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THE SIGNIFICANCE OF THE ROME II REGULATION IN THE UNIFICATION PROCESS OF THE EUROPEAN UNION

Oksana RUDENKO¹

Abstract

Legislative activity of the European Union (EU) came close to embodying the idea of creating the EU Code of Private Law, although traditionally questions of private international law have always been within the scope of regulation of national legislation.

The work on the unification of the rules on applicable law in the EU is currently being carried out in such activities of the EU Council and the EU Commission as: 1) the law applicable to contractual obligations (Rome I - Regulation of 2008); 2) the law applicable to non-contractual obligations (Rome II - Regulation of 2007); 3) the law applicable to the issues of divorce and separation of spouses (Rome III - Regulation of 2010); 4) the law applicable to inheritance issues (Rome IV - Regulation of 2012).

The law applicable to non-contractual obligations is defined in the EU member states under Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11.07.2007 "On the law applicable to non-contractual obligations ("Rome II")" (hereinafter referred to as "Rome II"). The use of uniform rules was intended to increase the predictability of court decisions and to ensure a reasonable balance between the interests of the person held responsible and the person who was harmed. The provisions of the "Rome II" Regulation are applied in situations containing conflicting laws to non-contractual obligations in the civil and commercial sphere and do not apply to tax, customs and administrative disputes, as well as to the responsibility of the state for actions and inaction committed during the exercise of public authority. A number of other issues are also excluded from the scope of the provisions of the Regulation.

The Regulation sets a general rule for the choice of an applicable law: the law applicable to a non-contractual obligation arising from harm is the law of the country where the damage occurs, but there are some exceptions to this rule. Summing up, it should be noted that at present the EU legislation on applicable law cannot be called consistent and logical. Many legal rules in different regulations repeat each other, thereby increasing the amount of legislative material, which adversely affects the principle of accessibility of justice. Long and painstaking work is needed to improve the EU legislation in the field of

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the international private law, in particular, the preparation by the EU Commission of Green Books on various aspects of the international private law.

Keywords:

Non-contractual obligations; European Union; the harmonization of the rules on applicable law in the EU; Regulation of the European Parliament and of the Council of the European Union N 864/2007 of July 11, 2007 “On the law applicable to non-contractual obligations”, international private law, torts, restitution obligations, choice of the applicable law, EU law, Rome II Regulation.

Introduction

The adoption on July 11, 2007 of the EU Regulation 864/2007 on the law applicable to non-contractual obligations [1], also known as the Rome II Regulation, marks a significant progress in the harmonization of international private law at the EU level. The Regulation supplements the Rome Convention on the law applicable to contractual obligations (1980) [2], determining the agreed choice of legal norms in relation to torts and restitution obligations. This article attempts to critically analyze the main provisions of the Rome II Regulation.

The Rome II Regulation (Regulation (EC) No 864/2007) contains rules on the choice of law that a court of an EU member state should apply in a qualifying case to a cross-border legal proceeding related to issues arising from non-contractual obligations. Together with the Rome I Regulation on the law applicable to contractual obligations (Regulation (EC) No 593/2008) and the Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters (Council Regulation (EC) No 44/2001) [3], which was repealed by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [4]. All these documents form a triangle of provisions which regulate the assumption of jurisdiction and choice of law treatment of cases before all Member State courts in virtually the whole area of the law of obligations.

Theoretical Background

The article is based on the unique experience of the European Union and its legislation. The main issues of non-contractual obligations in the EU were revealed by Andrew Dickinson, Zhang Mo, Dornis Tim, Kramer Xandra E., Novoa Rodrigo, Symeonides S.C., Vynogradov A.A., Troshchenko I.O. and others.

Argument of the paper

A significant event in the history of EU law took place on July 11, 2007, when the EU Parliament and Council adopted EU Regulation 864/2007 (Rome Regulation II) on the law applicable to non-contractual obligations. This Regulation entered into force on January 11, 2009 and applies to events that caused damage that occurs after this date. The Rome II Regulation establishes the choice of law in relation to torts and restitution obligations.

The Regulation was originally intended to supplement the Rome Convention of June 19, 1980 on the law applicable to contractual obligations. Although later that Convention was also replaced by the relevant 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) [5]. Unlike the Rome I Regulation, which was a relatively minor modernization of the pre-existing regulation of the applicable law on contractual obligations – the Rome Convention of 1980, the Rome II Regulation had no legal predecessor and therefore represents a new milestone in the development of European private law.

The Rome II Regulation contains 40 recitals, which set out the general objectives underlying the harmonization of the rules of choice of law. Thus, Recitals 1-2 set that the Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

According to the Recital 6, for the normal functioning of the internal market, it is necessary for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought. The principle of the *lex loci delicti commissi*, according to the Recital 15, 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. Thus, Recital 16 emphasizes that 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.

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The Regulation consists of 40 recitals, 7 chapters, 32 articles and 3 declarations. Recitals set out the general objectives underlying the harmonization of the rules of choice of law in relation to torts and restitution obligations. Chapter I defines the scope of application and specifies that the Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, 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*). Chapter II designates the law applicable to a non-contractual obligation arising out of a tort/delict. In this case, it 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. Chapter III sets the uniform rules applicable to restitutionary obligations, in particular, unjust enrichment, *negotiorum gestio*, *culpa in contrahendo*. Chapter IV allows the parties to use the freedom of choice, which means that the parties may agree to submit non-contractual obligations to the law of their choice. Chapter V sets the common rules to the scope of the law applicable to non-contractual obligations. Chapter VI discloses other common provision such as habitual residence, exclusion of *renvoi*, states with more than one legal system, public policy of the forum, relationship with other provisions of Community law and the existing international conventions. Final provisions, set in the Chapter VII, include the list of conventions, review clause, application in time and the date of application.

To determine the scope of application of the Rome II Regulations, it is first necessary to consider the very nature of the tort / delict or as defined by the Regulation “non-contractual obligation”. Depending on the grounds of occurrence, obligations are usually divided into contractual and non-contractual, whilst contractual obligations arise, as a rule, by agreement of the parties from the contracts, and non-contractual obligations arise from the grounds provided by law. Due to the fact that the legal norms regulating both types of liability are significantly different, there is often a question about the delimitation of the scope of contractual and tort obligations, as well as the delimitation of tort and contractual liability. Non-contractual liability is established by mandatory rules of law, while contractual liability is established both by law and by agreement of the parties on the basis of the contract. As rightly emphasized by Vinogradov A.A. [6], if one and the same case is considered first according to the norms on contractual liability, and then according to the norms of tort liability, then the results will be different. The question of the division of types of liability is resolved as follows: if the harm arises as a result of non-performance or improper

performance of the contract, then the rules on liability for tort are not applied. In this case, the damage is compensated in accordance with the rules on liability for non-performance of the contractual obligation or in accordance with the terms of the contract.

The Rome II Regulation is based on the principle of autonomy of the will of the parties. It should be noted that this is not typical for conflict of laws rules in the field of tort legal relations and indicates the strong influence of the recent trends in European private law [7]. The law chosen by the parties constitutes the primary rule applicable to delicts as well as quasi-delicts. In this case, the parties choose law applicable to a non-contractual obligation in two ways: *ex post* or *ex ante*. Where, the term *ex-ante* is a phrase meaning "before the event" and the term *ex-post* means "after the fact". In other words, the choice is made either through an agreement concluded by them after the legal fact entailing the occurrence of harm occurred, or when all parties are engaged in commercial activities, also by means of agreement concluded by them before there was a legal fact, which led to the damage occurred.

Thus, the 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 Regulation) is the EU regulation containing the conflict-of-laws regulation of the determination of the law applicable to non-contractual obligations. The Rome II Regulation, which entered into force on January 11, 2009, is the harmonization of the EU conflict rules in civil and commercial matters in the field of non-contractual obligations (with some exceptions). The Regulation regulates the following issues: specific categories of tort / delict, the definition of the law applicable to the tort liabilities as a result of unjust enrichment, acting as an agent without permission (*negotiorum gestio*) and misleading negotiation of a contract or fault in conclusion of a contract (*culpa in contrahendo*). The Regulation in accordance with the Article 3 is of a "universal application" that is, the law to which the Rome II Regulation refers, applies whether or not it is the law of a Member State. In addition, the Regulation provides that in certain circumstances and under certain conditions, the parties may choose the law applicable to non-contractual obligations. Similar rules have been established by the Convention on the law applicable to contractual obligations 1980 (Rome Convention), which was replaced by 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 Regulation).

Prior to the adoption of the Rome II Regulation, in the European countries the principle of "*lex loci delicti commissi*" ("law of the place where the delict [tort] was committed") was mainly applied to the choice of applicable

law to non-contractual obligations. However, the expansion of trade leads to difficulties in the application of this principle and becomes a source of uncertainty regarding the law to be applied. The amended text of the Rome II Regulation was submitted by the Commission in July 2003 and was adopted on July 11, 2007 and published in the Official Journal of the European Union on July 31, 2007. The question of the unification of the conflict-of-laws rules for non-contractual obligations was raised back during the work on the draft of the Rome Convention. That is, the development of the document took more than 30 years. In accordance with Article 32, the Regulations entered into force on January 11, 2009 (with the exception of Article 29, which became applicable on 11 July 2008).

According to the Article 1 of the Regulation, it shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters, although it 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*). The Regulation establishes some exceptions to the scope of application: non-contractual obligations within the framework of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations, matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession, bills of exchange, cheques and promissory notes and other negotiable instruments, legal regulation of legal entities, such as the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies trust property, relations between the settlors, trustees and beneficiaries of a trust created voluntarily, injury to nuclear materials, infringement on privacy and personal non-property rights, such as violations of privacy and rights relating to personality, including defamation [8: 86].

According to the paragraph 11 of the document, 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 this Regulation should also cover non-contractual obligations arising out of strict liability. In accordance with the Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, acting as an agent without permission (*negotiorum gestio*) or misleading negotiation of a contract or fault in conclusion of a contract (*culpa in contrahendo*).

Regarding the conflict of laws on the law applicable to non-contractual obligations the Regulation establishes a general rule of use *lex loci damni* as a

main connecting factor. In this context, *lex loci damni* refers to the law of the place where the injury occurs. In other words, if an injury appears in another country, the laws of that country govern. However, this rule is only applied if the tortfeasor had foreseen that the damage would have occurred there. This is a general rule applied under conflict of laws. Article 4 of the document sets a general rule to non-contractual obligations that is 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. That general rule has some exemptions: 1) 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; 2) where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with the other country than it was indicated before, the law of that other country shall apply.

Article 5 which indicates product liability prescribes that for non-contractual obligations arising from damage caused by the product should be applied: (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that, (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that, c) the law of the country in which the damage occurred, if the product was marketed in that country. Nevertheless, where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than the above-stated, the law of that other country shall apply, that is a law of a manifestly closer connection.

The Regulation also regulates the issues of unfair competition. Thus, the law applicable to obligations arising from unfair competition is the law of the country in whose territory competitive relations or the collective interests of consumers are affected. If unfair competition affects several countries, the claimant suing the court at the location of the respondent's domicile may choose the law of the court to which the claim is filed as an applicable law, provided that the market of this state is also affected by unfair competition. At the same time, to the obligations arising from unfair competition, the parties cannot choose the law on their own. This means that in these matters does not apply the autonomy of will of the parties.

Regarding issues of the environmental damage, the Regulation regulates them as follows: the plaintiff can choose the law of the country in

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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 (*lex loci damni*) or the country where the legal fact occurred (*lex loci delicti commissi*).

In the matter of intellectual property, the principle of “*lex loci protectionis*” is valid, that is the law of the country for which protection is claimed. If the violation affects the entire European Union, then the law of the country in which the act of infringement was committed applies (*lex loci delicti commissi*).

In a production conflict, according to the Regulation, the law of the country where the conflict occurred is applied.

Issues related to unjust enrichment are governed by the Article 10 of the Regulation, which states that if the obligation of unjust enrichment affects other existing obligations between the parties closely related to unjust enrichment, then the law that governs that relationship is applied. Nevertheless, there are exceptions to this rule, namely: a) application of the law of common habitual residence of the parties, if the obligation of unjust enrichment does not affect other obligations and the parties have their habitual residence in the same country; b) if the applicable law cannot be determined by the previous methods, then the law to be applied is the law of the country where unjust enrichment occurred (*lex loci delicti commissi*); c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated above, the law of that other country shall apply.

The document pays special attention to the regulation of issues related to *negotiorum gestio*. Therefore, before proceeding to the provisions of the law, which will be applied in this case, it is necessary to consider the very content of the concept of *negotiorum gestio*. Thus, *negotiorum gestio* (a **Latin** expression meaning “management of business”) is a form of spontaneous voluntary **agency** in which an intervenor or intermeddler, the *gestor*, acts on behalf and for the benefit of a **principal** (*dominus negotii*), but without the latter's prior consent. The *gestor* is only entitled to reimbursement for expenses and not to remuneration, the underlying principle being that *negotiorum gestio* is intended as an act of generosity and friendship and not to allow the *gestor* to profit from his intermeddling. This form of intervention is classified as a **quasi-contract** and found in **civil-law** jurisdictions and in **mixed systems**.

Tim Dornis rightly pointed out that the field of *negotiorum gestio* is perplexing. In civil law, its doctrinal, policy, and economic foundations are far from clear. In common law, the concept even seems to be inexistent. Nevertheless, in common-law as under civil-law doctrine, certain situations of intervention in another's affairs are acknowledged as establishing claims of an intervening party against the other side or vice versa. Whether these cases are formally treated under the rubric of *negotiorum gestio* or not – the practical relevance of the field cannot be denied, lest the search for a consistent system be neglected. Of the many fundamentals that still await clarification, one of the most pertinent is the question of how to draw the line between contract law and *negotiorum gestio* (or its equivalents in common law). A comparative look at different jurisdictions and the fields' structural foundations reveals that there not only exists a wide-reaching similarity in practical outcomes, but that the underlying policy is almost universally founded on a uniform economic basis – even though arguments of this kind are seldom made explicitly [9: 75]. The Regulation also regulates actions in the interest of others without an order, so according to Article 11, if a non-contractual obligation arising from the act performed without due authority in connection with the affairs of another person (*negotiorum gestio*) affects other existing obligations between the parties closely related to this non-contractual obligation, then the law regulating the already existing relations applies. However, if the parties have their usual place of residence in the same country, then the law to be applied is the law of that country. At the same time, if the applicable law cannot be determined by the previous methods, then the law to be applied is the law of the country in which the act was performed (*lex loci delicti commissi*). Nevertheless, where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated above, the law of that other country shall apply.

Article 12 of the Regulation is dedicated to *culpa in contrahendo*. Before proceeding to the consideration of the provisions of the Regulations concerning *culpa in contrahendo*, it is necessary to disclose the very concept of this term. Now then, it is a **Latin** expression meaning “fault in conclusion of a contract”. It is an important concept in **contract law** or many civil law countries, which recognize a clear duty to negotiate with care, and not to lead a negotiating partner to act to his detriment before a firm contract is concluded. According to Rodrigo Novoa [10: 590], the *culpa in contrahendo* doctrine has been adopted in both civil and common law systems. Despite

some differences in its requirements and legal classification, both systems impose on parties a duty to negotiate in good faith. While civil law jurisdictions generally recognize this duty as a general principle of law, and some of them have specific provisions establishing its framework. Common law countries are more reluctant to apply the *culpa in contrahendo* doctrine, giving more deference to the freedom of contract principle. Regarding the international applicability of the *culpa in contrahendo* doctrine, it is clear that the UNIDROIT Principles contemplate its application, as do countries such as Bolivia and Italy. Nevertheless, the CISG did not do so explicitly, leaving this issue of pre-contractual liability in international sales unsettled. It will be up to each court to interpret whether or not the *culpa in contrahendo* doctrine applies to negotiations where parties have their principle places of business in different states and both ratified the CISG.

Thus, the law applicable to non-contractual obligations regulates, in particular, the following issues: a) the conditions and scope of responsibility, including the definition of persons who may be held responsible for the actions they have committed; b) grounds for exemption from liability, limitation of liability and allocation of liability; (c) the existence, nature and assessment of the harm or the claimed compensation; d) within the powers granted to the court by the procedural law of its state, the measures that the court may apply in order to prevent, terminate or compensate for harm; e) the admissibility of the transfer of the right to compensation for damage, including inheritance; f) persons entitled to compensation for the harm caused to them; g) responsibility for the actions of others; (h) the procedure for termination of obligations, as well as the statute of limitations.

At the same time, regardless of the law applicable to the relevant non-contractual obligation, the provisions of the Rome II Regulation do not limit the application of imperative norms by the court. In addition, the application of the law of any country means the application of the norms of substantive law, but not the norms of the conflict of laws. That means that the application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Thus, the Rome II Regulation proves that it is difficult to reach a satisfactory compromise between legal certainty and flexibility in order to do justice in an individual case, while fulfilling the law and economics criteria of simple and predictable rules. The Regulation provides many special rules as well as general and special exceptions that are occasionally ambiguous and make the outcome sometimes unpredictable. Nevertheless, it is concluded

that the Rome II Regulation in spite of its flaws, is an acceptable instrument that furthers the harmonization of conflict of laws in Europe [11: 414].

Conclusions

The significance of the Rome II Regulation in the process of unification of international private law in Europe cannot be overestimated, since it filled the gap existing in the single European regulation in the field of international private law due to the limitation of the subject of the regulation of the Convention on the Law Applicable to Contractual Obligations 1980, (Rome Convention) [12: 617]. In addition, it became an important step in the Europeanization of the international private law in the member states of the EU, a step that can be characterized as “the revolution of the conflict of law of Europe” [13].

Thus, the adoption of the Rome II Regulation played an important role in the process of unification of the international private law within the EU. After the adoption of the Rome Convention in 1980 (and then on the basis of the Rome I Regulation), from which non-contractual obligations were excluded, the issue of resolving conflicts in this area was governed mainly by the internal regulations of the EU member states. Work on the document, continued for more than 30 years and led to the formation of the final text of the Regulations and its adoption by the Parliament and the Council of the European Union in the summer of 2007. In fact, the adoption of the Rome II Regulation completed the formation of the basic principles of European private law, supplementing the Rome I and Brussels I Regulations, as a result, in essence, the process of the formation of EU international private law was completed.

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