Case 43.Pf.632341/2019/4 (Budapest-Capital Regional Court), appealed from Case P.21637/2016/78 (Budapest District Court for the XX, XXI and XXIII Districts)
Case Gf.20100/2017/5 (High Court of Appeal of Győr), appealed from Case G.20969/2014/61 (Győr Regional Court)
Case Pfv.V.20.594/2017/6 (Supreme Court), reported as BH 2018.9.250.
Case Gf.20090/2020/5 (High Court of Appeal of Győr)
Case Gf.20062/2015/8 (High Court of Appeal of Győr), appealed from Case G.20918/2011/115 (Győr Regional Court)
Case Gfv.V.30.045/2019/9 (Supreme Court), appealed from Case Gf.40608/2017/12 (High Court of Appeal of Budapest), appealed from Case 29.G.42.778/2016/38 (Budapest-Capital Regional Court)
Case Gfv.VII.30.130/2016 (Supreme Court), reported as BH 2017.3.97.

Rome II Regulation

Case Pfv.20187/2016/6 (Supreme Court), appealed from Case Gf.40013/2015/15 (High Court of Appeal of Pécs), appealed from Case G.40110/2013/45 (Zalaegerszeg Regional Court)
Case 20.Gf.40.050/2020/36-II (High Court of Appeal of Budapest), appealed from Case 7.G.20.255/2018/92 (Balassagyarmat Regional Court)
Case Pf.20691/2017/10 (High Court of Appeal of Budapest), appealed from Case P.25618/2014/45 (Budapest-Capital Regional Court)
Case Pf.20095/2015/5 (High Court of Appeal of Budapest)
Case Gf.40117/2013/7 (High Court of Appeal of Budapest)
Case Pf.20174/2011/10 (High Court of Appeal of Győr)
Case G.40057/2012/118 (Debrecen Regional Court)
Case Pfv.21365/2018/6 (Supreme Court), appealed from Case Pf.21326/2017/9 (High Court of Appeal of Budapest), appealed from appealed from Case P.20187/2017/13 (Balassagyarmat Regional Court)
Case Pfv.VII.21.748/2019/11 (Supreme Court), appealed from Case Gf.40313/2019/11 (High Court of Appeal of Budapest), appealed from Case G.43386/2016/87 (Budapest-Capital Regional Court)

Case Pf.I.20.093/2015/26/I (High Court of Appeal of Budapest), appealed from Case P.20849/2014/13 (Győr Regional Court)
Case Pf.21147/2012/5 (High Court of Appeal of Budapest), appealed from Case P.22570/2010/57 (Budapest-Capital Regional Court)
Case 16.Gpkf.43.978/2015/2 (High Court of Appeal of Budapest), appealed from Case 25.G.42.357/2012/49 (Budapest-Capital Regional Court)
Case P.24487/2012/47 (Budapest-Capital Regional Court)
Case Pfv.20852/2014/6 (Supreme Court), appealed from Case Pf.640701/2013/4 (Budapest-Capital Regional Court), appealed from Case P.87875/2012/31 (Pest Central District Court)
Case Pfv.21135/2014/4 (Supreme Court), appealed from Case Pf.641647/2013/4 (Budapest-Capital Regional Court), appealed from Case P.101521/2011/42 (Pest Central District Court)
Case Pfv.VIII.20.109/2019 (Supreme Court), reported as BH 2020.8.242, appealed from Case Pf.633945/2018/6 (Budapest-Capital Regional Court), appealed from Case P.89585/2015/55 (Pest Central District Court)
Case P.21013/2011/49 (Győr Regional Court)
Case Pf.631007/2014/3 (Budapest-Capital Regional Court), appealed from Case P.8921013/2012/31 (Pest Central District Court)
Case Pf.632162/2019/4 (Budapest-Capital Regional Court), appealed from Case P.24479/2015/96 (Budapest District Court for the II and III Districts)
Case Pfv.V.20.490/2018/10 (Supreme Court), reported as BH 2019.10.270.