Polish PIL – International Law of Non-Contractual Obligations

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Outline of the lecture

- Notion of the „non-contractual obligations" in the law of conflict, sources of Private Int'l Law of Non-Contractual Obligations (the scope of application of the EU law: Rome II Regulation, the issues left outside)
- Law applicable to torts/delicts
- Law applicable to culpa in contrahendo and to the unjust enrichment
- Law applicable to the ownership and rights *in rem*

Sources of law, intertemporal problems

The law applicable – sources of law

- As usually, the law applicable may follow from the conflicts rules which are:
  - domestic (PIL 2011): Article 16(2) and (3), Article 34 and 35
  - international: conventions (esp. Hague Traffic Accidents Convention)
  - European: Rome II Regulation
- Regulation not always takes precedence
- As to the relation between the domestic and European law:
  - We have to look carefuly at the Regulation's scope of the application (see *infra*), the supremacy of the European law works only within this framework
- As to the relation between the international conventions and the Rome II:
  - Article 28(1) Rome II – conventions to which one or more Member States are parties at the time of adopting the Regulation takes the precedence (in other words, if such conventions are concluded between the Member State(s) and the third State(s))
  - Article 28(2) Rome II – the Regulation takes precedence over the conventions concluded exclusively between two or more Member States

Intertemporal problems

Articles 31-32 Rome II:

- Art. 31 *[Application in time]* This Regulation shall apply to events giving rise to damage which occur after its **entry into force**.
- Art. 32 *[Date of application]* This Regulation **shall apply from 11 January 2009**, except for Article 29, which shall apply from 11 July 2008…

Article 297(2) TFEU:

- The regulations shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.
- The Regulation was promulgated in the Official Journal L 199, 31 July 2007 – one could argue it formally entered into force on **20 August 2007**

Preliminary reference to the ECJ (from the High Court of Justice, UK), C-412/10 *Homawoo:*

- *„Are Articles 31 to 32 of Regulation Rome II, in conjunction with Article 297 TFEU, to be interpreted to require a national court to apply Rome II… in a case where the event giving rise to the damage occurred on **29th August 2007**?..."*
- Answer of the Court (judg. of 17 Nov., 2011): *„Articles 31 and 32 of Regulation […] read in conjunction with Article 297 TFEU, must be interpreted as requiring a national court to apply the Regulation only to events giving rise to **damage occuring after 11 January 2009** and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope ratione temporis of the Regulation."*

Non-contractual obligations: the notion

The notion

- 'Non-contractual obligations' – typical problem of the characterization under the Private International Law
- Understanding the notion (Rome II, Article 5 (2)(3) PIL 2011):
  - One should not simply refer to the substantive law, be it the one of the forum (*lex fori*), be it the one invoked by the claimant, to state whether the obligation at issue is a 'contractual' or 'non-contractual' – **an autonomous meaning of the term is sought**
  - an obligation which did not arise out of the contract (the element of the parties' consent is lacking) => in accordance with the scope of application of the Rome I Reg.
  - a possible coincidence between the contractual and non-contractual liability of the one party against the other – the characterization depends on whether this liability results clearly from the contract itself or its alleged grounds are situated outside it (they follow not from the consent of the parties)

Article 2(1) Rome II

„For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo".

- Enumeration at the end of paragraph 1 has nothing to do with a legal definition of non-contractual obligations
- It has only the function of defining the scope of the notion of the 'damage' (to spread it on such cases where there's no detriment to the party's interest or no economic loss, as e.g. the *negotiorum gestio*) and in this sense it corresponds to the Regulation's scope of applicability

List of exclusions – selected problems

- Some issues excluded from the Rome II Regulation (see Exhibits)
- *Acta iure imperii* (Article 1(1), second sentence Rome II) – exclusion justified by the public-law character of the State's responsibility and its international immunity (*par in parem non habet imperium*)
- Other exclusions – see the Cases above

Exclusions from the scope of the Rome II Regulation (examples)

- The couple of the mixed Spanish and Polish nationality lives in Poland since 2009. Both spouses had gathered a sizeable property before having concluded the marriage. During the construction of their common house in 2010, the husband spent PLN 100,000 from his wife's deposit, availing himself of the authorization from his wife. The latter insists on giving money back arguing that the expenditure was unnecessary.
- Two Poles of the male sex have lived in Scotland since 2004 where they entered into a civil union. One of them comes back to Warsaw, while the other is still abroad. The partner living still in Scotland sues the other for maintenance.
- Polish citizen Jan K. publicly slapped a Russian businessman domiciled in Poland Yuri S. accross the face. As the result of this accident, the lower jaw and the left chick of Yuri S. were injured, so that he had to spend several days at home and accepted analgesics. Yuri S. sued Jan K. for the apology and the payment of the moral damages, as well as the material damages for the lost profits during the days spent on the sick leave.

Short comments to the cases

- Case #1 – it clearly arises from the matrimonial property issues and then it falls under the exclusion of Article 1(2)(b) Rome II; but the situation would probably be less clear in the situation where the money were spent on the husband's personal expenses, e.g. on paying debts for the lost in gambling
- Case #2 – definitely more difficult, conf. Recital (10), 2nd sentence. Had the court excluded the family-law characterization (pretty probable in Poland), then the case would have fallen under the Rome II (!). But again, conf. the Comission's Proposal for the Regulation on the Property Aspects of the Registered Partnerships [COM(2011) 127 final]: Recital (12) and Article 1(3)(c) of the Reg. Proposal – the same about the Regulation 4/2009 on the Maintenance Obligations
- Case #3 – Yuri S. suffered not only a physical disease (causing both pain and the material loss) but also a psychological detriment (feeling of humiliation). Whereas the former result of the accident are covered by the Regulation, the latter is not because the damage follows not immediately from the beating but it consists rather in its indirect impact on the applicant's sphere of emotions and feelings. The law applicable to moral damages due to the humiliation of the applicant should be characterized as the infringement of the personality rights excluded from the Regulation by its Article 1(2)(g)

Protection of personality and the unfair competition cases

- To win a better market position, one of the Polish companies has spread the misleading news of its competitor from Germany. The latter sues the Polish undertaking for the cessation to diffuse the false statements concerning its economic activity.
- Group of the Polish antiglobalists runs a website www.bojkotujemacdonalds.com, containing critical data about the activities of MacDonalds' Corporation. Polish brand of MDC sues them for removing the defamatory content from the WWW server.

Article 1(2)(g) Rome II
Short comments to the cases

- Case #1 – taking into account the context of the case and the purpose of the defendant's activity (in order to win a better market position = to have higher profits), the action shall be characterized as the unfair competition, falling under Article 6(2) Rome II
- Case #2 – the defendant is neither the MDC's competitor nor even a commercial actor. The 'centre of gravity' of the claim is the defamation as such, then the case would fall under the exclusion of Article 1 (2)(g) Rome II

Law applicable to torts/delicts

General rule (I)

- Under the previous Polish law: the law of the country **where the fact which caused the obligation** had occured (Article 31(1) 1965 PIL – now repealed)
- Rome II Regulation has changed the attitude:
  - The law of the place **where the direct damage occurs** (*lex loci damni*) instead of the law of the place of the fact causing the obligation (*lex loci facti – lex loci delicti commissi* by the torts/delicts) is applicable
  - It is not a radical turnover but rather a specification of the connecting factor (one of the variants of the *lex loci delicti commissi*)

General rule (II)

„Direct damage" under the Rome II:

- 'Damage' as defined in Article 2:
  - any consequence arising out of the relationship covered by the Regulation
  - no matter whether it has occured or is likely to occur
- 'Direct' the ECJ jurisprudence concerning jurisdiction (see Exhibits) could be helpful:
  - C-364/93 *Marinari* – an Italian arrested in the UK, he sought the compensation for the personal damage in Italy - in the opinion of the ECJ, the effects of the alleged violation are too distant to reach Italy, not every place where the adverse consequences have appeared could be covered
  - Conf. English judgment by the Court of Appeal in *Henderson v Jaouen* [2002] EWCA Civ 75; [2002] 1 WLR 2971 – deterioration of the victim's injury in his country of domicile after he had suffered it in the car accident abroad is not a new 'harmful event' – for an illustration, see the next slide

General rule – a case

- Polish citizen Marek W. is the sailor contracted by a Norwegian firm. During his duty on the board of the oil tanker sailing under Liberian flag, he gets severily injured. The accident takes place in Lagos, Nigeria where Marek W. undergoes medical treatment, then he is transported to a hospital in Poland where it turns out that his spinal cord is broken. Marek W. has to be reoperated. He sues his former employer for damages. Which law shall govern the claim (passing over the question of jurisdiction)?
- Comment:
  - Unless the parties have a common habitual residence – which is not the case (Article 4(2) Rome II), the law applicable shall be the law of Nigeria as the coastal State having jurisdiction over the sea (Article 4(1))
  - No matter that there is a further consequence in Poland
  - Law other than Nigerian (e.g. the one of Liberia) applicable only if it were 'manifestly more closely connected' with the subject matter of the case
- Let us imagine that Marek W. dies and his widow is a plaintiff. What about the place of the damage?
  - One may argue that in such a case Poland is indeed the place of the **direct** damage

Rome II - particular rules of conflict for torts/delicts

- Certain types of factual situations, where the main rule is considered to lead to unjust results
- These are:
  - The product liability (Article 5)
  - Unfair competition/restrictions to the free competition (Article 6)
  - Environmental damage (Article 7)
  - Delicts/torts arising from the infringement of an intellectual property (Article 8)
  - Industrial action (Article 8)

Environmental damage – a case

- Polish undertaking seated in the town of Raciborz (southern Poland) is the owner of a pond restocked with fish. It draws water from Odra river flowing from the territory of the Czech Republic (where it begins its course). One day, the Czech rafinery contaminates the river's water with oil products, making fish in the pond die. Which law shall govern the compensation claim against the rafinery's owner?
- Comment:
  - Article 7 Rome II operates apparently with the connecting factor of the place of the **damage** (see the reference to Article 4(1) of the Regulation)
  - What is the 'damage' under Article 7, namely, is it: (a) the 'environmental' damage as defined in the Recital (24), or (b) the 'damage' in the stricter sense, understood as the consequence of the act or omission of the wrongdoer?
  - It depends on the circumstances: conf. Article 7 speaking expressly of both the environmental damage and the resulting damage (the latter being the damage in a stricter „civil-law" sense)
  - Here the claim concerns the resulting damage and the economic loss which stems therefrom
  - The applicable law shall be Polish law, unless the victim decides to base his claim on the law of the Czech Republic

The choice of law by the parties

- Article 14 Rome II:
  - Choice of law by the parties available unless the Regulation states otherwise – another general rule
  - The choice of law possible only after the event giving rise to the damage occured, unless both parties are pursuing the commercial activity
- Exceptions:
  - Article 6 (competition cases)
  - Article 8 (infringement of the intellectual property rights)

Law applicable to torts/delicts outside the Rome II – traffic accidents

- Article 28 and the relationship to the existing int'l conventions:
  - with the participation of Member States only => Rome II takes precedence
  - With the participation of the third States => the convention first
- The latter is the case i.a. of the Hague Convention on the Law Applicable to Traffic Accidents (parties to the Convention from the outside of the Union are: countries of the former Yugoslavia, Belarus and Switzerland)
- Poland is a party since 2002
- The main peculiarities of the Convention:
  - The wide notion of the traffic accident (incl. any vehicle, even one only, in any public place, not necessarily the road)
  - The complex system of connecting factors (the country of the accident – Article 3; the country of the registration/habitual stationing of the vehicle – Article 4)

Traffic accidents – a case

- During his way across Germany, a Polish citizen driving a car registered in the Netherlands picks up a hitch-hiker of Spanish nationality. The car has an accident caused by the Polish driver and the Spanish passenger is heavily injured. Which law shall apply to his compensation claims against the car driver?
- Comment:
  - The Convention's structure is highly complex and casuistic
  - It was believed that certain concessions to the rule of *lex libri* (the place of the registration) instead of the *lex loci delicti commissi* (here: the place of the accident) are justified due to the mandatory traffic insurance but the way of the realization of this idea seems inconsistent
  - Here the solution depends on whether the car driven by the Pole **is the <u>only</u> vehicle** taking part in the accident or not:
    - If yes: we have to examine where the Spanish victim seeking the compensation is habitually resident – where it is Germany (the country of the accident), the law applicable shall be that law, but otherwise - the law applicable shall be the law of the country where the car is registred
    - If there are many vehicles involved: the law applicable shall be the country of the place of the accident, unless all the vehicles are registered in the same country

Law applicable to the other non contractual obligations

Unjust enrichment

- The notion covers various cases of the restitution
- The hierarchical structure of the rule:
  - If the unjust enrichment arises from **the pre-existing relationship between the parties**, to which it is closely connected, then the law applicable shall be the law governing that relationship
  - Otherwise the law of **the common habitual residence** of the parties at the time of the event giving rise to the enrichment shall apply
  - At the last place, the law of **the country in which the unjust enrichment took place** shall apply
  - Anyway, the escape clause is included, i.e. the court may always assess that there is a manifestly closer connection with another law

Culpa in contrahendo

- The term used for the first time by the German scholar Rudolph von Ihering – means the liability for the different acts or omissions in the course of entering into a contract, which adversely affect its conclusion or performance
- Useful to remember that in certain countries (Germany) the institution of c.i.c. is believed to belong to the law of contract
- The conflicts scheme (Article 12 Rome II) resembles that known from the unjust enrichment:
  - Primarily the law governing the contract, regardless of its being concluded or not, shall apply
  - Where it is impossible to determine this law, the law of the country in which the damage occurs shall apply
  - Yet, should the parties have the common habitual residence at the time of the event giving rise to the damage, then that law shall apply
  - Anyway, the escape clause is included, i.e. the court may always assess that there is a manifestly closer connection with another law

Thanks for your attention!