

CONFLICT RULES FOR DELICTS AND QUASI-DELICTS¹

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Abstract

Following contribution deals with the conflict rules for delict/torts and quasi-delicts. We will refer to unsuitability of present Czech national legal regulation and on the hierarchy of the conflict rules set in innovative Regulation Rome II we will document how huge shift is coming to the practise of Czech courts.

Key words

Conflict rule, delict, tort, non-contractual obligation, private international law, Rome II, choice of law, unfair competition, product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights, industrial action, defamation, unjust enrichment, *negotiorum gestio*, *culpa in contrahendo*

1. Introduction

Czech private international law which has been until recently envisaged as exclusively national discipline only with higher number of international sources of law has been coming through fundamental changes connected with entering EC during the last decade. We don't want to justify all the changes by the accession into EC but in context of PIL it is not superficial simplification but pure establishment of facts. The scope of this contribution is not to analyze the course of events on the field of PIL in general but to concentrate on one of the last PIL communitarian regulations – n. 864/2007 on the law applicable to non-contractual obligation (ROME II). This abbreviated name reflects among others connection to ROME I (both Convention on the law applicable to contractual obligation and coming Regulation with the same name). These two legal acts – Rome I and Rome II – cover together both contractual and non-contractual obligations.

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In general - present Czech national conflict of law regulation is more likely fragmentary and unsuitable therefore the new European legal regulation represents the huge step in this field of PIL. We will document this establishment thereafter.

The purpose of this contribution is to give the reader the summarizing review of the conflict of law rules which are implicated in the Rome II Regulation and to compare this legal regulation with present Czech national one. We will skip over the genesis of the European area of justice, freedom and security and also over the development of Rome II. We also put aside the area of international conventions regulating the area of conflict rules for delicts.

2. Non-contractual obligation

First of all we consider necessary to outline very briefly what we think of delict. It would be more accurate to use the term non-contractual obligation which is used in the regulation Rome II. Non-contractual obligation rises not from the contract but from the breach of a duty defined by the objective law while there is no legal but only factual relationship between parties. From the breach of a legal provision the responsibility obligation arises and this obligation is already the legal one. Usually two divisions of non-contractual obligation are distinguished. The first one where the irregularity (wrongfulness) constitutes the essential presumption of existence (unfair competition, defamation) and the second group where contrariwise the irregularity (wrongfulness) is absent. The first group – delicts – is better known and represents the bigger part but we can't leave out of consideration the second group – sometimes called in the Czech theory as quasi-delicts i.e. unjust enrichment or pre-contractual liability.

We would like to mention very shortly whether it is necessary to diverse between delicts (Czech/continental point of view) and torts (common-law point of view). Even though there is a difference in the methodology of these two institutes – continental systems of law prefer general clause combined and supplemented by a few of particular provisions whereas high number of concrete types of torts inhere to common law systems but the main principles of both legal institutes are the same – the breach of a duty defined by the objective law, implication of such a breach and the causal connection between previous mentioned two points.

3. Czech PIL Act n. 97/1963

In the present Czech law there is only one legal provision dealing with non-contractual obligation – section 15 of PIL Act. And even this information is a little bit flaming. This provision concerns not the delicts/torts as such but only their effect – with the liability for damage. It is found insufficient while it doesn't cover delicts as such and also doesn't cover all possible effect only the liability for damage². On the other hand there are delicts where the existence of damage is not the essential presumption of a delict such as unfair competition where the menace of damage is fully sufficient. The other inadequacy can be found in the lack of the explicit regulation of torts committed abroad but with effect between two Czech citizens³. Entirely improper the rule is for other non-contractual obligations than delicts such as negotiorum gestio, unjust enrichment or pre-contractual liability. The creation of these conflict of law rules has stayed on the Czech doctrine of PIL and on the practise of courts. We don't want to be too rough to the Czech PIL. The truth is that also present Czech doctrine of civil substantive law leaves delicts out and concerns only on their effects. If the delict is dealt with than it is mentioned only as one of the causes for rise of the obligation. So both doctrines (of substantive law and private international law) mentioned above have gone hand in hand. Usually the legislator tries to cover by the conflict of law rules all the tasks lay out by the substantive law. Where there is none substantive provision there is no need for a conflict of law rule.

According to the Czech doctrine of PIL sec. 15 covers besides the effect of delicts – liability for damage also premises of inception of damage, substance, range and the ways of compensation, competence to perform delict, circumstances excluding liability, burden of proof and preclusion or expiration of rights for damage. Sec. 15 uses two equal connecting factors which are formulated alternatively to each other. These are *lex loci delicti commissi* (the law of the place where the delict was committed – where the wrongfulness arose) and *lex loci damni infecti* (the law of the place where the effect of the wrongfulness showed itself). In many cases these two places would be the same (car accident, injury of a skier by another skier) but there are a lot of imaginable situations where these places vary (leak of poisonous chemicals in one state and getting through a river to the second state and causing damages, transmission of commercial in TV which is consider to be an unfair competition and receiving

² Though we agree it would be the most frequent effect.

³ Such a situation is currently solved by the enunciation of absence of relevant international element.

of this commercial in the neighbouring state in which the same or very similar language is used). We can put a question whether in such cases the decisive institution or the plaintiff side has a right to make the choice. Notwithstanding opinion appeared that both the court and also the plaintiff was allowed to make the choice lead by the stand-point of material justice⁴ it was overrun by the opinion that the right to choose belong only to the court which should follow the collision justice⁵. We lean towards Kucera's opinion for taking into account the collision justice even though we admit that usage of this point of view lowers the plaintiff legal certainty.

The truth is that since 11th January 2009 sec. 15 is going to be replaced (but not completely) by the Regulation (EC) n. 864/2007 on the law applicable to non-contractual obligation (Rome II).

4. Regulation (EC) n. 864/2007 on the law applicable to non-contractual obligation (Rome II)

4.1 General overview

Let start a little bit more generally. Among the member states of EC the rules to set up the competence of national courts in relation to courts of other member state courts were unified (partly) early in Brussels Convention (now Regulations Brussels I and also Brussels II). Nevertheless it wasn't sufficient while parties have been able to agree on the jurisdiction of particular state courts or even the plaintiff alone has been able according to alternative jurisdiction rules to choose between courts of member states. This is a typical background for *forum shopping* phenomenon which can be avoided by unification of conflict of law rules. First attempt supposed to be a Convention on the law applicable to contractual and non-contractual obligations⁶. The draft was introduced in 1972 but after accession of UK and Ireland the preparatory works slowed down rapidly and finally in 1978 ECC refrained from reception of the whole project and cut it down only to contractual obligation. The reason embodied in the very dissimilar attitude to non-contractual obligation among member states. Therefore the area of no-contractual obligation stayed untreated on the ECC/EC level.

⁴ Tichý, L. *Náhrada škody při mimosmluvním porušení povinnosti*, kand. dis.práce, Praha 1982, příloha IV

⁵ KUČERA, Z. *Mezinárodní právo soukromé*. 5. vydání. Brno : Doplněk, 2001. s. 308. ISBN 80-7239-100-3

⁶ KUČERA, Z., KUNZ, O. Návrh úmluvy států EHS o právu použitelném na smluvní i mimosmluvní závazky. *Právník*, 1975, s. 891 - 899

After Amsterdam Treaty entered into force the situation changed considerably due to the new competences⁷ of EC institutions⁸. Passionate discussions about the Rome II draft started in May 2002 in which member states, academics and also private organizations representing contractors or consumers participated. Further development was even more convoluted. Report on proposal for regulation Rome II⁹ worked by rapporteur Diana Wallis was of a high impact on the whole process while it represented more likely the common law point of view¹⁰.

4.2. Characteristic and the Scope of Rome II

According to art. 6 the Regulation should be the necessary step to improve the predictability of a dispute and thus it is necessary for the proper functioning of an internal market. While it is a Regulation which is directly applicable and has the primacy over the national legal provisions it should be applied whenever a dispute is decided by a court of a member state¹¹ – the Rome II is of universal use (art. 3)¹².

The Regulation consists of 7 Chapters:

- a) Scope
- b) Torts/Delicts
- c) Unjust Enrichment, *Negotiorum Gestio* and *Culpa In Contrahendo*
- d) Freedom of Choice
- e) Common Rules
- f) Other Provisions
- g) Final Provisions

⁷ See also BASEDOW, J. The communitarisation of the Conflict of Laws under the Treaty of Amsterdam. *Common Market Law Review*, 2000, č. 37, s.687 - 708., HAMBURG GROUP FOR PRIVATE INTERNATIONAL LAW. Comments on the European Commission's Regulation on the Law Applicable to Non-Contractual Obligations. *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 2003, č. 67, s. 1 - 56. ISSN 0033-7250., REMIEN, O. Community law versus conflict of laws. *Common Market Law Review*, 2001, č. 38, s. 53 - 86.

⁸ For closer information see ROZEHNALOVÁ, N., TÝČ, V. *Evropský justiční prostor (v civilních otázkách)*. Brno : Masarykova univerzita v Brně, 2003. ISBN 80-210-3054-2 or PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé a procesní - aktuální otázky*. *Evropské právo*, 2003, č. 8

⁹ FINAL A6-0211/2005

¹⁰ Wallis proposed to remove almost all of the special rules – will be mentioned infra.

¹¹ Exemption is represented by Denmark (art. 1(4))

¹² See VALDHANS, J. *Evropský justiční prostor ve věcech civilních. Část XIII. Návrh nařízení o právu rozhodném pro mimosmluvní závazky*. *Právní fórum*, 2006, č. 2,

Some non-contractual obligations are excluded from the Scope of the Regulation, i.e. those which are arising out of family relationships and relationships with comparable effects; of matrimonial property regimes; arising under bills of exchange, cheques and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; non-contractual obligations arising out of nuclear damage; non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation¹³ and others (art. 1(2)). Regulation shall not apply to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*¹⁴) and to evidence and procedure.

Tort/Delict status (the law applicable in accordance with the conflict of law rules) include above all (art. 14):

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relation to the commencement, interruption and suspension of a period of prescription or limitation.

4.3 Hierarchy of the choice of law rules in Rome II

¹³ Tort/delict of defamation reveals oneself as a very problematic provision. It used to be included in the draft but caused one of the largest protests and malevolence. On the Swedish proposal this tort/delict was after long discussions excluded because it seemed that this one provision alone is able to stop the reception procedure. The largest task lay in finding of well-balanced position between the protection of freedom of speech and liberty of press in one hand and protection of privacy and personal rights (among others in face of media attacks) in the other hand.

¹⁴ *Acta iure imperii* were not mentioned in the primary Commission draft.

Rome II follows out trends of the last decades in PIL and puts stress on the principle of autonomy and introduces to the Czech legal system connecting factor for delicts which was unknown – *lex electa* (art. 14). Even though this possibility is substantially limited it stands for a huge innovation. Law elected by the parties represents the primary rule which can be used for both delicts and quasi-delicts. Choice can be performed both *ex ante* and *ex post*¹⁵ in relation to the wrongdoing with the condition that *ex ante* can be performed only between professionals. Settlement shall be expressed or demonstrated with reasonable certainty by the circumstances of the case. The choice doesn't affect the rights of third parties. Additional restrictions result from art. 14(2) and 14(3) according to which the choice shall not prejudice the application of rules of country which cannot be derogated from by agreement if all elements relevant to the situation are located in this country. EC law if all elements relevant to the situation are located in EC state is treated likewise when the law on non-member state is chosen. Certain conflict rules which are mandatory can't be excluded by the choice made by the parties – unfair competition and acts restricting free competition and infringement of intellectual property rights.

Choice of law is succeeded by the general conflict rule which is choosing between *lex loci delicti commisi* and *lex loci damni infecti* for the benefit of *lex loci damni infecti*. Again it is the illustration of accent of modern trends in PIL when the scope has shifted from choosing of law optimal for sanction of the malefactor to the law optimal for indemnity of sufferer¹⁶. If we talk about damage than only direct damage is considered. In the preamble there is said explicitly that for example 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 respectively¹⁷. The general rule shall be used for all torts/delicts with exclusion of those for which the special rules have been formulated. Following two subsections formulates the *lex communis* rule for situation when the malefactor and sufferer have their habitual residence in the same country or the escape clause for situations where circumstances of the case are closely connected with country other than previous mentioned.

¹⁵ Analogous to Rome I the Regulation tries to protect the position of a weaker party – employee or consumer.

¹⁶ KRÁL, R. Ke kolizní úpravě občanskoprávní mimosmluvní odpovědnosti. *Právník*, 1989, č. 8, s. 687 – 695.

¹⁷ Due to the same terms used both in Rome II and Brussels I it is possible to use the preliminary case of ESD as C-364/93 *Marinari* or C-168/02 *Kronhofer*.

As we mentioned hereinbefore special conflict rules are formulated for certain delicts¹⁸:

- a) Product liability (art. 5)
- b) Unfair competition and acts restricting free competition (art. 6)
- c) Environmental damage (art. 7)
- d) Infringement of intellectual property rights (art. 8)
- e) Industrial action (art. 9)

Legislators consider these torts to be specific in such a degree it is inappropriate to use the general rule. European Parliament and the rapporteur Diana Wallis above all strongly disagreed and tried to reduce this number but were not successful.

Compared to the former Commission draft in the final text there is no general rule for quasi-delicts and explicit conflict rules for 3 particular delicts have been submitted – for unjust enrichment (art. 10), *negotiorum gestio* (art. 11) and *culpa in contrahendo* (art. 12). First two have very similar conception

- *lex causae* if quasi-delict is connected with the relationship previously existed between the parties,
- *lex communis* where the parties have their habitual residence in the same country
- law of the country in which the quasi-delict took place.

Culpa in contrahendo differs partly. *Lex causae* stays on the first place and for situations the previous rule can't be used than *lex loci damni infecti*, *lex communis* and the escape clause shall be used.

4.4 Other provisions

Similar attention as Rome I does Rome II gives to overriding mandatory rules, public policy of the forum or exclusion of renvoi. Due to the range of this contribution we will not deal with these questions.

5 Conclusion

¹⁸ For closer information see VALDHANS, J. Evropský justiční prostor ve věcech civilních. Část XIII. Návrh nařízení o právu rozhodném pro mimosmluvní závazky. *Právní fórum*, 2006, č. 2,

Contemporary Czech conflict rule regulation for delicts and quasi-delicts could be hardly described as sufficient or suitable. Soon it will be replaced by the new, modern legal regulation – Rome II which will constitute a sizable drift. We suppose this drift will lead to the easier application of law and higher certainty of parties concerned.

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