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

MAGDALENA WASYLKOWSKA
Faculty of Law, Administration and Economy, University of Wrocław

Abstract

The contribution deals with three main aspects of looking for the law applicable to non-contractual obligations. Firstly it focuses on the short history of this process, then introduces the justification for the regulation and finally presents the scope of the general rule cointained in Article 4.

Key words

Rome II, european private law, lex loci delicti commissi, lex loci damni

1. The beginning of the european cooperation in civil matters

Treaty establishing the European Economic Community didn't empower the European Economic Community in competencies to establish private law. Only the article 220 of the TEEC stated that the members of Community could undertake, if neccessary, the negotiations concerning the simplification of formalities in the matter of mutual recognition and execution of judgements and arbitral awards[1].

Taking the foregoing into account the members of the EEC could cooperate in civil matters only by the way of international conventions. The first project of the Convention on the law applicable to contractual and non- contractual obligations was announced in 1972 r. The accession of Great Britain and Ireland to the EEC caused the limitation of the Convention's scope only to the law applicable to the contractual obligations[2].

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. According to the article K.1 paragraph 6 of this Treaty, for the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard as the matter of common interest judicial cooperation in civil matters[3]. Unfortunately the basic tool of cooperation in the Third Pillar was still the international convention.The Third Pillar maintained an intergovernmental lawmaking structure. While Member States had a general right of initiative, that of the Commission was more limited and the European Parliament played a minimal

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1 R. Mańko, *Prawo prywatne w UE. Perspektywy na przyszłość*, Warszawa 2004, s. 5

2 J. Gołaczyński, Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej, Warszawa 2007, s. 226

3 http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0001000001

role[4].

In October 1994 the European Council announced the plan which aim was to establish european regulation concerning the law applicable to non-contractual obligations. In 1998 the Member States received the questionnaires worked out during the four meetings. The questionnaires led to the preliminary project of the convention on the law applicable to non-contractual obligations. In the same time the European Commission introduced the other project prepared by the European Private International Law Group (GEDIP) in the frames of the project Grotius.This project referred the solutions of the Rome Convention from 1980 on the law applicable to the contractual obligations but it also introduced the new ones. Firstly it permitted the choice of proper law after the damage occured. Secondly, in the lack of the law chosen by the parties, it permitted the clause of the closest connetion[5].

Unfortunately the project never came into force. The process of preparing its next versions 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[6].
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. Currently the art. 61 states that in order to establish progressively an area of freedom, security and justice, the Council shall adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65. According to Article 65 measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include: (a) improving and simplifying: the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases, (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction, (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States[7].

On the basics of this Article the problem arose if the European Union had the competencies

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4 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/6605.htm

5 M. Fabjańska, M. Świerczyński, Ujednolicenie norm kolizyjnych dotyczączych zobowiązań pozaumownych, KPP, r. 2004, z. 3, s. 719

6 P. Saganek, Współpraca w dziedzinie wymiaru sprawiedliwości i spraw wewnętrznych, [w:] D. Milczarek, A.Z. Nowak (red.), Integracja europejska. Wybrane problemy, Warszawa 2003, s. 214-218.

7 http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0001010001

only to create the norms of competences which referred to the acts which happened within the territory of the Community. The European Commission acknowledged that such norm of competence were universal and could also indicate the law of the third country, otherwise their use would be very limited[8].On the basics of this article the European Council on the 3 December 1998 accepted so called Vienna Action Plan which aim was to create proper tools of Community Law reffering to competence law[9].

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[10].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. The draft was opened to discussion and in 2003 r. the European Commission, after taking into consideration all comments and remarks, published the project and sent it to the European Parliment. In the meantime the Hague Programme, adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).The regulation follows the private international law of many european countries. It was officially published on the 11th July 2007[11].

2. The need for Rome II

Recitals 2 and 3 of the draft Regulation refer to the Vienna Action Plan 1998 and the Tampere Summit 1999. In 1998 the Council and Commission adopted an Action Plan on how best to implement the provisions of the Amsterdam Treaty on an area of freedom, security and justice.[24] That required, within two years, "drawing up a legal instrument on the law applicable to non-contractual obligations".

Following the Tampere Summit, in November 2000 the Council of Ministers adopted a Programme of measures to implement the principle of mutual recognition in civil and commercial matters. This is also cited by the Commission as part of the political mandate for Rome II. It quotes the programme as saying that harmonisation of conflict of laws measures are measures that

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8 J. Gołaczyński, Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej, Warszawa 2007, s. 226

9 M. Fabjańska, M. Świerczyński, Ujednolicenie norm kolizyjnych dotyczączch zobowiązań pozaumownych, KPP, r. 2004, z. 3, s. 722

10 http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0001010001

11 J. Gołaczyński, Współpraca sądowa w sprawach cywilnych i handlowych w Unii Europejskiej, Warszawa 2007, s. 227

"actually do help facilitate the implementation of the principle" of mutual recognition.

Paragraph 9 of the Protocol on the Application of the principles of Subsidiarity and Proportionality states: "Without prejudice to its right of initiative, the Commission should: -except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever possible, publish consultation documents …". The Commission did not publish a Green Paper. It is true that it published a draft text and invited comments. The Commission also held an oral hearing at which interested parties could hear and respond to the Commission[12].

3. The position of the regulation Rome II within private international law

Private international law (sometimes referred to as the conflict of laws) deals with disputes between private persons, natural or legal, arising out of situations having a significant connection or connections to more than one country. Private international law covers three basic types of rule:

—jurisdictional rules (which country's courts can hear a case);

—choice of law rules (which country's law will the court which hears the case apply);

—rules relating to the recognition and enforcement of judgments of foreign courts (when will a court in one country enforce the decision of a court in another country).

There already exists within the European Union an established body of private international law rules of the first type and the third type. As to the second type, the 1980 Rome Convention on the law applicable to contractual obligations ("Rome I") lays down choice of law rules for contractual claims. The rules are binding on all Member States.

4. General rule

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[13].

The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in Regulation cover also non-contractual obligations arising out of strict liability[14]. Moreover the regulation doesn't explain the term „damage". In the case of Great Britain it can cause problems. Drs Crawford and Carruthers (University of Glasgow) pointed to the difficulty caused by the use of the word "damage" which in

[12] http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/6606.htm
[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:01:EN:HTML
[14] Pkt 11

English and Scots law may cover (i) the wrongful act or omission; or (ii) the consequential loss.[15].

The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for 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[16].

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[17]. The European Economic and Social Committee noticed that article 4, which deals with obligations arising out of a tort or delict, goes to the heart of the matter. 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 priority task of the Commission is therefore to introduce a uniform set of rules in all Member States[18]. The main defect of the first criteria is lack of the certainty in providing the proper low of the delict/tort as very often both the injured party and the party responsible for the damage can't foresee which law will be applied in their case. What's more it doesn't take into account so called „social surroundings" of the delict/tort[19].

This concept is strongly bound with the ideology of crimminal law. According to it perpetrator should bear responsibility for his act in the place in which he committed it. The concept is based on the assumption that the interest of the country which legal order is infringed should be protected in particular way. On the other hand the concept doesn't take into account the standpoint of the injured party and therefore doesn't guarantee compensation. Moreover, it doesn't

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15 http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/6606.htm

16 Pkt 14

17 Pkt 15

18 Pkt 5.1 Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II-COM(2003) 427 final - 2003/0168 (COD)

19 M. Świerczyński, *Delikty internetowe w prawie prywatnym międzynarodowym*, Kraków 2006, s. 53-55

apply to strict liability[20]. The discussed rule is also criticised because it doesn't take into account personal relations between parties which play important role in contemporary private international law[21].

Therefore 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[22]. 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[23].

This choice was also accepted by the European Economic and Social Committee. It noticed that it was perhaps questionable whether this was consistent with recent developments in legal consolidation in this area12, but the Commission's choice is justifiable on the grounds that it gives priority to protection of the injured party, without however completely neglecting the interests of the party causing the damage[24]. Lex loci dammni takes into account both the interest of the injured party and the protection of legal order in this country in which the damage occured. Moreover it is apllied to the strict liablity because it lays emphasis on the place of the damage and not on the place of act which caused it. It doesn't of course mean that against the lex loci dammni aren't presented any arguments. Firstly, it is emphasised that the term"lex loci dammni" is ambiguous because it can mean both the law of the country in which the event giving rise to the damage occured, the law of the country in which the damage occured and last but not least the law of the country in which the indirect consequences of that event occured[25]. Therefore the Regulation Rome II states clearly that the law applicable to a non-contractual obligations 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 on the damage occured and irrespective of the country or countries in which the indirect consequences of that event occur.

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. The regulation didn't

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[20] T.Pajor, *Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym,* Warszawa 1989, s. 183-184
[21] T.Pajor, *Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym,* Warszawa 1989, s. 31-38
[22] Pkt 16
[23] Pkt 17
[24] Pkt 5.1 Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II-COM(2003) 427 final - 2003/0168 (COD)
[25] T.Pajor, *Odpowiedzialność deliktowa w prawie prywatnym międzynarodowym,* Warszawa 1989, s. 185-188

introduce neither the term „citizenship" nor the „place of residence". The term „citizenship is the most public and unambiguous.It the most of coutries it is understood in the similar way. On the other hand the problem occurs when the person is stateless or when it has the citizenship of many countries[26]. The term „place of residence" (domicilium) is more public but also more difficult to define than the „citizenship". It is the legal binding between the person and the state that decides about the citizenship. In the case of the place of residence the mere fact of living on the terrority is taken into account. This term has different meaning not only in different coutries but also in different branches of law in the same country[27]. 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[28].

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Contact-email:
m.wasylkowska@prawo.uni.wroc.pl

[26] M. Pazdan, Prawo międzynarodowe prywatne, Warszawa, s. 46
[27] W. Ludwiczak, Międzyanrodowe prawo prywatne, Warszawa 1990, s. 28-29, K. Kruczalak, Zarys międzynarodowego prawa prywatnego, Warszawa, s. 60-61.
[28] Pkt 18