CONSIDERATIONS REGARDING THE GENERAL RULE PROV
THE ARTICLE 4 OF THE ROME II REGULATION

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Abstract

This article addresses certain issues related to the enforcement of the Rome II Regulation. The mentioned Regulation was adopted in order to unify, within the European Union, the rules regarding choice of law concerning non-contractual obligations. The application of the Regulation has caused some controversies in jurisprudence, regarding the implications on the national laws and international treaties or conventions. Almost two years after its prescribed date of application, a rigorous analysis of the Regulation's impact over the case law, both on national and European level is necessary. The purpose of this study is to briefly describe, the research of the two authors regarding the practical effects of the aforementioned Regulation, as well as some judicial problems arisen from its application, mainly relating to the general rule of law, expressed in the fourth Article of the Regulation.

Key-words: *choice of law, non-contractual obligations, habitual residence, Lex loci damni, Lex loci delicti comissi, temporal scope*

JEL Classification: K_{20}, K_{33}

Introduction

This paper addresses the legal consequences arising from the application of the Regulation (EC) No. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations. The adoption of the Regulation put into effect several rules regarding civil liability within the European Union. The conflict of laws has an important role in international litigation, because of its rules which determine the applicable law to various legal situations. However, most of the conflictual norms used by states to find the incident law have different rules, and these rules sometimes allow ambiguous characterization of certain legal situations. In an effort to unify and harmonize legal over such problems, International Conventions or, in this case, Regulations

are adopted. The Rome II Regulation tries to ensure that all Courts within the European Union apply the same rules, mainly regarding torts, establishing a unitary legal view over the regime of non-contractual obligations. Juridical concepts as *culpa in contrahendo*, *unjustly enrichment* or *negotiorum gestio* are addressed by the aforementioned Regulation. The adoption of this law also facilitates mutual recognition of judicial decisions in the European Union. Still, the effects of the Regulation do not appear to be as clear cut as desired, at the moment of entering into force. Following this direction, we should consider some of the rough edges produced when the articles of the Regulation were applied by the courts of the Member States.

Studying the legal effects of the Regulation is of the utmost importance, because its effects are projected over the entire space of the European Union. These effects have yet to be fully analyzed, as the review clause stated in article 30 establishes the obligation of the European Commission to submit, until the 20th August 2010, to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the Regulation, together with necessary proposals to adapt the Regulation. The effects of the Regulation are analyzed in correspondence also with Romanian Law, because of its imminent impact on Romanian case law.

Through careful consideration, some observations and comments are laid out in this paper, which are intended to promote a better understanding of the abovementioned Regulation, especially regarding the general rule laid out in the fourth Article.

The legal matters regulated by the Rome II Regulation are scarcely approached in Romanian specialized literature. However, there are several scientific international papers that discuss the effects and the controversies of the Regulation. Some of these papers are published in well known periodicals, like the International and Comparative Law Quarterly (Cambridge Journals), European Journal of International Law (Oxford University Press), while some legal opinions have been included in specialized books that address this subject. While we are aware of quite a large amount of information published in the international specialized literature regarding this subject, there are very few sources that document the effect of this mandatory Regulation to Romanian Law.

Literature Review

In the international specialized literature, the legal problem arising from the enforcement of the Rome II Regulation has been rigorously documented. Also, the effects of the Regulation have established a distinct case law. The authors of this paper themselves have researched and published various works in the field of private international law, relating to torts, public policy, renvoi or characterization. The most relevant problems discussed in doctrine concerning the effects of the Rome II Regulation and its general rule, as it is prescribed by Article 4 were the notion of habitual residence, multi-party cases (Trevor C. Hartley, 2008). Other

authors addressed certain quasi-contractual situations like unjust enrichment (A. Chang, 2008) etc.

Theoretical Background

The Rome II Regulation contains legal provisions related to private international law, or conflict of laws, as it is known in countries with common-law legal systems. Some of the most complicated problems within private international law are considered to be the concepts of *characterization*, *renvoi* and *dépeçage*. Theoretically, the private international law tries to offer solutions when certain legal situations appear to be subjected to more than one national law. Moreover, *dépeçage* is a notion that encompasses the situations when a certain case is governed by the laws of different countries. The characterization or qualification (as it is known in the French Legal System) represents the process by which the court addressed with a legal claim establishes the incident law regarding that particular case. To make matters even more difficult, sometimes, the forum court establishes foreign laws as incident to the case, which in their turn are directing towards other legal system as well. When a court is addressed with a complaint regarding a private international law issue, at first it verifies whether it has the authority to judge such case or not and afterwards decides of the applicable law. The jurisdiction matter was successfully addressed, within the European Union through the Brussels I Regulation. The characterization is usually made in accordance to the national conflictual norms of the forum court. From this rule there are the following major exceptions: a) when applicable law is determined by a provision of an international agreement, which binds the Court, b) when applicable law is determined by the provisions of a mandatory Regulation, within the space of the European Union. The scope of the Rome II Regulation is non-contractual obligations. Most of these obligations arise as a result of torts, while others are the effect of quasi-contractual obligations, like the *negotiorum gestio* or the *unjust enrichment*.

Use of the *lex loci delicti comissi* principle

In article 4 (1) of the Regulation, the *lex loci delicti comissi* principle is avoided partially, as the *lex loci damni* becomes the essential criterion in determining applicable law to obligations originating from torts. This means that any legal obligations arising from torts shall be governed by the law of the country in which the prejudice occurs. This rule must be considered as *lex generalis*, therefore the principle *generalia specialibus non derogant* applies. The *lex loci delicti comissi* is among the oldest concepts used in private international law, with regard to the law applicable to obligations determined by torts. However, in some legislation, the incident law is determined by the *lex fori* principle, or sometimes by the *proper law* of the tort. For instance, in English courts, the *lex fori* principle is usually used, as civil liability is seen as a problem of public policy. Sometimes, in other countries, such as the United States, the proper law of the tort is applicable.

Usually, the place where the tort took place is also the place where the damage was produced. However, there may be certain situations when the place of the tort is different from the place where the damage occurred. In such situations, the governing law is chosen without regard to the place where the event giving rise to damage occurred (*lex loci delicti comissi*), or to the state where the indirect consequences of that event occur. In many countries, this difference is very important, because it produces different legal solutions. In England, for instance, the *lex fori* was applied until the Rome II Regulation entered into force. In Harding v. Wealands (2006), the British Court decided that such a problem is a matter of procedure and it should be governed by the law of the forum. On the contrary, after the adoption of the Rome II Regulation, the English High Court decided, in a case where an English citizen, domiciled in UK, was injured by a German citizen, in a car accident produced in Spain, that the applicable law should be Spanish Law, not English Law (case Clinton David Jacobs v. Motor Insurers Bureau, 2010).

In the Romanian legal system, the actual rule imposed by Rome II is somewhat different from the national provisions comprised in conflictual norms, regarding torts. The Law no. 105/1992 specifically states that civil liability is governed by the law of the place where the event causing the damage took place, as an projection of the *lex loci delicti comissi* principle.

In order to better illustrate the effects of the first paragraph, we should consider the following situation: if a Romanian citizen travels into France, and becomes involved in an accident that produces damages in Germany, the applicable law, according to the Rome II Regulation shall be German Law, whereas according to Law no. 105/1992, such an incident would be subject to the French Law, as the law of the state in which the event took place.

The Regulation does not clearly states what law should be applied if the tort has produced damages in more than one country. In this case, it is appropriate perhaps to consider the use of the third paragraph, relating to the law of the country which is more closely related to the respective tort? Or we should take into account the national legislation regarding the conflict of laws, as an application of the *lex generalis* vs. *lex specialis* arguments? In English Law, for example, such situations are specifically addressed. If the tort damaged different persons in different state, every one of these persons may complain in Court, and their cases shall be judged according to the laws of the place where the damage occurred. For example, if an accident in France determined damages in both Italy and Switzerland, to different persons, each of the victims may start a trial, with a different law incident over the obligations arising from the tort. For the victim in Switzerland, the law considered incident shad be the law of that country, while for the victim of the prejudice produced in Italy, Italian law shall be competent. The problem is a bit more complicated when the victim is the same, even if the damage is produced in more than one country. In our opinion, the governing law should be established according to the proper law of the tort. We also consider, *de lege ferenda*, that the Regulation should be adapted as to specifically address this issue, in order to eliminate any discrepancies and uncertainty in the application of the general rule of law, prescribed by article 4.

Use of the habitual residence as a connection point for determining applicable law

The second paragraph to article 4 provides the first exception to the *lex loci damni* concept, as it states that if the both the liable person and the person who sustained damage have their habitual residence in the same country, the law of that certain country shall apply. This rule promotes the incidence of a variation to the *lex domicilii* principle, although the "habitual residence" concept is not precisely defined by the Regulation. Nevertheless, the provision of article 4 (2) only applies if the following conditions exist: a) both the tortfeasor and the victim have the same habitual residence; b) there are no pre-existent situations that would determine the incidence of article 4 (3).

Two concepts need a more careful examination, respectively the "habitual residence" notion and the "same country" notion. The habitual residence may be seen as a variation of the *lex domicilii* concept, although its scope seems to be a bit different. Habitual residence is regulated by article 23 which explains what should be legally understood when using this concept. The explanations regard companies and other legal entities, as well as natural persons. For companies, the traditional theory of the real seat is used. For natural persons, the habitual residence is considered to be the place of his/her principal place of business. However, this definition applies only to natural persons acting in the course of his or her business. The other notion concerns the idea of a common country as a place of habitual residence. This issue does not raise any concerns within the Romania legislation, although in other systems it may cause some confusion.

This paragraph brings up a problem similar to the problem of multiple places were the damage was produces. However, this time it is not a problem of objective multiplicity, but rather a problem of subjective multiplicity. What should happen if there is one tortfeasor and more than one victim, of which at least one is a persona that shares the same habitual residence as the tortfeasor? Every victim should take action against the person that caused the prejudice, but invoking different paragraphs of article 4? In such a case, the first victim (the one that has the same habitual residence with the tortfeasor) may initiate legal action and the obligations shall be governed by the law of the country of habitual residence of both victim and tortfeasor. The other victim (the one that does not share the same habitual residence with the tortfeasor) may initiate legal action, but the non-contractual obligation shall be governed by the law of the place where damage occurred (*lex loci damni*).

A more malleable approach, envisioned in the third paragraph of article 4

Finally, a second exception to the first paragraph is provided as a variation of the *proper law* concept. To this end, if the tort is manifestly more closely

connected to a country, other than those determined through the *lex loci damni* principle or the *lex domicilii* principle, the obligation shall be governed by the law of that third country.

This provision has only a subsidiary effect and is possible to invoke it only if the other two rules cannot apply. The essential condition for this rule is for the tort to be more closely connected to a third country, other than those indicated by the shared habitual residence or the place where the damage occurred.

Problems regarding the application in time of the Regulation

Article 31 of the Regulation clearly states that it shall apply to situations occurred after its entry into force. However, article 32 indicates that the Regulation shall apply from 11 January 2009, with the exception of article 28, which shall apply from 11 July 2008. The difference between the wordings included in the two articles provoked an entire doctrinal discussion in the legal community. The term "entry into force" is to be considered the same as "Regulation (…) shall apply"? In a recent case, it was claimed that the moment of entry into force was not the same with the moment prescribed by article 32. In the case Deo Antoine Homawoo v. GMF Assurance SA and others (2010), the defendant claimed that the moment of entry into force should be determined with regard to the date of the publication of the Regulation in the Official Journal of the European Union, in full accordance with article 254(1) of the EC Treaty, in force in 2007. In this case, the British Court raised a preliminary question for the ECJ, in order to obtain a legal interpretation of both article 31 and 32 of the Regulation. Only a few days later, English Court decided otherwise. In the Bacon v. Nacional Suiza Cia Seguros y Reseguros (2010) case, it was decided that the Regulation should be applied by Courts only after the date of 11 January 2009, but concerning all obligations arisen on or after 20th August 2007.

It remains to be seen if the legal point of view expressed by the European Court of Justice in the Homawoo case shall be similar.

In our opinion, the date of entering into force of the Rome II Regulation is 20th August 2007. Although the Regulation itself does not state such a date, nor it explains what it means by "entering into force", we believe that a subtle hint may be found within the Article 30 of the Regulation, regarding the review clause. According to the first paragraph, the Commission shall submit a report regarding the application of the Regulation. The report shall be submitted to the European Parliament, the Council and the European Economic and Social Committee. What is striking in this article is the date, which is established exactly four years after the possible entering into force of the Regulation, if we take into consideration the 20 day period stated by the Article 254 (1) of the EC Treaty. The date 20th August 2007 is nowhere to be found within the text of the Regulation, and the 11th January 2009 is stated to be the date from when the Regulation shall be applied. Therefore, we believe there are strong reasons to consider that 20th August 2007 is the real date when the Regulation entered into force.

Conclusions

In conclusion, in this paper we have tackled the issues raised by the application of Article 4 of the Rome II Regulation, which prescribes the general rules regarding the choice of law governing obligations arisen from torts or delicts. The subtle nuances of the legal provisions described in this study were meant to help both researchers and practitioners to gain a better understanding of the general rule of law imposed by the Regulation. Also, the newest legal opinions and controversies in jurisprudence are presented and commented. The research done by the authors of this article shall be continued, as the first legal reports regarding the effects of the regulation are due in 2011. Until then, it is imperative to analyze any other decisions of the European Courts regarding the subject in question.

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