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Scope of application of the general rule in the Rome II Regulation

Abstract

The purpose of the paper is to determine the scope of application of Article 4(1), which constitutes the general rule of the Rome II Regulation concerning the law applicable to non-contractual obligations. Article 4(1) says 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. However, this rule is subject to numerous exceptions, which the author divided into three groups: 1) exceptions resulting from the structure of Article 4 (Article 4(2) – common habitual residence in the same country, and Article 4(3) – escape clause), 2) exceptions resulting from the whole Regulation (Articles 5 to 9 – separate regulations for different types of tort, Articles 10 to 12 – separate regulations for non-contractual obligations, Article 14 – freedom of choice, Article 16 – overriding mandatory provisions, Article 17 – rules of safety and conduct), 3) restrictions resulting from other acts of EU and international law (the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents). The analysis resulted is the thesis that Article 4(1) of the Regulation applies to a few types of cases (mainly traffic accidents), which, however, happen quite frequently. The author of the paper refers to the provisions of law (analysis of existing legal regulations), as well as to literature based on these provisions, and therefore uses the dogmatic and legal methods of scientific research.

Keywords: tort/delict, Rome II Regulation, general rule, traffic accident, escape clause

Introduction

In association with the fact that more than ten years have elapsed since the entry into force of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the Rome II Regulation),¹ the general purpose of this paper is to verify the scope of application of the general rule of this Regulation expressed in Article 4 (1) (*lex loci damni* – the law of the place where the damage occurs). There were many doubts, even at the stage of legislative work on the Regulation, whether, given the numerous exceptions to the general principle, also in the Regulation itself, it would indeed be generally applicable and, if yes, then to what extent.

In particular, it was claimed in literature that exceptions to the *lex loci damni* principle may be divided into those that are applicable in all cases and those that are applicable to certain kinds of tort/delict. Accordingly, general exceptions include:

- Application of the law of the common place of habitual residence of parties, pursuant to Article 4(2);
- Application of the law of the State that is “manifestly more closely connected”, according to the “escape clause” of Article 4(3).
- Application of overriding mandatory provisions of the law of the State of forum (Article 16);
- “taking account” (and possible application) of the rules of “safety and conduct” (Article 17).

Meanwhile, specific exceptions include:

- Application, in the event of product liability, of the law of the common place of habitual residence of the party committing a tort/delict and the party sustaining the damage, the place where the product was acquired or the place of “manifestly closer connection” (Article 5);
- Application of the law of the State of forum in certain cases associated with restriction of competition (Article 6(3)(b));
- Application of the law of the State of an event at the request of the party sustaining the damage, in the event of environmental damage (Article 7);
- Possible application of the law of the place of habitual residence of the party sustaining the damage, when quantifying damages for traffic accidents (recital (33)).²

1 OJ L 199, 31.7.2007, pp. 40–49.

2 Symeonides, S.C., *Rome II and tort conflict: a missed opportunity*, “American Journal of Comparative Law” 2008, Vol. 56, pp. 192–193.

Moreover, it should be noted that the parties may effectively choose a law that will eliminate the general rule.³

In my opinion, it is possible to formulate a thesis, which will be the subject of reflections in this paper, that exceptions to the scope of the application of Article 4(1) may be divided into three groups. The first group are exceptions contained in the wording of Article 4, e.g. the mandatory application of the place of habitual residence of the parties (Article 4(2)) and the possibility to apply the clause of the closest connection (Article 4(3)). The second group are exceptions contained in the Rome II Regulation, namely the possibility to choose the law, provided for in Article 14, application of overriding mandatory provisions (Article 16) and taking account of the rules of safety and conduct (Article 27), as well as provisions, other than Article 4(1), governing specific types of tort/delict (Articles 5 to 9) and non-contractual obligations (Articles 10 to 12), which, however, due to the limited length of this paper, will not be discussed here. Finally, the *lex loci damni* rule is limited by legal regulations external to the Rome II Regulation, namely EU and international legal regulations, of which only the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents⁴ is discussed in this paper. Thus, the research goal of this paper is, in particular, to verify the thesis of whether the above exceptions to the general rule of the Rome II Regulation limit the scope of application of that rule to the extent that it no longer has any practical application. In order to verify the above thesis, I used the legal doctrine method based on an analysis of the case-law of Polish courts, as well as the courts of other EU Member States and of the European Court of Justice.

3 As a result of elimination of tort/delict concerning product liability (Article 5), arising from the law on competition (Article 6), environmental damage (Article 7), infringement of intellectual property rights (Article 8) and industrial action (Article 9), Article 4 is only applicable to traffic accidents to which the Hague Convention of 1971 on the Law Applicable to Traffic Accidents also applies, as well as delict committed via the Internet or other means of electronic communication, in the case of which it seems very difficult to apply the *lex loci damni* due to their specificity. Most other torts/delicts will predominantly be committed as so-called Point – or Platzdelikte (“point” or “location” delict). This means they will be completely realised within a single jurisdiction and, therefore, will normally not involve a border crossing during their perpetration (Hohloch, G., *The Rome II Regulation: an overview. Place of injury, habitual residence, closer connection and substantive scope: the basic principles*, “Yearbook of Private International Law” 2007, Vol. 9, p. 9).

4 Dz.U. (Journal of Laws) 2003 No. 63 item 585.

Limitations to the *lex loci damni* principle arising from the wording of Article 4 of the Rome II Regulation

Application of the law of the place where the damage occurs

The general rule of the Rome II Regulation is expressed in Article 4(1), according to which: 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. This regulation also applies to non-contractual obligations that are likely to arise (Article 2.2). Any reference in this Regulation to: (a) an event giving rise to damage shall include events giving rise to damage that is likely to occur; and (b) damage shall include damage that is likely to occur.

The wording of Article 4(1) of the Rome II Regulation is not problematic only when there is one event giving rise to one case of damage. Scattered delict (in German legal language: *Streudelikte*) is a delict where the victim suffers damage in more than one State, i.e. in multiple jurisdictions.⁵ Article 4(1) of the Rome II Regulation does not provide for any special solutions in the case of such delicts, even though this problem is quite substantial in the case of delicts perpetrated over the Internet. The literature proposes two solutions to this problem.

One of these is a “mosaic” (*Mosaikbeurteilung*) accumulation of individual injuries found in different places of direct damage. This approach, referred to as a distributive approach, obliges the Member State court where a dispute is pending to apply the law of that State only to damage that occurred in the territory of that State and then to combine the results of the application of the laws of all the States where damage occurred in order to settle the pending case. In such cases, the court (assuming that it has jurisdiction over the entire case) must act as if there were as many liabilities as there are States whose laws will be applicable and must combine compensations provided for by the laws of the different States into a single compensation.⁶

⁵ Hohloch, G., op. cit., p. 11.

⁶ Dickinson, A., *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford 2009, pp. 330–331. Cf. also Sonntag, M., *Zur Europäisierung des Internationalen ausservertraglichen Schuldrechts durch die geplante Rom II-Verordnung*, “Zeitschrift für Vergleichende Rechtswissenschaft” 2006, No. 105, p. 269. In my opinion, the problem with this solution is that it is particularly unfavourable to the perpetrators of the damage, especially if, despite the above approach, the perpetrator is not able to predict in any way the size of the damage or the scope of liability. This

The second solution proposes that every court adjudicate only on damage that was perpetrated in the State where that court is established, as this would eliminate a situation in which one court is obliged to apply many foreign laws. Such a solution, however, seems to be very unfavourable for the injured party, who will have to incur high costs associated with court proceedings in a number of States.⁷

A careful analysis of both domestic and international case-law suggests that the above problem should rather be examined in the category of theoretical problems. EU Member State courts primarily focus on establishing whether the rule of Article 4(1) of the Rome II Regulation is at all applicable, rather than Article 4(2) or Article 4(3). For example, in the judgment of 13 June 2013, the German District Court in Heinsberg applied, pursuant to Article 4 (1), the Dutch law, having first verified whether the parties had common habitual residence and whether it was possible to apply the escape clause. The dispute concerned a traffic accident that happened in the Netherlands. The complainant, who was a German national, requested compensation from the insurance company of the perpetrator of the accident.⁸ Then, in the judgment of 5 December 2012, the District Court in München applied Italian law, having first verified the possibility to apply Article 4(2) and 4(3), concerning an accident that occurred in Italy.⁹ As a further step, EU Member State courts verify whether the damage in question is direct damage, because the Rome II Regulation only applies to direct damage. In the judgment in the Spanish case of *Fiatc Mutua de Seguros y Reaseguros v. Axa Winterthur Seg* of 28 October 2010, the Belgian law was applied, because the accident, involving a Spanish truck, occurred in Belgium, and in the statement of reasons, the court emphasised the fact that the place of the event resulting in damage and the place where indirect consequences of the event occurred (in Spain) were irrelevant in determining the applicable law.¹⁰ The European Court of Justice also commented on the directness of damage in its judgment of 10 December 2015 in Case C-350/14, *Florin Lazar*

happens, for example, in the case of tort committed via the Internet, which was discussed during consultations with social partners. The application of this solution results in higher court costs, because it requires, for example, more opinions concerning foreign laws. It seems, however, that given the current wording of the general rule in the Rome II Regulation, this solution is the only one to have any legal justification whatsoever.

7 Hohloch, G., op. cit., pp. 10–11.

8 Judgement of the District Court in Heinsberg, 19 C 151/12, openJur 2014, 7622, as quoted in Pazdan, M., *Rozporządzenie (WE) Nr 864/2007 Parlamentu Europejskiego i Rady dotyczące prawa właściwego dla zobowiązań pozaumownych (Rzym II). Komentarz. Wyd I*, 2018, commentary on Article 4, Chapter I, SIP Legalis.

9 Judgement of the District Court in München 322 C 2045/12, as quoted in: *ibidem*.

10 Judgement of the Provincial Court, 554/2010, Ref. JUR/2010/382612, as quoted in: *ibidem*.

p-ko Allianz SpA, concluding that damage related to the death of a person in an accident that took place in the Member State of the court and sustained by the close relatives of that person who reside in another Member State must be classified as “indirect consequences” of that accident. A review of the case-law of Polish courts reveals that the *lex loci damni* rule expressed in Article 4(1)¹¹ of the Regulation was applied in the case concerning compensation for a flooded apartment in Austria (judgment of the Regional Court in Wrocław of 22 February 2013, II Ca 1367/12) and in the case of an aviation accident that took place in Poland (judgment of the Regional Court in Kraków of 27 October 2016, I C 1694/13).

Application of the law of common place of habitual residence

According to Article 4(2), where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Legal scholars and commentators claim that it will be difficult to apply the rule of habitual residence in practice,¹² because it is narrowed to parties that have their habitual residence in the same country and does not include a situation when parties have their habitual residence in different countries that have the same laws. The latter case is functionally analogous to the case of a common place of habitual residence, and as such, it should be treated analogously.¹³

¹¹ The Polish courts also commented on the inability to apply the rule of Article 4(1) in the following judgments: judgment of the Regional Court in Olsztyn, I C 726/13 – concerning personal rights protection to which the Rome II Regulation does not apply, judgment of the Appellate Court in Szczecin of 4 December 2013, I ACa 690/13 and judgment of the Appellate Court in Kraków of 2 July 2014, I ACa 548/14 – inability to apply the regulation due to the fact that the damage occurred before its entry into force.

¹² The Rome II Regulation does not include a definition of the “place of habitual residence” of a natural person. An autonomous definition of the term with respect to companies and other bodies, corporate or unincorporated, as well as natural persons acting in the course of their business activity is provided in Article 23 of the Regulation. It seems, however, that, the same as in the case of other EU laws, as well as in the Rome II Regulation, it should be assumed that a “common place of habitual residence” means that parties participating in a situation involving tort/delict have the factual centre of gravity of their lives (*faktische Lebensmittelpunkte*) in the same country (Von Ofner, H., *Die Rom II-Verordnung-Neues Internationales Privatrecht für ausservertragliche Schuldverhältnisse in der Europäischen Union*, “Zeitschrift für Rechtsvergleichung” 2008, No. 3, p. 16). Article 4(2) of the Rome II Regulation refers to “habitual residence” as the factual centre of gravity of life, supported by the will of the interested parties (Hohloch, G., *op. cit.*, p. 12).

¹³ In order to illustrate the problem, S.C. Symonides gives the example of a hunting expedition in Kenya, during which a French hunter wounded a Belgian hunter, with whom he had no pre-existing relationship. If the French and Belgian laws offer the same compensation, which is much higher than the Kenyan ceiling, it is a typical example of a “false conflict”, in which Kenya has no

Another problem with applying the provision of Article 4 (2) is that it seems to be “all or nothing”. The general rule is automatically superseded if there is a common place of habitual residence, even if it is entirely random and is not in the interest of the parties. Application of the law of habitual residence as if it was “all or nothing” may also result in the application of different laws depending on the configuration of parties, even if their claims concern the same event. In general, preference for the law of the common place of habitual residence may be contrary to the interests of parties if they do not expect the application of the law of their shared place of habitual residence, especially in the case of strict liability that corresponds to risk insurance.¹⁴ In the case-law of the Polish courts, the problem of applying Article 4(2) of the Rome II Regulation was analysed in association with the judgment of the Appellate Court in Katowice of 3 November 2016, case No. III APa 32/16. The case concerned an accident at work that happened in the Czech Republic and involved a Polish national. The party sustaining the damage was an employee of a company registered in Poland. The Appellate Court justified the application of Article 4(2) by the fact that the complainant was a Polish national and had his habitual residence in Poland, and the company he sued was also registered and established in Poland.

The clause of the closest connection

The rule of Article 4(3) of the Rome II Regulation enables so-called *Gleichlauf* (parallel application) of the law applicable to a contract and a tort/delict, since the law the most closely connected with a given tort/delict may be the law chosen or identified for the contractual relationship between parties. In this case, the Rome I Regulation, which governs the applicability of law to contractual obligations, also indirectly governs the law applicable to tort/delict. From a practical perspective, it is preferable to apply the same law to a tort/delict and a contract. It should be noted, however, that paragraph 3 functions as an exception within the structure of Article 4, and the accessory affiliation must not be treated as the general rule.¹⁵ Moreover, it is claimed in the literature that the Rome II Regulation lacks internal cohesion due to the fact that a pre-existing relationship between parties is only a presumption

interest in applying its law, whereas there is a good reason to apply French or Belgian law (Symeonides S.C., op. cit., p. 196).

14 Fröhlich, C.W., *The private international law of non-contractual obligations according to the Rome II Regulation*, Hamburg 2008, pp. 53–54.

15 Kramer, X.E., *The Rome II Regulation on the law applicable to non-contractual obligations: the European private international law tradition continued. Introductory observations and general rules*, “Nederlands Internationaal Privaatrecht” 2008, p. 421.

in the escape clause, while habitual residence automatically overrides the *lex loci delicti commissi*.¹⁶

There is also the question of the nature of a relationship between parties that can be considered pursuant to Article 4(3). Literal interpretation of this paragraph suggests that a relationship may also be factual, as Article 4(3) uses the term “relationship” rather than “contractual relationship”, and a contract is only mentioned as an example of a relationship between parties, which may be relevant to this paper. This is associated with the abovementioned concept that an invalid contract should be treated as an element of a matter of fact.¹⁷

A detailed analysis of problems that may arise in association with limited application of Article 4(3) was performed by R. Fentiman. In the first place, he presented the limitations on the application of that article caused by its association with Article 4(1) and (2). He believes it likely that the escape clause of Article 4(3), rather than serve the purpose of making a distinction between the rule of Article 4(1) and that of Article 4(2), introduces a third law. The wording of Article 4(2) suggests that this paragraph should always apply whenever there is a common place of habitual residence. Moreover, an alternative law, identified pursuant to Article 4(3), must be different than the law identified pursuant to paragraph 1 or 2, which means that it must be different than *lex loci damni* and the law of the common place of habitual residence. Thus, it is assumed that whenever a choice is to be made between *lex loci damni* and the law of the common place of habitual residence, the latter is always applicable. Article 4(3) may serve as a mediation tool between Article 4(1) and 4(2) if there are factors other than the place where the damage occurred or a common place of habitual residence that relate a tort/delict to one of those States. However, if a State is, at the same, time the place where the damage occurred and the place where indirect consequences of the damage occurred, Article 4(3) may be applicable.¹⁸

¹⁶ Alférez, F.J.G., *The Rome II Regulation: on the way towards a European private international law code*, “European Legal Forum” 2007, No. 3, p. 83.

¹⁷ This is also expressed by X.E. Kramer, who believes that it is not relevant here that the proposal of the European Parliament to include both legal and factual relationships in the provision was not accepted at the stage of legislative work. The existence of a factual relationship in general will have less significance than a legal relationship, and most of these situations will already be caught by either the exception of Article 4(2) or Article 12 on *culpa in contrahendo* (Kramer, X.E., op. cit., p. 421).

¹⁸ Fentiman, R., *The significance of closer connection*, in: Ahern, J. and Binchy, W. (eds.), *The Rome II Regulation on the law applicable to non-contractual obligations: a new international litigation regime*, Leiden 2009, p. 89.

The above hypotheses concerning limited application of the escape clause are in practice reflected in the limited case-law concerning Article 4(3). In the case-law of Polish courts, the clause of the close connection of Article 4(3) of the Rome II Regulation was used in case No. I ACa 212/14, reviewed by the Appellate Court in Szczecin, where, in their appeal, the complainant accused the district court of ignoring the escape clause of Article 4(3) of the Rome II Regulation, claiming that there existed a close connection between the tort and the pre-existing contract between the parties.¹⁹

Limitations to the *lex loci damni* principle arising from the Rome II Regulation

Freedom of choice

Pursuant to Article 14 (1) of the Rome II Regulation, parties may agree to submit non-contractual obligations to the law of their choice: a) by an agreement entered into after the event giving rise to the damage occurred; or b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

The above suggests that tacit choice of law according to Article 14(1) sentence 2 is generally admissible. The only requirement is that the choice of law be “expressed or demonstrated with reasonable certainty”. Thus, tacit choice of law based on the parties’ behaviour in proceedings is admissible (*Prozessverhalten*).²⁰ It is also possible to withdraw or change the law chosen by the parties.²¹ In the opinion of some of the representatives of the scholarship, a choice of law to the advantage of a third party should also be admissible.²²

¹⁹ As quoted in: Pazdan, M., op. cit. In this case, however, the Appellate Court dismissed the appeal, concluding that the damage was caused by the bailiff in Poland, and the contract that the complainant mentioned was only an item of evidence in the case for payment before a German court.

²⁰ Fuchs, A., *Zum Kommissionsvorschlag einer “Rom II”-Verordnung*, “Zeitschrift für Gemeinschaftsprivatrecht” 2003–2004, Vol. 2, p. 104.

²¹ Pazdan, J., *Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych*, “Problemy Prawa Prywatnego Międzynarodowego”, Vol. 4, 2009, p. 28.

²² Heiss, H. and Loacker, L.D., *Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II*, “Juristische Blätter” 2007, Vol. 129, p. 623.

Article 14(2)(b) requires that all parties pursue a commercial activity. This requirement must be fulfilled at the time of contract execution and with respect to the subject of the contract. To this end, according to A. Dickinson, “commercial activity” should be understood as inclusive of any activity with commercial or professional profit. Moreover, when a person acts partly for commercial or professional profit and partly for their personal profit, the commercial profit should be dominant, unless the scope is so limited that it is irrelevant in the general context of a contract.²³

Another condition that must be met to make a pre-existing choice of law effective is that an agreement must be freely negotiated – it is not enough that an agreement is only negotiated; it must be “freely negotiated”, which is a more stringent criterion. It seems that this provision was supposed to eliminate a situation in which the choice of law is imposed by one party on another, depriving the other party of a reasonable chance to negotiate the terms of an agreement.²⁴ Accordingly, the fact that an agreement containing a provision on the law applicable to non-contractual obligations has the form of a model contract²⁵ (e.g. market standards for a given type of a market instrument) does not automatically exclude the application of Article 14(1)(b) if every party is able to determine the contractual provisions, in particular the choice of law clause.²⁶

Another issue that was not sufficiently clarified by Article 14 of the Rome II Regulation is what kind of law parties may choose. It seems that Article 14(1) allows one only to choose the law of a given State and not, for example, the general principles of Sharia law.²⁷ There is also an opposite opinion expressed by legal scholars and commentators, namely that Article 14 concerns only the choice of “law”, without any limitations, whereas it should be, for example, “State law”.²⁸ It seems then that, with respect to non-contractual obligations, the first choice is Principles of

²³ Dickinson, A., op. cit., p. 561.

²⁴ Ibidem, p. 562.

²⁵ It should be noted, however, that there was some criticism in the literature concerning the possibility to verify whether the general terms of a contract were indeed “freely negotiated”. Such criticism was expressed, among others, by H. Heiss and L.D. Loacker, (Heiss, H. and Loacker, L.D., op. cit., p. 623).

²⁶ Dickinson, A., op. cit., p. 563.

²⁷ Ibidem, p. 553. On the admissibility of the choice of a regulation other than effective law as the applicable law, cf. also Pazdan, M. (ed.), *Prawo prywatne międzynarodowe. System Prawa Prywatnego. Tom 20 B*, Warszawa 2015, p. 23.

²⁸ Von Graziano, T.K., *Das auf ausservertragliche Schuldverhaeltnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung*, “Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht” 2009, No. 1(73), p. 9.

European Tort Law, presented by the European Group on Tort Law. It is worth noting here how this issue is treated in the Rome Convention and Rome I Regulation. Article 3 of the 1980 Rome Convention on the law applicable to contractual obligations²⁹ stipulates the “choice of law”, the same as Article 3 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).³⁰ Meanwhile, recital (13) of the Regulation explains that it does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Although such an explanation is missing from the Rome II Regulation, it should be noted that all the three legal acts use the term “choice of law”, which seems to eliminate all non-law principles.

In the Polish case-law, the issue of the choice of law pursuant to the Rome II Regulation was mentioned in the judgment of the Appellate Court of 27 March 2019, I ACa 94/18. The case concerned a claim for compensation for pain and suffering inflicted as a result of an accident that happened while skiing in Austria. In these proceedings, the parties referred to Polish law, and the court requested them to specify whether they chose that law as the applicable law. The parties confirmed their choice.

The general rule vs. application of overriding mandatory provisions of the law of the State of forum

The measure of overriding mandatory provision of law is provided for in Article 16 of the Rome II Regulation, according to which: nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. This means that the Rome II Regulation does not have its own definition of overriding mandatory provision of law, and it is up to a court to decide which of the provisions of the State of forum will apply, notwithstanding the law that applies to a non-contractual obligation.³¹ Moreover, an inevitable problem in this case is with interpreting which of the provisions of the State of forum should be considered to be overriding. It seems that the EU legislator noticed this problem, because recital (32) says that: considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.

²⁹ OJ C 169, 8.7.2005, pp. 10–22.

³⁰ OJ L 177, 4.7.2008, pp. 6–16.

³¹ *Ibidem*, p. 632.

Nonetheless, it must be noted that this explanation introduces two additional unspecified terms, that of “public interest” and “exceptional circumstances”. Still, the wording of recital (32) suggests that it is the intention of the EU legislator to prevent overuse of this institution by Member States.

Thus, an autonomous definition of overriding mandatory provisions is needed, taking into account the definition of the term contained in Article 9 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), to ensure coherence of interpretation and conceptual coherence of the two Regulations.³²

Paragraph 1 of that Article says that: overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. The difference between Article 9 of the Rome I Regulation and Article 16 of the Rome II Regulation is that the latter only concerns overriding mandatory provisions of the State of forum. This seems to exclude the application of provisions other than overriding mandatory provisions of the State of forum, e.g. the provisions of a third State in the event of tort/delict. Meanwhile, the EU legislator recognises overriding mandatory provisions included in EU directives or national laws implementing those directives as the law of the State of forum.³³

The European Court of Justice commented on the interpretation of overriding mandatory provisions based on the Rome II Regulation in its judgment of 31 January 2019 in case C-149/18, stating that Article 16 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) must be interpreted as meaning that a national provision, such as that at issue in the main proceedings, which provides that the limitation period for actions seeking compensation for damage resulting from an accident is three years, cannot be considered to be an overriding mandatory provision, within the meaning of that article, unless the court hearing the case finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted, that it is of such importance in the national legal order that it justifies a departure from the law applicable, designated pursuant to Article 4 of that regulation. The above judgment is casuistic, and

³² Pazdan, M. (ed.), *op. cit.*

³³ *Ibidem.*

it does not offer general guidance on the interpretation of the concept of “overriding mandatory provisions” pursuant to the Rome II Regulation.

Article 4.1 vs. the requirement to observe the rules of safety and conduct

Article 17 of the Rome II Regulation sets limits to the application of *lex loci actus*.³⁴ Out of the limitations to the application of Article 4(1), it is worth looking at the requirement to observe the rules of safety and conduct provided for in Article 17. According to Article 17 of the Rome II Regulation, in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

It seems that this Article suggests “observance”, rather than application of the rules of safety. This means that those rules should be regarded as a matter of fact and only in so far as appropriate.³⁵

It is controversial, however, whether Article 17 of the Regulation applies only to such rules of conduct that are specified in legislation or also to the criterion of diligence. The goal of Article 17 suggests that the concept of local standards of conduct should also include general standards of diligence, given the fact that the conduct of the perpetrator of damage will be assessed on the basis of a criterion that is more stringent than the one in force at the place of an act, the application of which could not have been foreseen by the perpetrator, even despite due diligence,³⁶ and yet the wording of the provision suggests a restrictive interpretation, and the preamble to the Regulation makes it clear that the term “rules of safety and conduct” should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident (recital (34)). The preamble clearly mentions “regulations”, giving the example of road safety rules. It seems that the possibility to claim the general criteria of diligence effective in a given State, although advantageous for a defendant, could violate the principle of certainty, as those criteria are highly discretionary, and their application often raises many doubts as to their interpretation in the countries where they are in force.

³⁴ Fentiman, R., op. cit., pp. 99–100.

³⁵ Leible, S. and Lehmann, M., *Die neue EG-Verordnung über das auf ausservertragliche Schuldverhältnisse anzuwendende Recht* (“Rom II”), “Recht der Internationalen Wirtschaft” 2007, p. 725.

³⁶ Ibidem, p. 6.

So far, the application of Article 17 of the Rome II Regulation has not been reviewed by Polish courts.³⁷

Relationship between the Rome II Regulation and the Hague Convention on the Law Applicable to Traffic Accidents

The purpose of Article 28 of the Rome II Regulation was to define the relationship between the Regulation and international conventions. Pursuant to this Article: this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.³⁸ Thus, Article 28 suggests that the Regulation makes it possible that in countries that have not ratified the Convention (the United Kingdom, Germany, Scandinavian countries, Iceland, Hungary, Romania, Italy, Portugal and Greece), the law applicable to non-contractual obligations arising from traffic accidents will be determined in accordance with the Rome II Regulation, whereas in the countries that have ratified the Convention (Spain, Poland,³⁹ France, Belgium, Luxembourg, the Netherlands, Austria, Latvia, the Czech Republic, Slovakia, Slovenia and, outside the EU, also Switzerland), the law will be determined in accordance with the Convention.

The scope of the discussed legal instruments is the same, but they use different connectors, i.e. the Rome II Regulation uses *lex loci damni*, while the Convention – *lex loci delicti commissi*. At first glance, however, it seems that, despite application of different connectors, the Rome II Regulation and the Hague Convention lead to the same results as, in the case of traffic accidents, the location of an event giving rise to damage is the same as the location of the occurrence of damage. However, the two legal instruments lead to different results if the tort status loosens: Article 4(2)

³⁷ Article 17 of the Rome II Regulation was the basis of judgments issued by German courts in cases concerning the application of local construction rules and standards, as well as safety rules in cases where both the injured party and the travel agency reside and are established in the same country (Germany). Cf. e.g. judgment of the German Federal Court of Justice of VII ZR 348/86, NJW 1998, No. 22, p. 380, or judgment of the German Federal Court of Justice VI ZR 257/06, NJW 2008, No. 40, p. 2918, as quoted in: Pazdan, M., op. cit.

³⁸ Jagielska, M., *Prawo właściwe dla wypadków drogowych – rozporządzenie Rzym II a konwencja haska o prawie właściwym dla wypadków drogowych*, in: Dańko-Roesler, A. et al., *Rozprawy z prawa prywatnego oraz notarialnego. Księga pamiątkowa dedykowana profesorowi Maksymilianowi Pazdanowi*, Warszawa 2014, p. 136.

³⁹ Article 34 of the Polish Private International Law Act of 4 February 2011, Dz.U. (Journal of Laws) of 2011 No. 80 item 432, stipulates that the law applicable to non-contractual civil obligations arising from traffic accidents is determined by the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, Dz.U. (Journal of Laws) of 2003 No. 63 item 585.

of the Hague Convention requires application of the law of the place of registration of all the vehicles involved in an accident, and Article 3(2) requires application of the law of the common place of habitual residence of the parties.⁴⁰ If two or more vehicles are involved in an accident, the rule of the law of the place of vehicle registration is only applied if all the vehicles are registered in the same State (Article 4). This also applies when the complainant or the defendant (e.g. passenger and driver of the same vehicle) have their habitual residence in the same State. Meanwhile, the Rome II Regulation requires application of the law of the common place of habitual residence.⁴¹

Accordingly, depending on the State, the court may apply: the Hague Convention, if the State is a party to the Convention, the Rome II Regulation, if the State is not a party to the Convention, or, in Denmark, Danish private international law.⁴²

In Polish case-law, cases involving cross-border traffic accidents are the most frequent. In such cases, depending on whether or not the States whose law is to be applied are parties to the Hague Convention, either Article 4(1)⁴³ of the Rome II Regulation or relevant provisions of the 1971 Hague Convention are applied. For example, the judgment of the District Court in Kłodzko of 26 November 2012, No. I C 390/11 is based on Article 4(1) of the Rome II Regulation, due to the following facts: on 10 September 2009, at around 6 p.m., a traffic accident occurred in Germany, caused by a German national, who failed to observe due diligence and drove into the back of a car of a Polish national.⁴⁴ Meanwhile, in the case of an accident that took place in Austria, which, the same as Poland, is a party to the Hague Convention, and was caused by an Austrian national insured through an insurance company established in Austria, the Hague Convention was applied⁴⁵ (there is no bilateral convention regarding traffic accidents between Poland and Austria).

⁴⁰ Fuchs, A., *op. cit.*, p. 102.

⁴¹ Von Graziano, T.K., *op. cit.*, p. 27.

⁴² Jagielska, M., *op. cit.*, p. 137.

⁴³ In some matters, Article 19 of the Rome II Regulation applies, e.g. in the judgment of the Appellate Court in Warsaw of 4 November 2016, VI ACa 826/15, concerning an accident that occurred in Romania, in which a car owned by a Romanian company drove into another car owned by a Polish company. Article 19 of the Rome II Regulation was also applied in the judgment of the District Court in Człuchów of 4 May 2017, I C 409/15. This case concerned an accident that occurred in Germany and involved a car registered in Germany.

⁴⁴ This was also the case with the judgment of the Appellate Court in Białystok of 30 July 2018, I ACa 824/17 and the judgment of the Appellate Court in Szczecin of 13 April 2016, I ACa 091/16.

⁴⁵ Judgment of the Appellate Court in Kraków of 23 May 2017, I ACa 178/17.

Conclusions

To conclude, in terms of the types of cases to which Article 4(1) of the Rome II Regulation applies, these are mostly road accidents, which indeed suggests that the application of the *lex loci damni* is limited, and additionally, it is shared with the Hague Convention of 4 May 1971 on road accidents. Moreover, analysis of the case-law of Polish and international courts suggests that road accidents represent the majority of cases in which the Regulation was applied. This is due to the specificity of the Regulation, which concerns the law applicable to non-contractual obligations, and relatively, the most frequent non-contractual obligations in cross-border relationships are those associated with traffic accidents. In the case of traffic accidents, application of the Rome II Regulation was partly eliminated by the 1971 Hague Convention on the Law Applicable to Traffic Accidents; however, it should be noted that some EU Member States, such as Germany, are not parties to the Convention. Meanwhile, because of their proximity and intensive cross-border exchange between the two States, for commercial, professional, family or leisure purposes, most traffic accidents involving Polish and German nationals will happen either in Poland or in Germany. Since Germany has not ratified the 1971 Hague Convention on the Law Applicable to Traffic Accidents, it cannot be applied in cross-border cases between Poland and Germany, and instead, Article 4(1) of the Rome II Regulation is applicable. To sum up, despite the hypotheses formulated by legal commentators, the actual case-law shows that the general rule of the Rome II Regulation is not a dead rule; to the contrary, statistically speaking, it is the legal basis of most judgments concerning the Rome II Regulation, not only in Polish courts, and it will remain so at least until conflict-of-law regulations on traffic accidents have been fully harmonised.

Analysis of the case-law presented in this paper leads to one more important conclusion, namely that the Rome II Regulation does not offer a final solution to road accidents, which constitute an important group of tort/delict. Member States such as Belgium, France, Austria, the Netherlands, Luxembourg, Spain and Poland will not apply the Rome II Regulation to traffic accidents. Instead, they will continue applying the Hague Convention in the future. This means that the Commission failed to achieve its goal concerning traffic accidents, which are at the core of international tort/delict, this goal being to reduce forum shopping cases by harmonising private international law and increasing legal certainty.

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