LOOKING FOR THE LAW APPLICABLE TO NON CONTRACTUAL OBLIGATIONS IN THE REGULATION ROME II

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Resume

Treaty establishing the European Economic Community didn't empower the European Economic Community in competencies to establish private law. Taking the foregoing into account the members of the EEC could cooperate in civil matters only by the way of international conventions.But it was Treaty on European Union from Maastricht which placed the cooperation in civil matters in the so called Third Pillar of the EU. Unfortunately the basic tool of cooperation in the Third Pillar was still the international convention.

In October 1994 the European Council announced the plan which aim was to establish european regulation concerning the law applicable to non-contractual obligations.On the other hand the European Commission introduced the other project prepared by the European Private International Law Group (GEDIP) in the frames of the project Grotius.

The process of projects' preparings showed all the weaknesses of the solution adopted in the Treaty on European Union. The basic tool of cooperation remained the international convention what made it ineffective. The text of such a convention usually wasn't ratified by the all Member States and the whole project collapsed. The second problem was too limited participation of the european institutions. They could only initiate the negotiations and consult the problems but they couldn't lead the official works as they didn't have proper competencies.

Everythig changed when the Treaty of Amsterdam came into force in May 1999. The new Title IV transfered the cooperation in civil matters from the Third Pillar to the First one. Thanks to the solutions of the Treaty of Amsterdam the Member States could use the regulation as a mean of unifying of the international private law. According to the Article 249 of the TEU a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. In this way all Member States are forced to apply solutions adopted by regulations. In May of 2002 the European Commission introduced the preliminary draft of regulation on law applicable on non-contractual obligations. It was officially published on the 11th July 2007.

The Commission sees Rome II as the next step in the harmonisation of private international law in relation to civil and commercial obligations. The objective of Rome II is to ensure that courts

in each of the Member States apply the same choice of law rules to disputes involving non-contractual obligations, thereby increasing legal certainty and facilitating mutual recognition of judgments across the Union. The Commission also contends that the Regulation would facilitate the enforcement of judgments across the Union. Facilitation of the mutual recognition of judgments requires a degree of mutual trust between Member States which is not conceivable if their courts do not apply the same conflict of laws rule in the same situation.

The Commission contends that the application of differing conflict rules by courts in different Member States could provoke a distortion of competition, and such a distortion could encourage forum-shopping. For exactly the same kind of companies which are involved in the same kind of business and sharing the same risks they could at the end of the day, in the same kind of torts, have completely different laws being applied to them just because of the different courts being seised and each court applying a different connecting rule and a different substantive law".

General rule of the non-contractual liability is expressed in Article 4. Paragraph 1 of this article states that unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.But Regulation provides for not only a general rule but also for specific rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

In the preamble it is provided that the principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable. Theoretically, a number of criteria, usually grouped together without distinction under the catch-all heading lex loci delicti (commissi) could be applied here, i.e. the law of the place where the event occurs, that of the place where the damage arises, that of the place in which the indirect consequences of the event arise or that of the place of habitual residence of the injured party. All these criteria have a basis in tradition and strong arguments in their favour. All are in fact used in various current systems of conflict rules.

The regulation introduces lex loci damni. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil

liability and the development of systems of strict liability. The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

To sum up the general rule in this Regulation should be the lex loci damni provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

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