

Hamburg Group for Private International Law*

Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations

Table of Contents

<i>Introduction</i>	2
<i>Title I</i>	5
<i>Art. 1</i> <i>Substantive scope of application</i>	5
<i>Art. 2</i> <i>Universal application</i>	9
<i>Title II</i>	10
<i>Chapter 1</i> <i>Non contractual obligations deriving from a tort, delict or quasi-delict</i>	10
<i>Art. 3</i> <i>General rule</i>	10
[<i>Art. 4</i> <i>(replaced by new article 11b, c)</i>]	14
<i>Art. 5</i> <i>Product liability</i>	15
<i>Art. 6</i> <i>Unfair and anticompetitive practices</i>	18
<i>Art. 6a</i> <i>Infringement of industrial and intellectual property rights</i>	21
<i>Art. 7</i> <i>Violation of personality rights</i>	24
<i>Art. 8</i> <i>Violation of the environment</i>	25
<i>Art. 9</i> <i>Scope of the law applicable to non-contractual obligations arising out of a tort, delict or quasi-delict</i>	26
<i>Chapter 2</i> <i>Non contractual obligations out of an act other than a tort, delict or quasi-delict</i>	28
<i>Art. 10</i> <i>Unjust enrichment</i>	28
<i>Art. 10a</i> <i>Scope of the law applicable to non-contractual obligations arising out of unjust enrichment</i>	29
<i>Art. 10b</i> <i>Negotiorum gestio</i>	30
<i>Art. 10c</i> <i>Scope of the law applicable to non-contractual obligations arising out of negotiorum gestio</i>	30

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<i>Chapter 3</i>	<i>Common rules applicable to non-contractual obligations arising out of a tort, delict or quasi-delict and those arising out of an act other than a tort, delict or quasi-delict</i>	34
<i>Art. 11</i>	<i>Freedom of choice</i>	34
<i>Art. 11a</i>	<i>Escape clause</i>	36
<i>Art. 11b</i>	<i>Acts in areas not subject to territorial sovereignty</i>	40
<i>Art. 11c</i>	<i>Supplementary rule</i>	40
<i>Art. 12</i>	<i>Internationally mandatory rules</i>	42
<i>Art. 13</i>	<i>Binding local regulations of traffic and like conduct</i>	43
<i>Art. 14</i>	<i>Direct action against the insurer of the person liable</i>	44
<i>Art. 14a</i>	<i>Voluntary assignment</i>	45
<i>Art. 15</i>	<i>Subrogation and multitude of debtors</i>	46
<i>Art. 16</i>	<i>Formal validity</i>	51
<i>Art. 17</i>	<i>Burden of proof, etc.</i>	51
<i>Title III</i>	<i>General provisions</i>	51
<i>Art. 18</i>	<i>Habitual residence</i>	51
<i>Art. 19</i>	<i>Exclusion of renvoi</i>	52
<i>Art. 20</i>	<i>“Ordre public”</i>	52
<i>Art. 21</i>	<i>No retrospective effect</i>	52
<i>Art. 22</i>	<i>States with more than one legal system</i>	52
<i>Art. 23</i>	<i>Relationship with other provisions of Community law</i>	53
<i>Art. 24</i>	<i>Relationship with international conventions</i>	55
<i>Title IV</i>	<i>Final clauses</i>	56
<i>Art. 25</i>		56

Introduction

In May 2002, the Directorate-General for Justice and Home Affairs of the European Commission published a “Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations”, hereinafter entitled EC Draft Proposal (DP)¹. This Draft Proposal is another important step in the series of efforts to codify the private international law of obligations within the European Community. While the first initiative in the 1970s to codify private international law within the EU aimed at a comprehensive regulation of the conflict rules relating to both contractual and non-contractual obligations² and even to property law consensus among the Member States could then only be achieved in respect of the former subject. As a result, the Rome Convention of 19 June 1980 is in fact

¹ See <http://www.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm>.

² See *Ole Lando/Bernd v. Hoffmann/Kurt Siehr*, European Private International Law of Obligations (1975).

limited to the law applicable to contractual obligations³. Since its adoption several European States such as Germany⁴, Italy⁵, Switzerland⁶ and the United Kingdom⁷ have also enacted legislation providing for the law applicable to non-contractual obligations. As these national legislators codify existing differences between national conflict rules and reduce the ability of national judges to harmonise existing rules, it becomes even more apparent that time has come to codify the matter at the European level. The need for harmonisation has been confirmed by the “Groupe européen de droit international privé” (GEDIP) which published a proposal for a European measure relating to the law applicable to non-contractual obligations in 1998⁸. It is this proposal in particular which, in combination with the Rome Convention, has served as guidance to the European Commission in preparing the EC Draft Proposal under scrutiny. The “Hamburg Group for Private International Law” therefore welcomes and strongly supports the initiative of the Commission to codify further parts of private international law.

Unlike the Rome Convention, the EC Draft Proposal is framed as a regulation, i.e. as an instrument of secondary EC legislation. Thereby, the Commission points out that it wants to avail itself of the powers vested in the Community by the Treaty of Amsterdam in the field of private international law, see arts. 61 and 65 EC. These powers enable the Community to adopt “measures”, a term which encompasses all types of Community acts listed in art. 249 EC including regulations. The Hamburg Group supports the choice of this instrument. As opposed to directives which have to be implemented by national provisions and often fall short of their objectives regulations do not encourage Member States to maintain as much of the pre-existing national law as possible.

However, in many other aspects the extent of the Community powers under art. 65 EC is under debate. While some believe that art. 65 EC is restricted to intra-Community fact situations⁹, others hold that art. 65 EC would permit the adoption of private international law acts having a universal

³ Convention on the Law Applicable to Contractual Obligations, Done at Rome on 19 June 1980, O.J. EC L 266/1.

⁴ Gesetz zum IPR für außervertragliche Schuldverhältnisse und für Sachen vom 21. 5. 1999, BGBl. I 1026.

⁵ Legge di riforma del sistema italiano di diritto internazionale privato del 31. 5. 1995, n. 218, Gazz. Uff., Suppl. ord. n. 68 al n. 128 del 3. 6. 1995.

⁶ Bundesgesetz über das Internationale Privatrecht vom 18 Dezember 1987, BBl. 1988 I 5 = AS 1988, 1776.

⁷ Private International Law (Miscellaneous Provisions) Act 1995 (c. 42).

⁸ See <<http://www.dr.t.ucl.ac.be/gedip>>; see Eur. Rev. Priv. L. 7 (1999) 45 for the English and French versions of the proposal.

⁹ *Oliver Remien*, European Private International Law, the European Community and Its Emerging Area of Freedom, Security and Justice: Common Market Law Review (C.M.L.Rev.) 2001, 53–86 (at 75/76).

purview¹⁰. The Hamburg Group will not dwell on this issue, but it should be pointed out that in its opinion a division of private international law into one body of intra-Community rules enacted by the Community and a second body of rules for third-state relations adopted by the Member States would be disturbing. Long-standing experience with legal practice in this field shows that lower courts having little expertise in private international law have to carry the biggest share of the case-load. The state of knowledge is by no means better in private legal practice. The complexity and, compared to purely internal cases, the relative scarcity of transborder lawsuits would require a specialization of lawyers which cannot be attained for the whole of the Community territory. Therefore everything should be done to avoid further complications of the discipline. Doubling the legal sources would do more harm to the international harmony of decisions than can be outweighed by the possible benefit of conserving national competencies for the regulation of third-state relations. These observations are of particular relevance to art. 2 DP.

When the Commission published its Draft Proposal it pursued the goal of launching a public debate on a future Community instrument on the law applicable to non-contractual obligations. The Commission has in fact invited all interested parties to present their comments by 15 September 2002. The following observations are meant to contribute to that debate. They are the result of several meetings of scholars affiliated with the Max-Planck-Institute for Foreign Private and Private International Law and with the University of Hamburg, held from June to September 2002. They do not purport to be comprehensive or complete. Our comments concentrate on some issues that appeared particularly important to the members of our group. For a complete discussion more time would have been required. We have tried to focus our comments as much as possible on alternative proposals which, where applicable, will be reproduced in italicised print next to the EC Draft Proposal. While the proposals have undergone several discussion rounds and reflect the majority opinion in the group, not all of them have been approved unanimously.

¹⁰ *Jürgen Basedow*, The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam: C.M.L.Rev. 2000, 687–708 (at 701 et seq.).

Title I – Scope

Article 1 – Scope

1. The rules of this Regulation shall apply to non-contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) non-contractual obligations arising out of a family relationship or a relationship deemed to be equivalent, including maintenance obligations to the extent that they are governed by specific rules;

(b) non-contractual obligations governed by the law of succession;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) the personal liability of officers, of members, and of persons responsible for carrying out the statutory audits of accounting documents, for the obligations of a company or body incorporate or unincorporate;

(e) liability incurred in the exercise of public authority;

(f) non-contractual obligations among the settlers, trustees and beneficiaries of a trust;

(g) evidence and procedure, without prejudice to Article 17.

Article 1 – Substantive scope of application

No changes

See comment no. 1

Comments

1. *Reduction of the number of exclusions.* – Article 1(2) DP excludes a great number of legal relationships from the scope of the future regulation. Most of these exclusions are tailored on the model of art. 1(2) of the Rome Convention. In that convention it was necessary to exclude certain legal relations which are equally based upon agreement, but are generally characterized as forming part of another area of the law such as company law, family relations

or the law of succession. The contractual relations encountered in these areas should in fact be subject to the same national law that is applicable to other issues of company law, family law or the law of succession. In the future regulation of the law applicable to non-contractual obligations the escape clause of art. 3(3) DP (see art. 11a of the Hamburg alternative proposal) allows for applying one and the same law to the non-contractual obligation and to the underlying legal relation pertaining to another area; the subordination of the applicable law to the law governing other relations such as those flowing from company or family law is clearly spelt out in subpara. 2 of that provision. The exclusion of those relations from the scope of the future regulation would therefore be unnecessary in order to attain the goal of a synchronisation of the applicable laws. For example, the fraudulent evasion of maintenance obligations may give rise to a liability sounding in tort in some countries. If the exclusion contained in art. 1(2)(a) DP is deleted a judge applying art. 3 DP to such claims in transborder cases would certainly subordinate the tort claim to the same national law that is governing the maintenance obligation itself, art. 3(3) subpara. 2 DP (see art. 11a[2] of the Hamburg alternative proposal). Without going into the details the Hamburg Group recommends that the Commission once more check the need for each of the exclusions contained in art. 1(2) DP, and in particular the need for lett. (a), (c), (d) and (f).

2. *Exclusion of liability for nuclear damage?* – The issue of civil liability for nuclear incidents is not expressly excluded from the scope of the proposed Regulation as defined by art. 1 DP.

Earlier proposals for an international convention or, indeed, an EC instrument on the law applicable to non-contractual obligations generally excluded liability for nuclear damage from their respective scope of application. This is true both for the 1972 preliminary draft of an EC Convention on the law applicable to contractual and non-contractual obligations (art. 1[f])¹¹, and the internal proposal by the European Commission from 1999 for an EC Regulation (art. 1[2][f]). A provision to the same effect is found in the proposal drawn up by GEDIP in 1998 (art. 1[2][d]). Against this background, the omission of a similar clause in the draft proposal now under discussion must be interpreted to mean that the proposed regulation is indeed intended to cover liability for nuclear incidents.

This inevitably raises the question of how the proposed regulation would affect the operation of those international agreements dealing specifically with civil nuclear liability that are already in place. Most important among these agreements is the so-called Paris Convention, dating from 1960¹². Drawn up under the auspices of the OEEC (now OECD), it has been signed

¹¹ See *supra*, at n. 2.

¹² Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy, BGBl. 1975 II 959 (1007).

and ratified by all EU Member States with the exception of Austria, Luxembourg and Ireland, all of which do not have any commercial nuclear installations within their borders. Contracting states from outside the EU are Turkey, Slovenia and Norway. In 1963, a further international agreement on civil nuclear liability was negotiated and signed in Vienna. The Vienna Convention¹³, which aimed at a potentially global participation, is currently in force in 32 countries, many of them in central and eastern Europe. These two liability conventions are “linked” by the “Joint Protocol” of 1988¹⁴ which extends compensation under the Paris Convention to damage suffered in a Vienna Convention state and vice versa.

Both liability conventions adhere to similar principles: liability for nuclear incidents is “channelled” onto the operator of the nuclear installation causing the damage and exclusive jurisdiction for all claims resulting from any one nuclear incident is granted to the courts of the contracting state in whose territory the nuclear incident occurred (Paris Convention, art. 13[a]; Vienna Convention, art. XI[1]). Liability is irrespective of fault and limited in amount. It is left to the law of each contracting state to fix the maximum level of liability for operators of nuclear installations within that state’s borders (Paris Convention, art. 7; Vienna Convention, art. V[1]). Virtually all national laws provide for state intervention on some level of the compensation regime: either the state acts as guarantor for the operator’s obligation, or it directly compensates victims of a nuclear incident if the damage exceeds the operator’s liability limit or the operator is exonerated from liability.

Pursuant to art. 11 in combination with art. 14(b) of the Paris Convention, the nature, form and extent of the compensation as well as the equitable distribution thereof shall be governed by the national law of the court having jurisdiction under the convention. The *lex fori* shall also apply to all matters – both substantive and procedural – not specifically governed by the convention itself (Paris Convention, art. 14[b]). Again, similar provisions are contained in the Vienna Convention. This reference to the law of the competent court is understood by the vast majority of legal writers to include the choice-of-law-provisions of the *lex fori*. According to this view, the court having jurisdiction under art. 13 of the Paris Convention may therefore have to apply a foreign law to some aspects of a claim brought under the convention if a nuclear installation in the forum state causes damage in another country. For example, if an incident in a nuclear power station in England causes damage in France, the French claimants must sue the English operator in England due to the rule of exclusive jurisdiction in art. 13(a) of the Paris Convention. How-

¹³ Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, BGBl. 2001 II 202 (207).

¹⁴ Joint Protocol of 21 September 1988 Relating to the Application of the Vienna Convention and the Paris Convention, BGBl. 2001 II 786.

ever, under the relevant English choice of law rules the law of the country where the injury or damage was sustained may apply, i.e. French law¹⁵. Therefore, the “nature, form and extent of the compensation” and its equitable distribution as well as those issues on which the convention is silent would appear to be governed by French law. If, however, the choice of law rules of the *lex fori* refer to the law of the place where the tortfeasor acted, as it is the general rule under German law the claim for compensation remains wholly governed by the substantive provisions of the *lex fori* and those of the Paris Convention itself¹⁶. According to a minority view, however, the reference in arts. 14(b) and 11 of the Paris Convention is interpreted as referring only to the substantive provisions of the law of the competent court, i.e. excluding that law’s choice of law rules altogether. As a result, the courts of the Member State having jurisdiction under art. 13 of the Paris Convention would only apply its own substantive law and the rules of the Convention.

Pursuant to the prevailing view on the nature of the reference in arts. 14(b) and 11, the effect of the proposed regulation in such cases would be to harmonise the interaction between the rules of the Paris Convention and national choice of law rules with the obvious exception of those countries that are party to the Paris Convention but outside the EU. In every case of transborder nuclear damage, the competent court would – on the premise of the abovementioned majority view – have to apply the law of the place where the damage was suffered to the extent prescribed by the Convention, according to art. 3(1) DP or, if the term “violation of the environment” is meant to include nuclear emissions, art. 8 DP. This effect of the proposed Regulation is welcomed, despite the fact that the exact scope of the reference to the *lex fori* and the interplay between the rules laid down in the Convention and the national law of the contracting states remains somewhat unclear. Yet even if only a small scope of application remains for national choice of law rules, it would certainly be beneficiary if these rules were the same in all or nearly all contracting states.

What would be the effect of the proposed Regulation on nuclear liability cases outside the framework of the Paris Convention? Again, this may be illustrated, at least in broad outline, by way of an example: a nuclear power station in the Czech Republic – as yet and for the purpose of this example a non-EU State, where the proposed Regulation would have no immediate application – causes damage in Germany and Austria. The situation in relation to victims in Germany is, at least in theory, quite straightforward. Since the Czech Republic is party to both the Vienna Convention and – like Germany

¹⁵ Section 11 PIL (MP) Act 1995, *supra* (at n. 7). This general rule is subject to an exception under section 12.

¹⁶ Of course, the claimant can demand the application of the law of the country where the damage was sustained, cf. art. 40(1) EGBGB (*supra*, at n. 4).

– the Joint Protocol, all German compensation claims come under the regime of the Vienna Convention (art. 3 of the Joint Protocol provides that in a “conflict of conventions” that convention prevails to which the state, where the liable nuclear installation is situated, is a party). As a result, all claims would have to be brought in the Czech Republic and the operator is liable under the rules set up by the Vienna Convention. Claims by Austrian victims, on the other hand, are not within the ambit of either nuclear liability convention: Austria has signed neither the Paris nor the Vienna Convention. The Vienna Convention by itself does not cover damage in non-contracting-states. Therefore, if an action for compensation is brought before an Austrian court, the applicable law would have to be determined according to the general rules on choice of law for torts, i.e. the rules of the proposed Regulation. Whether the resulting judgment, based on Austrian liability law, is enforceable in the Czech Republic, is, of course, a different question.

Whether much would be gained by the application of the proposed Regulation in a case such as the one just mentioned is questionable. The courts in those states that are outside the liability framework established by the Paris and the Vienna Convention, such as Austria, will, it is submitted, usually find a way to apply their own law to claims concerning damage suffered in those states on the basis of their national law as it stands. This can be achieved by applying either the general choice of law rules which, at least in cases of environmental violations, quite often tend to point to the law of the place where the damage was suffered, or those choice of law provisions contained in national legislation that are specifically designed to deal with transborder nuclear damage (see, e.g., section 23[1] of the 1999 Austrian Act on Third Party Liability for Nuclear Damage¹⁷). However, as in relation to intra-community cases, uniform conflict rules applicable to transboundary nuclear emissions would achieve harmonised results to the extent that the general choice-of-law rules remain relevant.

As an overall conclusion, therefore, the issue of civil nuclear liability should not be excluded from the scope of the Regulation.

Article 2 – Universal application

Any law specified by this Regulation No changes
shall be applied whether or not it is the
law of a Member State.

¹⁷ Bundesgesetz über die zivilrechtliche Haftung für Schäden durch Radioaktivität vom 1. 1. 1999 (AtomHG 1999), BGBl. I 170/1998.

Comment

See the Introduction, above at footnotes 9 and 10.

Title II – Uniform rules

Chapter 1

Non-contractual obligations deriving
from a tort or Delict

Non-contractual obligations deriving
from a tort, *delict or quasi-delict*

Article 3 – General Rule

1. The law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the loss is sustained, irrespective of the country or countries in which the harmful event occurred and irrespective of the country in which the indirect consequences of the harmful event are sustained, subject to paragraph 2.

2. Where the author of the tort or delict and the injured party have their habitual residence in the same country when the tort or delict is committed, the applicable law shall be the law of that country.

3. However, if it appears from the circumstances as a whole that there is a substantially closer connection with another country and there is no significant connection between the non-contractual obligation and the country whose law would be the applicable law under paragraphs 1 and 2, the law of that other country shall be applicable.

A substantially closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is linked to the tort or delict in question.

1. *Subject to paragraph 2*, the law applicable to a non-contractual obligation arising out of a tort, delict or *quasi-delict* shall be the law of the country in which *the injury is, or may be, suffered*, irrespective of the country or countries *in which the act giving rise to liability was committed* and irrespective of the country in which *any consequential loss resulting from the injury is sustained*.

2. Where the author of the tort or delict or *quasi-delict* and the injured party have their habitual residence in the same country when the tort or delict is committed, the applicable law shall be the law of that country.

3. Replaced by new art. 11a

Comments

1. *The basic approach.* – The Hamburg Group approves of the basic approach of art. 3(1) DP but proposes some improvements of formulation for the sake of clarity.

The starting point of any liability sounding in tort is a damage which a person, the victim, has to sustain involuntarily and that s/he, in order to get compensation and/or its termination, tries to ascribe to another person's, the actor's behaviour which is claimed to have encroached upon the victim's protected interests without his or her consent. In a free society, the paramount weight concerning the applicable law must be attributed to the involuntary sufferance of the victim rather than the actor's reliance on a given legal system. The actor may trust in the law of the place of acting insofar as the consequences *within that state* are concerned, but s/he is not entitled to avail himself/herself of that law in respect of consequences occurring in other countries.

The victim's legitimate expectations focus on the protection accorded by the law of the country where s/he gets involved with the public intercourse and, thereby, exposes his/her rights and interests to potential infringements. This expectation is legitimate since it is cognisable for actors even if resident or acting abroad. The victim may also wish to invoke the law of the state where the acts giving rise to non-contractual liability have been perpetrated if that law accords a better protection. But since the place of acting is determined by the actor and is purely accidental for the victim the latter's expectation to have the law of that place applied cannot be said to be legitimate. A similar assessment has to be made in respect of the law of a country or countries where the indirect consequences of the injury such as the consequential, in particular the financial loss flowing from the infringement (cost of healing etc.) are sustained. The link between these countries and the events causing the loss may consist of the habitual residence of the victim injured in another country, a bank account or another contractual arrangement which is usually unknown and not cognisable to the actor at the time when he committed the relevant acts. Accordingly, s/he should not be held liable for the violation of national laws which s/he had no reason to take into consideration at the time he acted.

An exception is appropriate if both the actor and the victim are connected, by their habitual residences, to one and the same country, art. 3(2) DP, or if other facts indicate a closer connection to a state different from the country of injury, art. 3(3) DP (see also below, at comment no. 5 seq.). It appears equally useful to supplement the basic rule by definitions of the place of injury and of some further corrections for specific types of tort or delict.

2. *Terminology.* – Article 3(1) DP is based upon the identification of three elements of a tort or delict or quasi-delict: the act or event giving rise to lia-

bility, the injury suffered by the victim, and the consequential loss following from that injury. The three elements may be allocated in the same state or in different states. In the latter case it is important that the places of acting, of injury and of the loss are clearly kept apart by precise language. Under the English (but also the French and German) version of the EC Draft Proposal, however, the distinction between the place of injury and the place where the loss is sustained remains unclear. The “country in which the loss is sustained” would appear to include the “country in which the indirect consequences of the harmful event are sustained” although only the former is material and the latter declared to be irrelevant by art. 3(1) DP. By introducing the concept of the place of injury, the alternative proposal of the Hamburg Group tries to separate this place from the place of consequential loss which is regarded as too accidental, open for manipulation and too difficult to determine as to serve as a connecting factor.

3. *Strict liability*. – Apparently the EC Draft Proposal purports to cover both fault liability and non-fault or strict liability. This can be inferred from the fact that (not the country where the harmful *act* was committed, but) the “country ... in which the harmful *event* occurred” is declared to be irrelevant. By including quasi-delicts in accordance with art. 5 no. 3 Reg. 44/2001¹⁸, the Hamburg Group advocates a clarification of this meaning.

4. *Ex ante-injunctions*. As compared with art. 5 no. 3 of the Brussels Convention, art. 5 no. 3 Reg. 44/2001 makes it clear that the court of the place where a tort or delict or quasi-delict occurred is not only competent for awarding damages and for ordering the termination of a wrong. The extension of the jurisdiction to cases in which a harmful event “may occur” indicates that art. 5 no. 3 Reg. 44/2001 also deals with preventive measures that enjoin the defendant from imminent wrongful action¹⁹. As in that provision the formulation “may occur” requires that damage is immediately threatening. Except for preliminary measures such remedies should be based on the same national law as those which are applied for after the wrong has occurred. Therefore the alternative proposal refers to the law of the state where the injury is or “may be” suffered.

5. *General remarks on the escape clause, art. 3(3) DP*. – The Hamburg Group welcomes the introduction of an escape clause into the regulation. A mechanical application of *lex loci delicti* (art. 3(1) DP) or *lex domicilii communis* (art. 3(2) DP) may not be appropriate in each individual case. Although the EC Draft Proposal contains specific rules for some particular groups of cases (defamation, product liability, environmental torts), cases may arise in which

¹⁸ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. EC L 12/1.

¹⁹ In accordance with art. 5 (3) Reg. 44/2001: “... where the harmful event occurred or may occur”.

these rules do not apply. It should also be noticed that the escape devices which are provided by the traditional conflicts law of the Member States such as characterization or renvoi can no longer be relied upon by national judges once the regulation is in force. Rather, under the Rome Convention or the Reg. 44/2001, characterization has to be carried out in an autonomous way and renvoi is excluded (art. 19 DP). Therefore, judges urgently need a different device that enables them to reach fair and just results in the individual case at hand. Nevertheless, for reasons of legal security the regulation is and should be founded on a European rule-based understanding of the conflict of laws rather than on an American-inspired “proper law approach”²⁰. Flexibility in choosing the applicable law and foreseeability of results are the two goals one must strive to attain in a balanced fashion.

6. *Accessory choice of law.* – The Hamburg Group also welcomes the introduction of accessory choice of law (art. 3[2] subpara. 2 DP). It is common knowledge that European legal systems draw the line between contractual and delictual obligations differently. While some countries allow the victim to base his or her claim simultaneously on a contractual as well as on a tortious (delictual) foundation (e.g. Germany), others deny this possibility (e.g. the principle of non-cumul in France). Moreover, contractual and delictual obligations are often interrelated. Gaps in one field are sometimes filled with instruments of the other legal area. For example, the “contract with protective effects for third parties” (Vertrag mit Schutzwirkung für Dritte) under German law which is technically contractual in nature often fulfils social functions usually ascribed to tort law. Another example is the contractual basis of French and Austrian liability laws, which, at least from a comparative and functional point of view, are generally delictual in nature. Such differences lead to severe problems of characterization. Accessory choice of law, however, prevents these technical deviations from influencing the result of the case. Hence, it significantly increases legal security and predictability of results.

7. *Special torts.* – Contrary to the approach pursued by the EC Draft Proposal, the Hamburg Group concludes that judges should also be able to invoke the escape clause in cases involving special torts regulated in arts. 5–8 DP such as product liability and defamation. In particular, product liability cases should not be exempt from an accessory choice of law (art. 3[3] subpara. 2 DP). The general considerations supporting an accessory choice of law rule apply equally to cases where the injured person buys the defective goods directly from their manufacturer. In these cases, too, the enhancement of predictability and the reduction of conflicts between the law governing the con-

²⁰ See Jan Kropholler/Jan v. Hein, From Approach to Rule-Oriented in American Tort Conflicts?, in: Law and Justice in a Multistate World, Essays in Honor of Arthur T. von Mehren, ed. by James A.R. Nafziger/Symeon Symeonides (Ardsey/New York 2002) 317–340.

tractual obligation of a party, on the one hand, and the law governing this party's delictual obligations, on the other are objectives of primacy importance. With regard to environmental torts, however, accessory choice of law should be excluded because it would contradict the Hamburg Group's negative attitude toward party autonomy in this area (see art. 11[1] of the Hamburg alternative proposal). Furthermore, in defamation cases, accessory choice of law will usually not be a viable solution because there is no pre-existing relationship between tortfeasor and victim. The general escape clause could come into play, however, if the particular circumstances of a defamation case deviate from the regular fact pattern in which the victim legitimately expects the protective standards of his or her country of habitual residence. The residence may have been set up solely for tax purposes in a country where there is no (or only insubstantial) distribution of the supposedly defamatory article (e.g. a German tennis player travelling around the world, but formally residing in Monaco, sues an Austrian tabloid for libel). Hence, judges should be enabled to rebut the presumption underlying art. 7 DP in cases where there is in fact no significant social connection of the victim with the country whose law would be applicable under that provision.

8. *Systematic relocation of the escape clause.* – For these reasons given under 7, the escape clause should be placed *after* the provisions related to particular torts or delicts. For the sake of systematic coherence, it should also encompass unjustified enrichment and negotiorum gestio. Therefore, the Hamburg Group suggests codifying the escape clause in a new *art. 11a*. See there for further comment.

Article 4 – Areas not subject to territorial sovereignty

1. The law applicable to a tort or delict occurring in areas not subject to the territorial sovereignty of a State shall be the law of the country in which the means of transport or the installation connected with the tort or delict is registered or whose flag it flies or with which it has similar connections.

Replaced by new art. 11b

2. If there is no connection with a specific country or if there is a connection with several countries, the applicable law shall be that of the country with which the case is most closely connected.

Replaced by new art. 11c

Comments

The issues dealt with in art. 4 DP may arise in all types of non-contractual obligations and should be regulated by provisions of general purview, see below, arts. 11b and 11c of the Hamburg alternative proposal.

Article 5 – Product liability

- | | |
|---|--|
| <p>1. The law applicable to a non contractual obligation arising out of damage caused by a product shall be that of the country in which the person directly sustaining the loss is habitually resident or has his main establishment, if that country is also the country where:</p> <ul style="list-style-type: none"> – the person alleged to be liable has his main establishment; or – the product was purchased. <p>2. In all other cases, the applicable law shall be that of the country where the tort or delict is committed.</p> | <p>1. The law applicable to a non-contractual obligation arising out of damage caused by a product shall be that of the country in which <i>the product was, or may be commercialised. The place of commercialisation is the place where the product is sold or let in another manner to a final user for the first time.</i></p> <p>2. <i>If the country in which the person directly sustaining the loss is habitually resident or has his main establishment is also the country where the person alleged to be liable has his main establishment, the applicable law shall be the law of that country.</i></p> |
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Comments

1. *Analysis.* – The main difference between arts. 5 and 3 DP lies in the role of the place where the loss is sustained in determining the applicable law. Whereas this place constitutes the only relevant connecting factor in art. 3(1) DP, it is not to be taken into account in cases of product liability under article 5(1) and (2) DP. Article 5(1) first dash DP essentially repeats art. 3(2) DP, while art. 5(1) second dash and art. 5(2) DP each contain specific provisions. Also, in contrast to art. 3(3) DP, there is no escape clause. Consequently, a pre-existing contract between the parties that is linked to the tort or delict in question cannot be taken into account.

Rules determining the applicable law to torts and delicts must, on the one hand, ensure that the person directly sustaining the loss gets adequate compensation and, on the other hand, give optimal incentives to the potential tortfeasor to prevent damage. This is also true in the special field of product

liability. Here, these interests can be spelt out in a specific way. First, the applicable law should be predictable to the person alleged to be liable. Without any predictability the producer/importer will not be able to calculate the risk of the production and exportation of a product and, hence, to insure the risk. Second, the equal treatment of market participants must be ensured for reasons of competitive fairness. It shall be analysed whether the proposed art. 5 DP fulfils these functions.

2. *The basic rule: law of the country of commercialisation.* – In the case of product liability, the place where the loss is sustained can be purely accidental and unpredictable to both the producer/importer and the injured user. In the hypothetical case of a European tourist travelling through Indonesia where a bottle bought at home explodes, there is hardly any connection to the Indonesian law as the law of the place of injury. Consequently, the decision for a departure from the general rule in art. 3(1) DP and for a specific rule is the right solution.

The critical evaluation has to start with art. 5(2) DP, since this paragraph, not para 1, contains the basic conflict rule applicable to product liability. Therefore, the order of the two paragraphs should be changed.

The wording of art. 5(2) DP is unclear. The country “where the tort or delict is committed” could be the place where the injury was suffered or the place of acting or both. Moreover, the interpretation of the place or places of acting is highly controversial in cases of product liability. The place of production, of assembly, of commercialisation at the first or any subsequent level of the distribution chain may each be arguably regarded or rejected as a place of acting. Consequently, the current draft proposal will provoke misunderstandings and different interpretations. Hence, it needs to be clarified. The Hamburg Group proposes that the connecting factor should be the place of commercialisation. The place of commercialisation is not the place where the producer puts the product into the chain of commerce (which will usually be at his production plant). Rather, it is the place where the product causing harm is sold or otherwise let to a final user for the first time. The application of this law provides for an equal treatment of all competitors on the respective market. And above all, the place of commercialisation is predictable to the producer/importer in most cases. S/he is usually able to organise his/her distribution network such as to determine the places of commercialisation. Using this criterion as a connecting factor would exclude the laws of countries in which certain goods are only sold as used goods. It would equally exclude the laws of countries that are not more than platforms in B2B commerce (business to business transactions). It would not, however, exclude the laws of those states whose markets are served by independent importers rather than the producer or the distributors of his own marketing network.

Generally the legitimate expectations of a consumer regarding the law protecting his/her interests are guided by the place where s/he purchases, leases

or rents the product. If the consumer is the first final user as defined above, the place of purchase, lease, rent and the like is equal to the place of commercialisation. Consequently the interests of this person are respected by applying the law of the country in which the product was commercialised. Through this application, he or she can regularly rely on the law of his/her home market.

The situation of second purchasers or third parties is different. They have no necessary connection to the place of commercialisation. The application of the law of that country is nevertheless justified. The underlying aim is that the person directly sustaining the loss gets compensation. If the product is commercialised in a Member State of the European Union, a minimum compensation – even for third parties sustaining loss in a non-Member State – is ensured by the product liability Directive 85/374²¹.

The remaining cases are those where the product is commercialised outside the European Union. If the place of commercialisation is equal to the place of the habitual residence of the injured person or the main establishment of the person alleged to be liable there is a close connection to justify the application of the law of that country. This holds true in particular in cases where both connecting factors refer to that country. In all other cases the connecting factors point to different countries. Consequently a decision in favour of one connecting factor is necessary. It follows from what has been said that the law of the country in which the product is commercialised should prevail.

3. *The Exception.* – The Hamburg Group approves of the conflict rule contained in art. 5(1) first dash DP which in reality is an exception to the basic conflicts rule on product liability provided by art. 5(2) DP.

The country where the person directly sustaining the loss is habitually resident is generally where s/he actually feels the loss. Thus, in most cases, there is a close connection to this country. Similarly, the main establishment of the person alleged to be liable is the place where the important decisions are taken. Its law is known or at least predictable to this person and usually influences his/her behaviour. Consequently, art. 5(1) first dash DP contains a justified solution that has been adopted by the Hamburg Group in para. 2 of its proposal.

The exception contained in the second dash of art. 5(1) DP, however, appears less justified. This follows from the use and interpretation of the term “purchase”. This term includes sales of both new and used goods by private individuals (consumers). In these cases the country of purchase is unpredictable to the producer/importer. Hence, the aim of influencing his/her behaviour by the local product safety and liability rules cannot be reached. The producer/importer is only able to take into account the rules of the place of

²¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ. EC L 210/29.

commercialisation. Whereas s/he may be able to survey his own distribution channels, there is no possibility of influence once the goods have been sold to the first final user. Hence, art. 5(1) second dash DP should be reconsidered.

4. *Escape clause.* – It does not seem that an escape clause would be necessary in many cases. But if such a situation appears before the judge, justice may be reached by the application of the general escape clause as proposed by the Hamburg Group (art. 11a).

In order to avoid the problems arising out of the application of laws of different countries to contractual obligations on the one hand and product liability on the other hand, the same law should be applicable to both contract law and product liability. Hence, a pre-existing contract between the parties that is linked to the tort or delict in question should be treated as an expression of a closer connection with another country justifying the application of the proposed general escape clause (art. 11a).

The escape clause may also be invoked with regard to claims of so-called *bystanders*, i.e. victims who have not themselves bought or otherwise acquired the defective product (e.g. a passenger in the buyer's car which crashes due to a malfunction of its brakes, or a passer-by hit by the car spinning out of control). While the place of commercialisation may be regarded as an appropriate solution for a victim within the immediate social sphere of the buyer such as the passenger in the above-mentioned example, it is doubtful whether the rule contained in art. 5(1) of our alternative proposal is suitable for cases in which the victim had no relation to the buyer before the harmful event (e.g. the passer-by mentioned above). Applying the law of the place of commercialisation in such cases might be considered as an unfair surprise to the bystander, especially in light of the value judgment made in art. 3(1) DP to consider the protection of a victim's legitimate expectations. Because appropriate solutions for these cases depend on a close analysis of very specific fact-patterns, it is suggested that this task should be left to judges who may apply art. 11a of the Hamburg alternative proposal.

Article 6 – Unfair competition and other unfair practices

The law applicable to a non-contractual obligation arising from unfair competition or other unfair practices shall be the law of the country where the unfair competition or other practice affects competitive relations or the collective interests of consumers.

Article 6 – Unfair and anticompetitive practices

1. The law applicable to a non-contractual obligation arising from unfair competition or other unfair practices or a *restraint of competition* shall be the law of the country where the practice affects or may affect competitive relations or the collective interests of consumers.

2. *Where the elements relevant to the situation at the time of publication are exclusively connected with one or more Member States of the European Union and subject to article 7, non-contractual obligations arising from unfair advertising are governed by the law of the Member State where the advertising company has its principal place of business.*

Comments

1. *Unfair competition and restraints of competition.* – The Hamburg Group approves of art. 6 DP. It is essentially in line with the private international law of most Member States and also with the effects principle which the Court of Justice de facto espoused in its *Wood Pulp* decision concerning the scope of art. 81 EC²². The overlap of the law against restrictions of competition and of the law against unfair competition favours the use of the same connecting factors. This would allow for extending art. 6 DP to non-contractual obligations arising out of restraints of competition. A clear-cut conflicts rule for such claims appears desirable in view of the intention of the European Commission to promote private enforcement of arts. 81 and 82 EC through national courts²³. An antecedent to and model for such a conflict rule is art. 137 of the Swiss statute on private international law²⁴.

A further amendment of the text (“or may affect”) again takes account of ex ante-injunctions and follows the wording of art. 5 no. 3 Reg. 44/2001²⁵.

2. *Intra-Community advertising.* – However, the Hamburg Group invites the Commission to consider an exception for intra-Community advertising. In this field, the harmonisation of substantive law is particularly far advanced. This is true for television advertising (Dir. 89/552²⁶ and 97/36²⁷) and for com-

²² ECJ 27.9. 1988, joined cases 89/85 (*Ahlström*), [1988] E.C.R. V-5193.

²³ See the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87, EC Doc. COM (2000) 582 fin., section 2 C 1 (a) of the Explanatory Memorandum; cf. *Jürgen Basedow, Who will Protect Competition in Europe?*, From central enforcement to authority networks and private litigation: *European Business Organization Law Review* (2001) 443–468 (at 459 seq.).

²⁴ See *supra*, at n.6.

²⁵ See also *supra*, art. 3 comment no. 4.

²⁶ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, O.J. EC L 298/23.

²⁷ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997

mercial communications distributed via the internet (Dir. 2000/31²⁸). Other Community measures are applicable to advertising irrespective of the media used; this concerns the rules on misleading and comparative advertising (Dir. 84/450²⁹ and 97/55³⁰), the advertising of medicinal products for human use (Dir. 92/28³¹), and various other measures which are contained in various Community acts. Insofar as substantive harmonisation has taken effect the country-of-origin principle will prevail over art. 6 DP for all practical purposes; this is due to art. 23 DP and the principles of the Internal Market which flow from primary Community law and take priority over conflicts rules adopted in instruments of secondary legislation. Thus, the target market as the point of contact set out in art. 6 DP will in most intra-Community advertising cases be superseded by a different criterion implementing the country-of-origin rule. If the market principle under the impact of the basic freedoms of Community law de facto loses its significance for advertising, the conflicts rule as such should be reconsidered. The complex two-tiered process shaped by the EC Draft Proposal and consisting of a choice of law and a Community law stage could be greatly simplified by drafting a specific conflicts rule for advertising along the lines of the Hamburg alternative proposal. In view of the far-reaching harmonisation of substantive law it would do little harm to consumers and competitors of advertising companies, while it would, on the other hand, allow Community-wide advertising to be based on a single legal system. This would favour the growth of an advertising industry operating at a Community scale.

It follows from the systematical structure of art. 6 that para. (2) if applicable supersedes para. (1). However, in case of advertising which also violates personality rights the specific rule in art. 7 DP prevails over art. 6(2).

amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. EC L 202/60.

²⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), O.J. EC L 178/1.

²⁹ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, O.J. EC L 250/17.

³⁰ Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, O.J. EC L 290/18.

³¹ Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use, O.J. EC L 113/13.

Article 6a – Infringement of Industrial and Intellectual Property Rights

1. *The law applicable to a non-contractual obligation arising from an infringement of a copyright or a registered industrial property right shall be the law of the country for which protection is claimed.*

2. *A non-contractual obligation arising from an infringement of a Community industrial property right with a unitary character shall be governed by the law of the Member State where the infringement affects the right.*

Comments

The preliminary draft proposal neither contains a special conflict of laws rule for intellectual or industrial property infringements nor does it exclude copyrights, patents, trademarks and designs from its scope of application, see art. 1(2) DP. The Hamburg Group takes the view that the general conflicts rules contained in art. 3 of the EC Draft Proposal are not appropriate to address this matter and suggests the adoption of a special conflicts rule.

1. *Industrial Property rights granted under national law.* – In all Member States and international conventions infringements of industrial property rights (patents, trademarks, designs, semiconductor products, plant variety rights) are governed by the *lex loci protectionis* and not by the *lex loci delicti*. The *lex loci protectionis* is considered as a special rule for registered rights that supersedes the more general rules of private international law.

National patents follow the principle of territoriality: a patent is granted as a monopolistic right for the territory of the granting State, but the monopoly ends at that state's boundaries. Therefore a German patent cannot be infringed by producing or distributing goods in France. This applies equally to all other registered national property rights like trademarks, designs, semiconductor products and plant variety rights. Ownership and infringement are a matter for legislation in the country where protection is claimed.

International conventions on industrial property rights have affirmed the authority of the principle of territoriality. The Paris Union Convention for industrial property of 1883³² is founded on the principle of national rights having a territorial scope. The Convention actually has 163 members including the EU Member States, the U.S., Japan, Russia and China. The European

³² Paris Convention for the Protection of Industrial Property of 20 March 1883, R.GBl. 1903, 147.

Patent Convention (EPC) of 1973³³ likewise subscribes to the principle of territoriality, and the European Patent Office grants bundles of national patents, art. 3 EPC. However, because these conventions do not state the principle of territoriality in explicit words, the relevant provision on the conflict of conventions, art. 24 DP, is insufficient to ensure the acceptance of the worldwide system of national industrial property rights.

Nor does art. 3 DP provide a suitable regulation for these registered rights. Article 3(1) DP refers to the law of the country in which the loss is sustained. In contrast the *lex loci protectionis* refers to the law of the country in which the act of infringement was committed. While this tension might be accommodated by way of interpretation, art. 3(2) DP is incompatible with the basic principles governing industrial property rights. The application of the law of a country which has not granted the patent, trademark or other registered right cannot be justified. If an Italian resident infringes a French patent owned by another Italian national, French Patent Law has to be applied. If infringing goods are produced and/or distributed in several countries several laws are applicable, so long as patents are registered in these countries.

2. *Unitary Community Industrial Property Rights.* – The *lex loci protectionis* is not sufficient and has to be supplemented with regard to Community trademarks, Community Designs, Community plant variety rights and similar rights which may be created in the future.

Council Regulation (EC) 40/94 of 20 December 1993 on the Community trademark³⁴ provides for European property rights with a unitary character, and the territorial scope of the Community trademark extends to the Community as a whole. It has equal effect throughout the Community unless otherwise provided in the Regulation. For infringements of a Community trademark art. 98(1) grants peculiar injunctive relief, but in all other respects the Community trademark court shall apply the law of the Member State where “the acts of infringement or threatened infringement were committed, including the private international law”, art. 98(2). The reference to the private international law of the Member State should not be understood as mandating the application of the *lex loci protectionis* for each Member State. Because of the unitary character of the Community trademark, the *locus protectionis* is the Community. Since substantive Community provisions on the liability for infringement of a Community trademark are lacking, a supplementary conflicts rule referring the matter to the national law of a Member State is required.

³³ Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, BGBl. 1976 II 649, 826.

³⁴ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark, O.J. EC L 11/1.

The Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs³⁵ has created a similar situation regarding the choice of law rules for these Community industrial property rights. Under art. 89(1)(d) the Community design court shall make “any order imposing other sanctions appropriate under the circumstances which are provided by the law of the Member State in which the acts of infringement or threatened infringement are committed, including its private international law.”

In contrast, Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights³⁶ itself provides for a substantive regulation of cease-and-desist orders and of damages, see art. 94. A reference to national law including private international law is made only in respect of claims for restitution in case of infringement of the right, see art. 97.

It is submitted that the supplementary conflicts rule needed in these cases should refer to the law of the country or countries where the unitary Community right is affected. While this may lead to the application of several laws in case of multistate infringements, the application of each law is justified by the fact that the perpetrator of an infringement seeking the profit of his acts in a specific national market should bear the costs which arise from his acts under the laws of that country.

3. *Intellectual Property (Copyright)*. – Under the international private law of most Member States the infringement of copyrights including moral rights is subject to the *lex loci protectionis*. In addition, the Berne Convention of 1886³⁷ is founded on the same principle. With a view to the international acceptance of the *lex loci protectionis* for copyright infringements, a European harmonisation should not prescribe a different rule.

The Berne Convention now has 149 contracting parties including the EU Member States, the U.S., Japan, Russia, China. Although the Berne Convention provides that a copyright is not a registered right but property flowing naturally and without formality from the act of creation, the Convention is built on the principle of territorial protection. It is founded on the idea that the extent of protection is governed by the law of the country where protection is claimed. Even though the principle is mentioned in explicit words in art. 5(2) and art. 14(2)(a) most authors believe that the convention itself does not state the principle of territoriality as a conflicts rule. Rather, they regard the territoriality of copyrights as a pre-existing rule for the Berne Convention. For that reason art. 24 DP, i.e. the provision on conflicts of conventions

³⁵ Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs, O.J. EC L 3/1.

³⁶ Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights, O.J. EC L 227/1.

³⁷ Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, RGBl. 1887, 493.

is insufficient to provide for the non-application of the general rules of the EC Draft Proposal.

Article 7 – Defamation

The law applicable to a non-contractual obligation arising from a violation of private or personal rights or from defamation shall be the law of the country where the victim is habitually resident at the time of the tort or delict.

Article 7 – Violation of personality rights

The law applicable to a non-contractual obligation arising from *defamation or any other* violation of private or personal rights shall be the law of the country where the victim is habitually resident at the time of the tort or delict.

Comments

1. *Scope and title.* – While the EC Draft Proposal in accordance with its title would appear to cover only cases of defamation, the scope of the provision is much wider and includes the illegal interference with all kinds of personality rights such as the right of the individual to determine the use made of his/her own picture, personal data and genetic disposition. Defamation, generally defined as the violation of a person's honour or reputation, is only one specific example of the infringement of personal rights. This explains the change of title and of the text ("*defamation or any other ...*") proposed by the Hamburg Group.

2. *The conflicts rule.* – A conflicts rule dealing with defamation and other violations of personal rights such as the processing of personal data has to take into account two factual changes. First, the internet and international distribution of other media have turned this type of tort into a potentially ubiquitous behaviour. As a consequence, under art. 3(1) DP, the media industry could be exposed, in one and the same case, to a great number or – in the case of the internet – even to all laws. This explains the desire of the industry to reduce that exposure by advocating the law of the place of acting (production, publication) as the applicable law of this tort. It goes without saying that this solution would allow the media to shop around for the lowest standard of protection and would be very detrimental to victims in other countries. Second, victims are more mobile than they used to be and may be connected with many jurisdictions at the same time. This is true for multinational enterprises, but also for many individuals who acquire a worldwide reputation in the fields of politics, business, arts, sports, science, or religion. If the general conflicts rule of art. 3(1) DP is to be understood such as to allow the victim of an internationally distributed defamation to invoke the law of each country where his or her reputation has been impaired, a tremendous potential for forum shopping would be created.

The Hamburg Group takes the view that art. 7 DP provides for a fair compromise between the divergent positions. The geographic centre of a victim's

activities and interests is that person's habitual residence ("gewöhnlicher Aufenthalt" instead of "Wohnsitz" in the German version) or, in the case of a company, its central administration or principal place of business (see art. 18 DP). It is safe to presume that this place is one voluntarily chosen by the individual or corporate victim. As a result, it is not unfair to exclude the laws of other countries where the victim's reputation has been equally injured. Furthermore, a media undertaking which targets a foreign company or individual can be expected to take into account the law of that person's habitual residence (or central administration etc., art. 18 DP) where a defamatory statement would produce its main effects. This law is foreseeable and defines the target's personal rights. The media's observation of this law is a fair trade-off for the exclusion of laws of other countries where the victim's reputation is equally impaired.

The *Shevill* opinion of the Court of Justice³⁸ does not require a different solution. In that opinion the Court has acknowledged that a defamation claim under art. 5 no. 3 Reg. 44/2001³⁹, can be brought either in the country of publication – for recovery of the full loss – or, if limited to the loss occurred in the country of distribution, in that state. This opinion, however, dealt with the jurisdiction of the courts and, indirectly, with the application of the *lex fori* to procedural matters. But the Court's decision has no implications for the applicable substantive law.

In case of conflict with art. 6(2) as proposed by the Hamburg Group art. 7 DP is to prevail.

Art. 8 – Violation of the environment

The law applicable to a non-contractual obligation arising from a violation of the environment shall be the law of the country in whose territory the damage occurs or threatens to occur.

The law applicable to a non-contractual obligation arising from a violation of the environment shall be the law of the country in whose territory *the injury is or may be suffered*.

Comments

At first sight, art. 8 DP does not seem to deviate from art. 3(1) DP and might appear as superfluous. The reason for an independent conflicts rule on the violation of the environment emerges from the absence of exceptions in art. 8 DP similar to those laid down in art. 3(2) and (3) DP. In fact, art. 8 DP is not qualified, neither in a general sense, art. 3(3) DP, nor in case both parties

³⁸ ECJ 7.3. 1995 – Case C-68/93 (*Shevill v. Presse Alliance S.A.*), [1995] E.C.R. 1995, I-415; NJW 1995, 1882; IPPrax 1996, 111.

³⁹ See *supra*, at n. 12.

are habitually resident in the same state, art. 3(2) DP. The strong territorial roots of the environment effectively reduce the weight to be given to personal points of contact such as the habitual residence of landowners etc. It is therefore appropriate to provide for a specific conflicts rule on environmental liability excluding such personal points of contact. On the other hand, the need for a general escape clause cannot be excluded altogether. While it will be used with circumspection in this field, it should nevertheless be available, see art. 11a of the Hamburg alternative proposal.

The changes proposed by the Hamburg Group in respect of art. 8 DP essentially concern the drafting and not the substance of the provision. By replacing “injury” with “damage” the Group – just like in art. 3(1) DP – seeks to clarify that the country where damage is sustained in terms of financial or other consequential losses, e.g. the country where the owner of contaminated land has his/her bank account or habitual residence, is irrelevant. Rather, what counts is the place where the soil is polluted. In case of natural resources which are not confined to a given territory such as water, air, fish or game, the place of injury includes all countries which are affected by the pollution in the regular course of affairs.

Furthermore, the wording (“or may be suffered”) has again been adapted to art. 5 no. 3 Reg. 44/2001 (see also above, at art. 3 comment no. 4).

The Group has also discussed the question whether in case of environmental torts affecting several states a single law should be identified as applicable. This would most likely be the law of the country where the cause of pollution was released. But the Group does not find this solution to be acceptable. It is difficult to see how judges of Member States could, in a case such as the Chernobyl disaster, be obliged to exclusively apply the law of a non-member State. Moreover, such a rule would encourage industry to lobby even more for limitations of liability in their home countries, and it would induce defendants to invoke the multistate rule in order to avoid liability under a foreign law. The end result might even create an incentive for injuring the environment in several states instead of one.

Article 9 – Scope of the law applicable to non-contractual obligations arising out of a tort or delict

The law applicable to non-contractual obligations under Articles 3 to 8 and 11 of this Regulation shall govern:

1. the basis, conditions and extent of liability, including the determination of persons who are liable for acts performed by them;

Article 9 – Scope of the law applicable to non-contractual obligations arising out of a tort, *delict* or *quasi-delict*

The law applicable to non-contractual obligations under Articles 3 to 8 and 11 to 11c of this Regulation shall govern:

1. the basis, conditions and extent of liability, including the determination of persons who are liable for acts performed by them, *and tortious capacity*;

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|---|--|
| <p>2. the grounds for exemption from liability , any limitation of liability and any division of liability;</p> <p>3. the existence and kinds of injury or damage for which compensation may be due;</p> <p>4. the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;</p> <p>5. the measure of damages in so far as prescribed by law;</p> <p>6. the question whether a right to compensation may be assigned or inherited;</p> <p>7. persons entitled to compensation for damage sustained personally;</p> <p>8. liability for the acts of another person,</p> | <p>2.the grounds for exemption from liability, any limitation or division of liability <i>including contributory negligence</i>;</p> <p>3. No changes</p> |
| <p>9. the rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.</p> | <p>4. the measures which a court has <i>jurisdiction to grant</i> under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;</p> <p>5. No changes</p> <p>6. No changes</p> <p>7. No changes</p> <p>8. No changes</p> <p>9. <i>performance and the various ways of extinguishing the obligation</i>;</p> <p>10. No changes as compared to no. 9 DP</p> |

Comments

1. *General.* – Article 9 DP obviously draws a welcome parallel to art. 10 of the Rome Convention. It is extremely helpful for practitioners to see expressly listed the matters which fall within the ambit of the proper law of the tort or delict. Matters of characterization could otherwise become a major problem and a major source for misunderstandings.

2. *Amendments.* – Only a few minor amendments are proposed: Firstly, in order to avoid conflicts of characterization it appears sensible to expressly include tortious capacity in no. 1. Otherwise, it would be possible to characterize tortious capacity as a matter left to the general rules on capacity and thus generally governed by the law of the tortfeasor's domicile, habitual residence or nationality. The express inclusion would be an expression of the more general rule that special capacities relating to certain acts are governed by the proper law of that relationship. Secondly, contributory negligence deserves an express mention in no. 2. Contributory negligence is certainly

the most important reason for a division of liability. However, to refer only to the “division of liability” might be misinterpreted by a court without knowledge of these specific concepts. Mentioning contributory negligence clarifies the wording and answers an important question at first glance. Thirdly, the proposed change in the wording of no. 4 is simply a matter of editing and updating the wording consistent with the standard of terminology used in procedural law. Fourthly, the proposed new no. 9 is a sibling to art. 10(1)(d) of the Rome Convention. It should go without saying that the performance of an obligation is governed by the proper law of that obligation, but it does no harm to expressly add some words on performance and its substitutes. Otherwise there could arise the danger of an *argumentum e contrario* derived from a comparison to art. 10(1)(d) of the Rome Convention.

Chapter 2

Non-contractual obligations out of an act other than a tort

Article 10 – Determination of the applicable law

1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, it shall be governed by the law of the country whose law governs that relationship.

2. Subject to paragraph 1, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.

Non-contractual obligations out of an act other than a tort, *delict or quasi-delict*

Article 10 – *Unjust enrichment*

1. If a non-contractual obligation arising out of *unjust enrichment* concerns a relationship previously existing, or *supposed to be existing*, between the parties, it shall be governed by the law of the country whose law governs that relationship.

2. *A non-contractual obligation arising from a non-tortious infringement of a protected interest or right shall be governed by the law of the country which grants such protection or for which such protection is claimed. A non-contractual obligation arising from a non-tortious infringement of a Community industrial property right with a unitary character shall be governed by the law of the Member State where the infringement affects the right.*

3. *In any other event*, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.

3. Subject to paragraph 1, a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be governed by the law of the country in which the action takes place.

4. Notwithstanding paragraphs 2 and 3 and subject to paragraph 1, if the parties have their habitual residence in the same country when the non-contractual obligation arises, the obligation shall be governed by the law of that country.

Replaced by new art. 10b(1)

4. *Subject to paragraph 1*, if the parties have their habitual residence in the same country when the non-contractual obligation arises, the obligation shall be governed by the law of that country.

Article 10a – Scope of the law applicable to non-contractual obligations arising out of unjust enrichment

The law applicable to non-contractual obligations arising out of unjust enrichment shall govern:

1. *the basis and conditions of any such obligation, including the determination of creditor and debtor;*
2. *the objections to, and exemptions from, any such obligation;*
3. *the extent of liability under such obligation including any privilege, exclusion, division or restriction and the question whether restitution in kind or money is due;*
4. *the question whether the liability might be extended upon third parties;*
5. *the question whether such obligation may be assigned or inherited;*
6. *performance and the various ways of extinguishing the obligation;*
7. *the rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period;*
8. *accompanying tracing claims.*

[Article 10(3) DP:

Subject to paragraph 1, a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be governed by the law of the country in which the action takes place.]

[Article 10(4) DP:

Notwithstanding paragraphs 2 and 3 and subject to paragraph 1, if the parties have their habitual residence in the same country when the non-contractual obligation arises, the obligation shall be governed by the law of that country.]

Article 10 b – Negotiorum gestio

1. Subject to paragraph 2, a non-contractual obligation arising out of *acts concerning another person's affairs* and performed without due authority (*negotiorum gestio*), shall be governed by the law of the country in which the *relevant acts* take place.

2. *If a person performs another person's obligations without due authority, the mutual claims between the acting person (the gestor) and that other person shall be governed by the law that governed the original obligation fulfilled.*

3. Subject to paragraph 2, if the parties have their habitual residence in the same country when the non-contractual obligation arises, the obligation shall be governed by the law of that country.

Article 10c – Scope of the law applicable to non-contractual obligations arising out of negotiorum gestio

The law applicable to non-contractual obligations arising out of negotiorum gestio shall govern:

1. *the basis and conditions of any such obligation, including the determination of creditor and debtor;*

2. *the extent of liability under such obligation including any privilege, exclusion, division or restriction;*

3. *the mutual collateral obligations of the parties including claims against the gestor, and the question whether or to which extent the gestor may be entitled to an advance payment;*

4. *the standard of care to be observed by the gestor;*

5. *the question whether such obligation may be assigned or inherited;*

6. *performance and the various ways of extinguishing the obligation;*

7. *the rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.*

Comments on Articles 10–10c

1. *Structure of the chapter.* – Chapter 2 should be restructured substantially. In its present form it does not accurately reflect the state of the law and is under-represented compared to the detailed structure of Chapter 1 on torts and delicts. To confine the chapter to basically a single rule each on the law applicable to unjust enrichment and negotiorum gestio pays too little justice to some differentiation that already took place in modern conflicts law. This is reflected by the addition of the proposed paras. 2 of arts. 10 and 10b respectively. The new art. 10(2) in addition clarifies the line drawn by art. 10(2) DP, in order to keep in line with art. 3(1). The proper law of a claim in tort and the proper law of a competing claim in restitution should run parallel to avoid conflicts of characterization. This is particularly reflected in the second sentence of art. 10(2) of the Hamburg alternative proposal mirroring and complementing art. 6a(2) of the Hamburg alternative proposal.

2. *Restitution related to contracts.* – There must be a specific rule like art. 10(1) DP for restitution after the collapse of a contract; on the one hand this is a bare necessity and on the other hand a prerequisite already set by art. 10(1)(e) of the Rome Convention. A slight refinement in the wording, namely the addition of a phrase expressly referring to a relationship only supposed to be existing, does not result in an alteration in substance, but serves as a means of clarification to expressly include void contracts (which might be deemed akin to non-existing contracts). Additionally, this provides a clear-cut solution in the event that a person performs a non-existing obligation under the erroneous assumption that this obligation exists.

3. *Other cases of restitution.* – Article 10(1) and (2) DP already acknowledge that the case of performance of obligations under a (supposed) relationship and the case of an infringement of rights or interests (akin to tortious liability) ought to be treated differently. The necessary differentiation also results in an attempted rule dealing with all other kinds of restitution, particularly restitutionary redress. The proposed art. 10(3) is a catch-all clause for rather uncommon and rare cases. It repeats the wording of art. 10(2) DP but its relevance is reduced by the introduction of the new and more confined art. 10(2).

4. *Negotiorum gestio.* – To include a conflicts rule for negotiorum gestio is undoubtedly a bold attempt since this concept or notion is almost unheard of in some Member States. Where such a concept exists, national laws might dif-

fer in scope. Nevertheless, for convincing reasons of systematic coherence and comprehensiveness the future Regulation should contain a conflicts rule for negotiorum gestio. No one can deny the very existence of the respective situations and, as a result, they should get proper attention. This has the advantage to start relatively afresh and one should not be afraid of defining the notion as art. 10(2) DP demonstrates. In addition, it appears useful to introduce at least the gestor as another terminus technicus by way of definition. Admittedly transborder cases involving negotiorum gestio have been rare in the past and might be *rarae aves* in the future too. Nevertheless, art. 10b(2) of the Hamburg alternative proposal is a specific rule for the event that negotiorum gestio can be instrumentalized as a means of redress.

5. *Salvage*. – The most commonly discussed case of negotiorum gestio in the conflict of laws was the case of a ship rendering help to another ship. Nevertheless it is not advisable to design a rule especially for this case. In modern times such cases mostly fall into the realm of contract and are not left to negotiorum gestio⁴⁰. The small remainder not ruled by contract will most likely be governed by the Convention on Salvage⁴¹. It appears even more unnecessary to provide for a specific conflicts rule since there would be a kind of deadlock to choose between the flag of the helping ship and the flag of the ship to which help is rendered as the appropriate connecting factor⁴².

6. *Common habitual residence*. – The Hamburg Group appreciates art. 10(4) DP. Evaluating the common habitual residence in the same country as a prevailing connecting factor is in line with art. 3(2) of both DP and our proposal and art. 5(2) of our proposal. It also provides a very sensible opportunity for applying *lex propria in foro proprio* since in the cases concerned, lawsuits will almost invariably be filed with the courts of the country in which both parties live. Nevertheless, as acknowledged by art. 10(4) DP there must be exceptions to the rule. With regard to unjust enrichment, regard must once again be had to art. 10(1)(e) of the Rome Convention, and consequently an exception has to be made for the cases falling under art. 10(1) DP. As to negotiorum gestio, art. 10b(2) of the Hamburg alternative proposal has to be viewed in its context as only one method of redress between persons other than the creditor and debtor of an original obligation, i.e. persons which might habitually reside in a country different from that whose law governs the original obligation. Thus, in order to gain maximal conflictual harmony and maintain minimal friction between the various methods of redress the rule set out in art.

⁴⁰ For the determination of the proper law of a salvage contract under the Rome Convention cf. *Peter Mankowski*, *Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht* (1995) 444–447.

⁴¹ International Convention on Salvage, given at London on April 28, 1989; in force as of July 14, 1996; text e.g. in: *Uniform L. Rev.* 1989 I, 218.

⁴² *v. Staudinger(-Bernd v. Hoffmann)*, *Kommentar zum Bürgerlichen Gesetzbuch*, Art. 38–42 EGBGB¹⁴ (2001) Art. 39 EGBGB note 33 with ample references.

10(4) DP should not apply. However, where appropriate to reach the mentioned aim, the general escape clause in art. 11a of the Hamburg alternative proposal (art. 3[3] DP) might provide suitable means of deviation, and prevent art. 10b(2) from becoming too rigid.

7. *Scope of the applicable law.* – Chapter 2 was out of balance compared to chapter 1 insofar as it did not contain any rule like art. 9 DP, i.e. a rule on characterization that qualifies certain matters as being within the ambit of the proper law of the unjust enrichment or the negotiorum gestio. This lacuna might be filled by the proposed arts. 10a and 10c respectively. The proposed wording seeks to establish parallels to art. 9 DP as far as possible. However, the existing differences appear to make it inappropriate to establish a general rule on characterization. For instance, art. 10a no. 4 of the Hamburg alternative proposal has no parallel in the law of torts, and the aspects mentioned in our art. 10c nos. 3 and 4 are germane to the law of negotiorum gestio (and form a very considerable part of its entire system since those questions regulate the incentives to the gestor). Article 10c no. 3 avoids the possibility of having to apply two different laws⁴³ to mutual claims. This alternative is not feasible for it destroys conflictual harmony between a claim and a counter-claim⁴⁴. To expressly subject accompanying and auxiliary tracing claims to the law governing the main claim in restitution is advocated by art. 10a no. 9 of our proposal. Generally, auxiliary claims should follow the main claims that they are aimed to support and effectuate. Article 10(1) of the Rome Convention, which appears to be the discernible model for art. 9 DP and consequently our proposed arts. 10a and 10c, has proved extremely useful in this context. The more detailed the catalogue of matters the easier lawyers and courts can answer questions by simply reading the text of the Regulation. Some redundancy by repeating words already to be found in art. 9 DP with regard to torts is not too high a price for accomplishing that feat.

8. *Triangular situations.* – Like the EC Draft Proposal the present proposal refrains from adding a specific rule for triangular situations which could be the worst nightmare of the law of unjust enrichment in substantive law. The possible situations are so diverse and manifold⁴⁵ that any attempt to draft rules covering them at least in their majority is doomed to failure. Article 10(1) in fine must not be understood as a conclusive answer as might be easily illustrated by a typical case of triangular situations where two possible claims in restitution lead to two different debtors and are governed by two different laws. However, art. 10(3) as a catch-all clause for rather uncommon and rare

⁴³ As sometimes was advocated in the past; cf. for possible reasons *Ernst Rabel/Ulrich Drobnig*, *The Conflict of Laws III*² (Ann Arbor, Mich. 1964) 194.

⁴⁴ Cf. only OLG 20. 6.1991, NJW 1992, 2367; v. *Staudinger(-Bernd v. Hoffmann)* (supra, at n. 42) Art. 39 EGBGB note 62.

⁴⁵ Cf. e.g. v. *Staudinger(-Bernd v. Hoffmann)* (supra, at n. 42) Art. 38 EGBGB notes 18–27.

cases and thus as a kind of ultima ratio should govern any restitutionary relationship that cannot be brought under art. 10(1) and (2).

Chapter 3

Common rules applicable to non-contractual obligations arising out of a tort or delict and those arising out of an act other than a tort or delict

Common rules applicable to non-contractual obligations arising out of a tort, *delict or quasi-delict* and those arising out of an act other than a tort, *delict or quasi-delict*

Article 11 – Freedom of choice

1. The parties may choose the law applicable to a non-contractual obligation. The choice shall be made expressly and shall not adversely affect the rights of third parties.

2. If all the other elements of the situation at the time when the obligation arises are located in a country other than that whose law has been chosen, the choice of the parties shall not prejudice the application of rules of the law of that country which cannot be derogated from (“mandatory rules”).

3. The choice of the parties of the applicable law shall not debar the application of mandatory provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the obligation came into being.

1. *Except for the cases covered by articles 6, 6a and 8*, the parties may choose the law applicable to a non-contractual obligation. The choice shall be made expressly and shall not adversely affect the rights of third parties.

2. If all the other elements of the situation at the time when the obligation arises are located in a country other than that whose law has been chosen, the choice of the parties shall not prejudice the application of rules of the law of that country which cannot be derogated from (“*internally mandatory rules*”).

3. The choice of the parties of the applicable law shall not debar the application of mandatory provisions of Community law where the other elements of the situation were located in one *or more* of the Member States of the European Community at the time when the obligation came into being. *The mandatory provisions of Community law shall be applied such as implemented in the law of the Member State which would be applicable in the absence of a choice.*

Comments

1. *Admissibility of the choice of law.* – The Hamburg Group basically approves of the admission of the free choice of law with regard to non-contractual obligations. However, the parties' choice should be without effect where public interests are or may be involved. This concerns competition law, which always aims at the protection of certain markets, not only in the interest of the market actors, but also with a view to the public good. Similar considerations apply to the infringement of industrial and intellectual property rights due to their territorial scope and to the protection of the environment which usually pursues some public interests beyond the protection of the landowners who are directly affected.

While GEDIP had proposed to admit the free choice of the applicable law only subsequent to the events that give rise to non-contractual liability, the EC Draft Proposal does not contain a similar restriction. In our view, that restriction is not indispensable. While there may be ethical objections to a choice of law antecedent to a non-consensual infringement of a victim's rights, such a choice prior to the harmful event can only be conceived in cases where a contractual relationship between the parties already exists at the time of the tort or delict or quasi-delict. Article 3(1) of the Rome Convention guarantees the free choice of law for that contractual relationship. Moreover, the synchronization of the choice of law for contractual and non-contractual obligations arising from the same fact-pattern appears highly desirable in view of the coordination that single legal systems provide with regard to the conditions and extent of liability, and the remedies granted. It is therefore very likely that the escape clause of art. 3(3) subpara. 2 DP (art. 11a[2] of the Hamburg alternative proposal) would be used to apply the law chosen by the parties for their contractual relationship to any non-contractual obligation. For all practical effects, this amounts to the admission of the choice of law antecedent to the harmful event with regard to non-contractual obligations.

2. *The reservation of mandatory rules.* – Article 11(2) DP corresponds to art. 3(3) of the Rome Convention. For the practical application of that convention two different concepts of mandatory rules are useful: The internally mandatory rules of a state which may not be derogated in cases without any transboundary element, but which may be ousted by a choice of a foreign law where the fact situation has some contact with a foreign country. The second group of mandatory provisions are the internationally mandatory rules dealt with in art. 12 DP and art. 7 of the Rome Convention; they are regarded as so important for the legal system of a state as not even to give way to the choice of a foreign law in transborder cases. This distinction should be clarified by appropriate terminology.

The Hamburg Group welcomes art. 11(3) DP. It will fill a gap that had been left open by art. 3 of the Rome Convention with regard to contractual

obligations. In intra-Community cases, the mandatory provisions enacted by the Community should in fact be treated like internally mandatory rules in art. 11(2) DP. Consequently, the choice of the law of a non-member state should not thwart the implementation of the mandatory Community provisions where all relevant elements of the situation are located within the Community, either in one or in more Member States. Unlike the French and the German versions of the draft proposal, however, the English text does not cover the case of an intra-Community, transborder fact situation. Such a situation has, from a Community point of view, the same characteristics as a fact pattern which is linked to one Member State exclusively; hence the added words “or more” in the Hamburg alternative proposal.

The mandatory provisions of Community law may be regulations or directives. In the latter case, the courts have to apply not the directive, but the national provisions adopted for its implementation in national law. But which national law? Should the judge enforce the *lex fori* or the law of the Member State that would be applicable without the choice of law? The latter solution would appear to be in line with the basic approach of the EC Draft Proposal and should therefore be added to the text.

The Hamburg Group would also like to point out that the reservation in favour of mandatory rules under art. 11(2) and (3) DP should not be confined to cases where the choice of law explicitly refers to non-contractual obligations, but also where a choice relating to contractual obligations results in a subordinate or synchronized application of the same law to the non-contractual obligations under art. 3(3) subpara. 2 DP (art. 11a[2] of the Hamburg alternative proposal).

[Art. 3(3) DP

However, if it appears from the circumstances as a whole that there is a substantially closer connection with another country and there is no significant connection between the non-contractual obligation and the country whose law would be the applicable law under paragraphs 1 and 2, the law of that other country shall be applicable. A substantially closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is linked to the tort or delict in question.]

Article 11a – Escape clause

1. If it appears from *all* the circumstances of an exceptional case that the non-contractual obligation is substantially closer connected with another country than with the country whose law would be applicable under the regular rules, the law of that other country shall be applicable.

2. A substantially closer connection with another country may be based in particular on a contract or another pre-existing relationship between the parties, provided that they could have chosen the applicable law for this type of non-contractual obligation under article 11.

Comments

1. *Problems involved in the current two-pronged approach.* – The current art. 3(3) DP opts for a two-pronged exception clause that is reminiscent of art. 10(2) of the 1972 EEC draft⁴⁶. This provision read as follows:

“However, if, on the one hand, there is no significant link between the situation arising from the event which has resulted in damage or injury and the country in which that event occurred and, on the other hand, the situation has a closer connexion with another country, then the law of that other country shall apply.”

Under art. 3(3) DP, two conditions have to be met simultaneously if the general rule is to be displaced:

(1) It must appear from the circumstances as a whole that there is a substantially closer connection with another country,

and

(2) there must be no significant connection between the non-contractual obligation and the country whose law would be the applicable law under paras. 1 and 2.

This two-pronged approach is problematic, because it combines a relative standard (“closer connection”) with an absolute one (“no significant connection”). Escape clauses in national codifications usually presuppose that a comparison has to be made between the proximity of a given case to the state whose law would be applicable under the general rule(s) and the connection of the case with another country. See, e.g., §48(1) 2nd sentence of the Austrian IPRG⁴⁷, art. 41(1) of the German EGBGB⁴⁸ and the very explicit s. 12 of the British PIL (MP) Act 1995⁴⁹, which mandates a “*comparison* of – (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and (b) the significance of any factors connecting the tort or delict with another country”. Since the escape clause in art. 3(3) DP can only be invoked if there is “*no significant connection* between the non-contractual obligation and the country whose law would be the applicable law under paragraphs 1 and 2”, it is difficult to see how the judge should compare the closeness of the connection between the non-contractual relationship and the country designed by the general rule with the closeness of the connection between the tortious relationship and another country. Under the narrow wording of art. 3(3) DP, it would not suffice if the judge considered the connection between the case at hand and the country designed by the general rules as clearly *less* significant

⁴⁶ See *supra*, at n.2.

⁴⁷ Bundesgesetz vom 15.6. 1978 über das internationale Privatrecht (IPR-Gesetz), BGBl. 1978/304.

⁴⁸ See *supra*, at n. 4.

⁴⁹ See *supra*, at n. 7.

than the connection between the case and another country. Only if there is *no* significant relationship between the case and the country whose law would normally be applicable could he or she depart from the general rules contained in art. 3(1) and (2) DP. The open question is how connecting factors which support the general conflicts rules of art. 3(1) and (2) DP (place of the harmful event, common habitual residence) and which are therefore deemed to have some significance could ever be regarded not only as comparatively *less* significant, but rather simply as *insignificant*.

In the light of this absolute standard, it is also difficult to see how the judge should handle the first branch of art. 3(3) DP. A connection with another country can only be deemed “substantially *closer*” if we know by which yardstick we have to measure this closeness. For example, *A* can be closer to *B* than to *C*, but *A* cannot be just “closer” without further information concerning the decisive question: closer compared to what? The obvious point of reference would be the country whose law would be applicable under art. 3(1) and (2) DP (the “regular country”). But even if this comparison leads the judge to consider the connection between the case and another country as substantially closer than that between the case and the “regular country”, this exercise would still lead him or her nowhere because of the following absolute barrier (“*no significant relationship*”).

In the face of this conundrum, judges have two options: First, they may opt for a literal application of art. 3(3) DP realizing that the requirement of the second branch (“no significant relationship”) can never be met, and thereby depriving the escape clause of any practical value. Second, they may apply the European escape clause just like they have applied their national escape clauses, i.e. comparing the two relevant countries’ competing connections with the case at hand and then deciding which connection is more or less significant (see s. 12 [1] of the British PIL [MP] Act 1995). This would be the only sensible approach, but hardly in line with the restrictive wording of the second branch of art. 3(3) DP.

2. *Alternative proposal.* – The second branch of art. 3(3) of the current draft seems to be motivated by the desire to prevent judges from being overly generous in departing from the general conflicts rules. This policy is sound, yet it should be pursued by other and less clumsy means.

a) *No “cherry-picking”.* – First of all, it makes sense to remind the judge that he or she has, in weighing the significance of the various connections, to take into account “the circumstances as a whole” (art. 3[3] of the current draft). This is well-established in several national codifications, see explicitly s. 12 of the British PIL (MP) Act (“in all the circumstances”), art. 3257 Louisiana Civil Code⁵⁰ (“totality of the circumstances”), art. 3082 Code civil québe-

⁵⁰ Louisiana Civil Code, Act No. 923 of 1991, H.B. 251 = Rabelsz 57 (1993) 508.

cois⁵¹ (“compte tenu de l’ensemble de circonstances”). This prevents judges from focussing on one single connecting factor just to satisfy their homing instincts (“cherry-picking”).

b) *Warning sign*. – Secondly, it is helpful to put up a *warning sign* that alerts judges to the fact that, by invoking an escape clause, they are departing from the main road and entering uncharted territory. The exceptional nature of escape clauses is highlighted in national laws by formulations such as a “*significantly* closer connection” (art. 41[1] German EGBGB), “*substantially* more appropriate” (§. 12[1] British PIL [MP] Act), “*clearly evident*” in an “*exceptional case*” (art. 3257 Louisiana Civil Code), “à titre *exceptionnel ... manifeste*” (art. 3082 Code civil québécois).

3. *Interpretation by Court of Justice*. – Finally legislators who decide to insert an escape clause into a codification of private international law make clear that they trust the judges who are to apply the law to do so in a methodologically correct and responsible way. Unfortunately, it is common knowledge that judges are all too often experts in substantive law, but significantly less competent in the conflict of laws. The solution to this problem lies not, however, in formulating verbose and clumsy conflicts provisions or setting up “laundry lists” of potential connecting factors (such as s. 12[3] of the British PIL [MP] Act, § 6[2] of the Restatement 2d or art. 3542 of the Louisiana Civil Code). The Member States should rather ensure that international cases are decided by well-qualified judges who have sufficient and specific legal knowledge and experience for this task. Moreover, the reference procedure under art. 234 EC could help to attain that objective. Given the limitations introduced by art. 68 EC one might consider a unanimous Council decision under art. 67(2) EC to restore the right of inferior national courts to refer cases to the Court of Justice for the purposes of the future Regulation.

4. *Accessory choice of law*⁵². – The proposed changes are mostly technical in nature and reflect the relocation of the escape clause in a new art. 11a. The sentence “*if the parties could have chosen the applicable law for this type of tort or delict*” is necessary for the sake of logical coherence with the restrictions proposed in art. 11(1) of the Hamburg alternative proposal.

⁵¹ Code civil du 18.12.1991, L.Q. 1991, ch. 64 = RabelsZ 60 (1996) 327.

⁵² See comment no. 6 on art. 3 DP, *supra*.

[Article 4(1) DP

The law applicable to a tort or delict occurring in areas not subject to the territorial sovereignty of a State shall be the law of the country in which the means of transport or the installation connected with the tort or delict is registered or whose flag it flies or with which it has similar connections.]

[Article 4(2) DP

If there is no connection with a specific country or if there is a connection with several countries, the applicable law shall be that of the country with which the case is most closely connected.]

Article 11b – Acts in areas not subject to territorial sovereignty

1. Subject to Article 11a, the law applicable to a non-contractual obligation arising from acts occurring aboard a ship on the High Seas or a flying aircraft shall be the law of the country the flag of which the ship is entitled to fly or the law of the country where the aircraft is registered.

2. The law applicable to a non-contractual obligation arising from acts occurring in an area not subject to the territorial sovereignty of any State shall be the law of the country with which the case is most closely connected.

Article 11c – Supplementary rule

If the connecting factors named in Articles 3 to 8, 10 or 10b are not discernible or point to the laws of several countries, the applicable law shall be the law of the country with which the case is most closely connected.

Comments on articles 11b and 11c

1. *Revision of basic structure.* – Article 4 is both misworded and misplaced, but not entirely misconceived. It only needs severe re-editing. To serve its function as a general supplementary rule properly, it ought to be placed in chapter 3 of Title II on common rules applicable to non-contractual obligations of all kinds. Further on, the heading of art. 4 DP (“Areas not subject to territorial sovereignty”) does not cover the content of art. 4(2) DP which contains an auxiliary rule supplementing the other conflict rules in case they do not provide for an unambiguous reference of a given case to a single national law; this rule is unrelated to the particular problems of locations not subject to national sovereignty. The proper solution is that the content of art. 4 DP should be split into two different articles.

2. *Supplementary rule.* – Article 11c of the Hamburg alternative proposal replaces the misworded art. 4(2) DP. To oblige judges and lawyers to search for the closest connection if there is no connection at all, as art. 4(2) DP urges to do, would pose an eternal conundrum. The proposed art. 11c reflects the concept and falls back on the general rule of looking for the closest connection once more. Secondary connecting factors not named in arts. 3 to 8, 10 or

10b might come in to break the deadlock if the primary connecting factors, with equal weight, point to the laws of different countries. However, art. 11c does not apply if there exists a reasonable possibility for a ranking of the named connecting factors, allowing one connecting factor to prevail over the others. Nor does art. 11c apply to multistate torts; here, the connecting factors named in the preceding articles may equally point “to the laws of several countries”, but with regard to different fact patterns. Article 11c presupposes an ambiguous reference with regard to one and the same fact situation.

3. *Vessels and aircraft.* – The proposed art. 11b(1) is an appropriate rule for any act occurring aboard ships and aircraft outside territorial realms of any State⁵³, while art. 4 DP does not address these cases clearly. It should be required that the ship is entitled to fly the flag of the State in question. Thus cases where ships fly flags without the permission of the respective State are subject not to para. 1 but to para. 2 of art. 11b (which does not automatically exclude the unlawfully flown flag from being taken into consideration). However, the rule now expressed in art. 11b(1) must not be intermingled with other considerations as it unfortunately happened in art. 4(1) DP. Not every act occurring outside the realm of genuinely territorial reach happens to occur aboard a ship or aircraft. Hence, art. 4(1) DP is incomprehensive and misguided at the same time.

4. *Other cases.* – Article 11b(2) of the Hamburg alternative proposal provides a supplementary or auxiliary rule for the unlikely, but not wholly impossible case that the act occurs outside the territory of any State and not aboard a ship or aircraft. A possible example could be a collision on the High Seas or an act committed on an oil drilling rig outside any territorial waters (if the oil drilling right cannot be attributed to a “Flag State” by means of registration) or in Antarctica. In this rare event one cannot do better than to fall back on the general rule backing private international law and to look for the closest connection⁵⁴. This solution gains some support from art. 4(1) and (2) 3rd sentence of the Rome Convention. However, para. 2 does not apply if the injury is sustained in the coastal zone or in waters above the continental shelf. In these events the law of the relevant coastal state ought to be applied⁵⁵.

⁵³ Cf. OLG Frankfurt a.M. 13.2. 1997, TransportR 1998, 62; *v. Staudinger(-Bernd v. Hoffmann)* (supra, at n. 42) Art. 40 EGBGB note 36.

⁵⁴ This might result in the application of the law of the country where the company running or controlling the installation has its central administration or its statutory seat; *v. Staudinger(-Bernd v. Hoffmann)* (supra, at n. 42) Art. 40 EGBGB note 36. Where territorial bonds of actions or objects fail and do not establish some kind of localization, personal bonds (i.e. bonds connecting a relevant person with a certain country) generally might provide a feasible solution; compare *PeterMankowski*, Das Internet im Internationalen Vertrags- und Deliktsrecht: RabelsZ 63 (1999) 203–294 (265 et seq.).

⁵⁵ Compare ECJ 27.2. 2002 – case C-37/00 (*Herbert Weber v. Universal Ogden Services Ltd.*) (concerning Article 5 no. 1 sentences 2 and 3 of the Brussels Convention), EuZW 2002, 220.

Article 12 – Mandatory rules

Nothing in this Regulation shall restrict the application of the mandatory rules of the law of the forum irrespective of the law otherwise applicable to the non-contractual obligation.

Article 12 – *Internationally mandatory rules*

1. *When applying, under this Regulation, the law of a country, effect may be given to the mandatory rules of the laws of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the case. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

2. Nothing in this Regulation shall restrict the application of the *internationally* mandatory rules of the law of the forum irrespective of the law otherwise applicable to the non-contractual obligation.

Comments

Article 12 DP reserves the application of those rules of the *lex fori* which are deemed to be internationally mandatory, hence the change of title suggested by the Hamburg Group. While art. 12 DP corresponds to art. 7(2) of the Rome Convention, the special reference to internationally mandatory rules of a foreign law contained in art. 7(1) of the Rome Convention is addressed in the EC Draft Proposal. The Hamburg Group acknowledges that the need for such a rule, which is undisputed in contract law, may not be quite the same with regard to non-contractual obligations. However, the former sweeping rejection of foreign mandatory rules has given way to a more differentiated assessment. The rapid increase in the number of international contacts favours the insight that legal systems have to take into consideration not only traditional private law of foreign countries, but also certain mandatory provisions of those states. Against this background, the elimination of art. 7(1) of the Rome Convention from the EC Draft Proposal is a regrettable step backward.

Article 13 – Rules of conduct and safety

Whatever may be the applicable law, in determining liability account shall be taken of the rules of conduct and safety which were in force at the place and time of the act giving rise to non-contractual liability.

Article 13 – Binding local regulations of traffic and like conduct

In determining liability under the applicable law, account shall be taken of binding local regulations of traffic or like conduct which are of general application and were in force at the place and time of the conduct giving rise to non-contractual liability.

Comments

Article 13 DP follows the model of art. 7 of the Hague Convention on the law applicable to traffic accidents of 1971⁵⁶ which in turn responds to the obvious need to take into account the traffic regulations of the country where the accident occurred even if the non-contractual liability arising from that accident is subject to a different law. For example, when assessing the mutual claims of two Frenchmen involved in a road accident in the U.K., the court, in applying French law, cannot disregard that driving on the left-hand side is prescribed by English law, i.e. by so-called local data. The EC Draft Proposal has extended the scope of this rule to non-contractual liability in general, which reveals the uncertainties inherent in this rule and the threat it presents for the operation of the other conflict rules of the EC Draft Proposal.

To put it in general terms, it could be said that conduct as a connecting factor would first be thrown out by the door of art. 3(1) DP but return by the window of art. 13 DP. This can be illustrated by examples relating to the special conflict rules of the EC Draft Proposal some of which may be regarded as special imprints of the general rule referring to the place of injury. For example, take the connecting factor of the target market under art. 6 DP and suppose that a trader established in country A offers goods to be sold in a clearance sale in country B; assume further that the clearance sale is illegal under the laws of B while it is lawful in A. The seller's competitors in the market of B who seek an injunction against the sale and damages for loss of business will be unsure whether the court will grant the claim applying the laws of B under art. 6 DP or whether it will dismiss the claim on the basis of art. 13 DP. This situation may be similar with regard to defamatory statements in the press: would a court rely on art. 13 DP to apply the law of the country of publication which perhaps protects the freedom of speech of the media in a very generous way? Or would it take recourse to the law of the victim's residence

⁵⁶ Convention on the Law Applicable to Traffic Accidents, Done at The Hague on 4 May 1971, in: Hague Conference on Private International Law, Collection of Conventions (1951–1980) 142.

under art. 7 DP? Another example would be the pollution of a river in a down-stream country which is caused by a dump in an up-stream state and which is permitted by an administrative licence of that country. Would the judge dismiss the claims based upon the law of the down-stream country applicable under art. 8 DP because s/he has to take into account the law of the up-stream state under art. 13 DP?

The examples clearly demonstrate that art. 13 DP is too wide. The language of art. 13 DP furthers the (wrong) impression that the rules of conduct and safety entirely replace the applicable law governing liability. The legitimate aim of the article is, however, only to give adequate weight to binding local regulations within the liability rules of the applicable law. In road traffic, where this conflict rule has been conceived, the “rules of conduct and safety” mean the binding local traffic regulations (speed limits, traffic signs etc.). They are expected to be observed by everyone participating in public traffic because those rules are necessary and of general application. There is, therefore, hardly any doubt that the prescriptive or prohibitive rules of the place of acting have to be taken into account by the judge when applying the law that governs the claim as such. Otherwise the person held responsible would be pushed into a conflict of duties arising under the laws of different countries. However, the recognition of local regulations at the expense of the otherwise applicable law must be strictly confined to rules of the character of local traffic rules that prohibit or prescribe a certain conduct. This becomes particularly clear when permissions or permissive rules and their extraterritorial effects are at stake. When the applicable law provides for liability a permission granted in one country or a conduct allowed there cannot and should not serve as justification to injure persons in another country. A state and its residents cannot expect the home rules to be taken into account if the behaviour permitted there injures people in foreign countries. There may be a case for the respect of such rules within the European single market under art. 23 DP, but this depends on the subject and cannot be extended to the relations with third states. The Hamburg Group therefore proposes to restrict the rule contained in art. 13 DP to binding local regulations such as the local traffic rules.

Article 14 – Direct action against the insurer of the person liable

1. Persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right under the law applicable to the non-contractual obligation.

The injured person’s right of direct action against the insurer of the person liable is determined by the law which is applicable to the non-contractual obligation or by the law governing the contract of insurance, whichever is more favorable to the injured person.

2. If this law does not provide any such right, it may be exercised if it is provided by the law governing the contract of insurance. See preceding paragraph.

Comments

Article 14 DP is drafted as a substantive rule that would appear as an alien element in an instrument on private international law; the Hamburg Group therefore suggests to adjust its style to other provisions.

As to the substance, it appears that art. 14 DP purports to favour the victim by allowing him/her to base a direct claim either on the law applicable to the non-contractual obligation or on the law governing the contract of insurance. However, this favour is inconsistent and half-hearted, since the second option, i.e. the law governing the contract of insurance, is only open to the victim if the law applicable to the non-contractual obligation “does not provide any such right”. It necessarily follows that the former option is unavailable if the law applicable to the non-contractual obligation provides for a direct action within certain limits or restrictions. The technique of the alternative availability of two national laws, as suggested by the Hamburg alternative proposal, appears to implement the intended favour of the victim more thoroughly.

Article 14a – Voluntary assignment

1. *The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which applies to the contract between the assignor and assignee.*

2. *The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.*

3. *Validity and Effects of the assignment with regard to third parties are governed by the law of the assignor's habitual residence.*

Article 15 – Subrogation

1. Where a person (“the creditor”) has a non-contractual claim upon another (“the debtor”), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person’s duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part.

2. The same rule shall apply where several persons are subject to the same claim and one of them has satisfied the creditor.

Article 15 – Subrogation and multitude of debtors

1. Where a person (“the creditor”) has a non-contractual claim upon another (“the debtor”), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person’s duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part. *The law governing the debtor’s obligation remains applicable to its enforcement and to the debtor’s protection, excluding the question whether the right can be subject to subrogation at all.*

2. Where several persons are subject to the same creditor’s claims arising from the same fact pattern, and one of them has satisfied the creditor of these claims, the law governing this debtor’s obligation also governs that person’s right to contribution from the other persons. *Where the law governing those other persons’ obligations towards the creditor contains rules deemed specifically to protect them from liability, those rules are equally applicable against the claim for contribution.*

Comments on articles 14a, 15

1. *The Concept of Art. 15 DP.* – Article 15 DP does not only deal with “subrogation”, as its overly narrow title suggests, but with several cases where one party fulfils the creditor’s claim and then, because of this, demands reimbursement or contribution from someone else. The difference between paras. 1 and 2 is in the relation between the obligations of the party who pays to the creditor, and the party asked for contribution or indemnity. Consequently, the typical cases arising under art. 15(1) and (2) DP respectively are different.

Paragraph 1 regulates the case in which the third person acquires the right the previous creditor had against the debtor. The reason for this typically is that the third person’s and the debtor’s obligations are not on equal footing, but the debtor’s obligation is primary to the one of the third person that ac-

tually pays. The typical case in the law of torts is that of an insurer who pays because of a contractual obligation towards the debtor, irrespective of whether the tort victim has a direct claim against the insurer or not.

Paragraph 2, to the contrary, deals with the case of equally obligated debtors ("same claim"), one of whom has paid and now asks for contribution from the other. The technical basis for this claim is irrelevant. The typical case in the law of torts is that of several tortfeasors being jointly (in a non-technical sense) liable to the tort victim and one of them satisfying the victim's claim.

Article 15 DP is almost identical to art. 13 of the Rome Convention. This is justified in part by the parallel structure and is in accordance also with the proposal of GEDIP. Yet some problems are specific to non-contractual obligations or at least rest on different considerations. More importantly, a new regulation offers the possibility of improvements or at least clarifications.

Missing from art. 15 DP are two bigger questions. First, the proposal, unlike the Rome Convention (see art. 12), fails to address in any provision the voluntary assignment of claims. Secondly, like the Rome Convention, the proposal does not deal with the case in which the person asking for contribution or indemnity has paid without an own obligation. This is arguably a case of restitution (*negotiorum gestio*) and should be regulated there (see art. 10b[2] of the Hamburg alternative proposal).

2. *Voluntary assignment.* – Although the assignment of non-contractual rights is not infrequent, voluntary assignment is not regulated in the proposal. Further, whether the assignment of non-contractual claims falls under art. 12 of the Rome Convention is disputed and unclear. Arguably, due to the language of art. 1(1) of the Rome Convention, only the assignment of rights from contractual obligations is therein addressed. Further doubts arise because art. 9 no. 6 DP specifically subjects assignability to the law determined under the draft proposal and thereby repeats part of art. 12(2) of the Rome Convention. This invites the unwelcome argument that, *e contrario*, the other questions under art. 12(2) of the Rome Convention do not, at least automatically, fall under the EC Draft Proposal.

It is proposed to copy art. 12 of the Rome Convention into this regulation for purposes of clarification. In this respect, a problem left open in the Rome Convention should be regulated as well, namely the question of the law determining the validity of the assignment with regard to third parties, and most notably the creditors of the debtor and of the assignor. Several connecting factors have been proposed in the discussion: the law applicable to the assigned right itself, the assignor's or the assignee's habitual residence, or even the law applicable to the assignment contract itself, enabling assignor and assignee to determine that law with regard to third parties. While no clear convergence towards one particular solution is visible thus far, the question should, because of its importance, not be left open. There appears to be a growing tendency towards either application of the law governing the as-

signed right, or of the assignor's habitual residence at the time when the assignment is entered into. This latter solution also seems to be in accordance with the relevant interests, mainly because the assignor and therefore the applicable law are recognizable to all parties alike both before and after the assignment takes place⁵⁷. In the opinion of the Hamburg Group, this should be regulated in a new para. 3, which can also serve as a model once the Rome Convention is replaced by a regulation.

3. *Basic Approach of art. 15(1) DP.* – Although the wording of the provision appears somewhat clumsy and unnecessarily complicated, it should not be altered at this stage due to the parallel wording of art. 13(1) of the Rome Convention. Applicability of the law governing the third person's liability to compensation appears plausible and is in accordance with major legislation and doctrinal writers. It is justified by the close connection between the third party's obligation to compensate on the one hand, and his/her interest in having recourse against the debtor who is primarily responsible on the other.

The proposed art. 15(1), like art. 13(1) of the Rome Convention, only regulates the case in which the third person acquires the creditor's right (*cessio legis*), or the right to enforce that right (subrogation). As in art. 13 of the Rome Convention, *cessio legis* must be considered to be included (as the German version suggests). Other cases of recourse outside subrogation and *cessio legis* are different because the particular right against the debtor, or the right to enforce it, is not transferred. It is therefore justified to keep these cases outside the scope of this rule; they should be dealt with in the context of the chapter on restitution including *negotiorum gestio* (see art. 10b of the Hamburg alternative proposal).

An insurer has the duty to indemnify the insured; this (usually contractual) duty determines the law applicable to the recourse under art. 15(1). This should also be understood to be the case where the tort victim has a direct claim against the insurer. While one might argue, technically, that in such a case the insurer pays in discharge of a duty towards the victim, the underlying duty stems from its contract with the insured. Because this is also the law most predictable for both insurer and insured and because the victim's interests are not affected, it is therefore more legitimate than the law governing the victim's direct claim against the insurer. It seems unnecessary to change the wording in order to make this clear, as long as such an understanding is agreed to underlie the provision.

4. *The debtor's protection.* – An unregulated question is the impact of the law governing the debtor's obligation to the creditor. Clearly, the obligation is enforced according to the law governing that obligation, after it has been transferred or subrogated. Other aspects are less clear.

⁵⁷ See in more detail *Eva-Maria Kieninger*, *Das Statut der Forderungsabtretung im Verhältnis zu Dritten*: RabelsZ 62 (1998) 678–711.

The rule is silent with regard to the debtor's protection, although there is virtual agreement that the debtor's position should not be worsened by the *cessio legis*/subrogation, and that therefore specific rules for his/her protection under the law governing his obligation remain applicable. This should be made clear, as e.g. in art. 146(2) of the Swiss Law on Private International Law⁵⁸.

Finally, like the Rome Convention, the proposal does not make clear whether the law governing the debtor's obligation should also apply to the question of whether the right can be subrogated at all. If it did apply, a situation could arise in which, because of different applicable laws, the third person would be obliged to pay, but would not receive the right against the debtor in return. This would be unfair as against the third person, because that person's obligation to pay and his/her right to recourse are intimately connected, and because the debtor does not require this degree of protection. On the other hand, the mere change in the position of the creditor is not detrimental to the debtor, as long as s/he maintains the same protection as s/he had against the old debtor. It is therefore justified to treat provisions that restrict transferability differently from provisions for the debtor's protection.

5. *Redrafting of art. 15(2) DP.* – There are several problems with art. 15(2) DP. First, it suffers from the same unclear formulation as its model, art. 13(2) of the Rome Convention. “The same rule” may be sufficiently clear, although subrogation is a different case from the one regulated here. The formulation “the same claim”, however, has already led to dispute in art. 13(2) of the Rome Convention; the chance should not be missed to reach more clarity here. Also, it is unclear what “the same claim” means.

In its content, art. 15(2) DP appears justified, although the situation dealt with here is substantially different from that of art. 15(1) DP. Problems may arise in the case of different laws governing the obligations of different tortfeasors, a situation favoured by conflicts rules allowing for different connecting factors apart from just the place of the injury.

Application of the law under which the tortfeasor seeking contribution was obliged to compensate the victim appears justified. S/he is in a worse position than the other joint tortfeasors, because s/he has already paid and now runs the risk of having to seek contribution. It appears to give him/her at least the privilege to see “his/her” law applied to that contribution. As a result, though, a tortfeasor may be confronted with a claim to contribution under a law different from the one governing his/her own obligation towards the tort victim. Some argue against this possibility. They are afraid of a race between the tortfeasors towards compensation, because the one compensating the victim first would thereby secure applicability of his/her own law to contribu-

⁵⁸ Les dispositions du droit régissant la créance qui sont destinées à protéger le débiteur sont réservées, cf. supra, at n. 6.

tion. However, this argument is weak. To the contrary, a race between several tortfeasors may even be desirable, because it is in the victim's interest.

Some argue for a general rule under which contribution should always be regulated by the law of the place of the tort. The argument is that different laws will govern the several tortfeasors' obligations only where for at least for one of them the place of the tort, as the general criterion to determine the applicable law, is replaced by another specific criterion. It is argued that such a criterion, making the relation between that tortfeasor and the victim special, should be irrelevant for the other tortfeasors, and that the *lex loci delicti* as the "normal" law should continue to govern the claims between the tortfeasors. Yet even though *lex loci delicti* may still be the general rule in the draft proposal, it is hardly more than a residual rule, and the exceptions are so numerous that the argument seems weak.

Structurally, while the obligation of the person compensating the creditor is typically one of tort law, the question as to his/her recourse against the other tortfeasors is one of restitution. This may look like an argument against the application of the law governing his obligation towards the victim, and one might argue that the applicable law should be determined differently. This is, however, unconvincing, at least as a general rule. Contribution between several debtors is only a question of distributing non-contractual liability towards the creditor, it is so closely related to that liability that applying a different law normally appears artificial and may lead to problems. One might be inclined to argue differently if there is a special contractual relation between the several tortfeasors. Take the example of several directors of a company jointly liable for damages inflicted upon a third person, only one of whom compensates that person. Seemingly, the law governing the company should also determine claims to contribution. Yet, while it is true that that special relation should normally prevail, this need not – and should not generally – be done with choice of law instruments. Just as in other cases in which there is concurrence of different claims underlying different laws (e.g. a contractual and a tortious claim), the question can be dealt with more flexibly in the application of the different substantive laws determined by the different choice of law provisions⁵⁹.

Finally, neither this proposal, nor art. 13(2) of the Rome Convention, apply, on their faces, to situations in which both contractual and non-contractual claims are involved. Because the rules are, substantively, the same, however, this situation should not deserve its own conflicts rule.

6. *Escape Clause.* – While these rules should provide legal security and just results for most cases, situations of more than two persons like this one are particularly inapt for a priori rules governing all imaginable and unimaginable

⁵⁹ See *Manfred Wandt*, Zum Rückgriff im internationalen Privatrecht: ZVglRWiss. 86 (1987) 272–313 (287–289).

cases. This is true in particular for the case of art. 15(2) if the several tortfeasors' liability to the victim looks different under different laws ("gestörter Gesamtschuldnerausgleich"). It is therefore desirable to have an escape clause (see art. 11a of the Hamburg alternative proposal).

Article 16 – Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done. No changes

Article 17 – Burden of proof, etc.

1. The law governing non-contractual obligations under this Regulation applies to the extent that it contains, in matters of non-contractual obligations, rules which raise presumptions of law or determine the burden of proof. No changes

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 16 under which that act is formally valid, provided that such mode of proof can be administered by the forum. No changes

Title III – General Provisions

Article 18 – Habitual residence

1. For bodies corporate or unincorporate, the central administration shall be considered to be the habitual residence. No changes

2. Where the act giving rise to the non-contractual obligation is perpetrated or suffered in the exercise of a trade or a profession, the principal place of business shall be considered to be the habitual residence. Where there is more than one place of business, the one at which the harmful event was perpetrated or suffered shall be considered to be the habitual residence.

No changes

Article 19 – Exclusion of renvoi

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.

No changes

Article 20 – “Ordre public”

The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (“ordre public”) of the forum.

No changes

Article 21 – No retrospective effect

This Regulation shall apply to non-contractual obligations deriving from acts occurring after its entry into force.

No changes

Article 22 – States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

No changes

2. A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.

No changes

Article 23 – Relationship with other provisions of Community law

1. This Regulation shall not prejudice the application of provisions which are or will be contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:

- in relation to particular matters, lay down choice of law rules relating to non-contractual obligations; or
- lay down rules which apply, irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or
- prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject services to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances.

1. This Regulation shall not prejudice the application of provisions which are or will be contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities *or national provisions adopted for their implementation* which:

- in relation to particular matters, lay down choice of law rules relating to non-contractual obligations; or
- lay down rules which apply, irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or
- prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments *or national provisions adopted for their implementation* which, in relation to particular matters and in areas coordinated by such instruments, subject services to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances.

Comments

Article 23 DP deals with very heterogeneous problems: the relation between the EC Draft Proposal and other conflict rules on non-contractual obligations contained in instruments of secondary Community law (para. 1, 1st point); the respect of internationally mandatory rules of Community law (para. 1, 2nd point); the relation between the private international law rules contained in the EC Draft Proposal and some directly applicable rules of primary Community law (para. 1, 3rd point); and the respect of Community law instruments which prescribe the country-of-origin principle for some services (para. 2). The mix of problems creates a rather incoherent piece of legislation. The only common feature of the various issues treated in this article is the relation with other Community law instruments.

The first point of para. 1 is an expression of the general principle *lex specialis derogat legi generali*. Rules of this type are usually allocated among the “general provisions” of statutes. This is different for the second point of para. 1. The regard of mandatory rules irrespective of the national law governing the non-contractual obligation would have to be classified in connection with art. 12 DP in the Third Chapter of Title II on “common rules”. One might even question the need for art. 23(1) 2nd point DP as an additional rule next to art. 12 DP. The future regulation as such will only be applied by courts of Member States; it is submitted that Community instruments which lay down rules that apply irrespective of the national law governing the non-contractual obligation be included in the “mandatory rules of the law of the forum” for the purposes of art. 12 DP. The Community instruments referred to in art. 23(1) 3rd point DP, which prevent the application of a provision of the applicable law, are essentially some directly applicable provisions of the Treaty. In substance, art. 23(1) 3rd point DP simply is declaratory of the primacy of the Treaty and in particular of some of its directly applicable provisions such as the basic freedoms. Although such a reminder is rather unusual in Community instruments of secondary legislation, it might be useful in this context, since the addressees of the future regulation are thus invited to consider the impact that some provisions of the Treaty may have on the conflict of laws.

Article 23(2) DP apparently refers to Directive 2000/31 on electronic commerce in the internal market⁶⁰. It should be recalled that the meaning of that directive is far from clear as far as private international law is concerned⁶¹. It is difficult to see how the reservation contained in art. 23(2) DP can clarify

⁶⁰ Directive of the European Parliament and of the Council of 8. June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce), O.J. EC L 178/1.

⁶¹ See *Peter Mankowski*, *Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie*: ZVglRWiss. 100 (2001) at 137 et seq.

the purpose and content of that very unfortunate directive. As far as specific and limited subject matters such as advertising are concerned, it would rather appear appropriate to adopt a conflict rule openly connected to the country-of-origin principle as an exception to art. 6 DP (see art. 6[2] of the Hamburg alternative proposal).

Both paras. of art. 23 DP refer to acts or instruments of the Community and apparently purport to include directives. Since directives lack a direct horizontal effect, they are not applicable as such in private law litigation. The Commission should therefore consider adding the reference to the national provisions adopted for the implementation of the directives which is contained in the Hamburg alternative proposal.

Article 24 – Relationship with existing international conventions

This Regulation shall not prejudice the application of international conventions to which the Member States are party when this Regulation is adopted and which, in relation to particular matters, lay down choice of law rules relating to non-contractual obligations.

Article 24 – Relationship with international conventions

This Regulation shall not prejudice, *as far as the relation to states that are not members of the European Community is concerned*, the application of international conventions to which *one or more* of the Member States are *or may become* party and which, in relation to particular matters, lay down choice of law rules relating to non-contractual obligations.

Comments

According to art. 24 DP, existing conventions to which the Member States are parties shall not be touched by the regulation. For some Member States this takes such important areas as traffic accidents and product liability out of the scope of the proposal. This reduction in scope is undesirable, because it maintains discrepancies between the Member States' conflicts rules in important areas, thereby depriving the regulation of much of its unifying effect. A similar reservation may have been necessary for the Rome Convention (see its art. 21), which, as a convention between sovereign states, stood on the same level as those other conventions. With regard to the new Regulation which will be enacted as a Community act it is inadequate and, in its scope, unnecessary. Under art. 307 EC, certain treaties to which the Member States are parties take priority over obligations imposed upon them by Community law only with regard to third States. It follows and is common ground that Community law prevails over treaties concluded by the Member States *inter se*. This takes account of the Community's legitimate interest in regulating internal matters, while other states' interests are not infringed absent a relevant

connection to them. It is therefore proposed to make an exception for existing conventions only insofar as relations to non-Member States are concerned.

If those Member States that are parties to these conventions strongly favour their content, they should rather argue for the inclusion of this content into the proposal instead of an exception from its scope of application. This would avoid conflicts between the regulation and those conventions. The alternative to fully adopt the content of these conventions into the regulation, however, must be rejected. In a possible new discussion of the advantages of these conventions it should be kept in mind that several Member States have deliberately refrained from becoming parties to these conventions for good reasons.

Affirming the strict priority of the future Regulation with regard to intra-Community relations would, at the same time, allow for more flexibility in respect of future international conventions that may be concluded with third States. The need for specific treaties with third States may be felt in single Member States only and not by the Community institutions. In such situations, art. 24 DP would exclude the Member States from concluding a treaty they deem desirable. By allowing for such future treaties as well, the proposal of the Hamburg Group opens a gate for specific needs of single Member States without encroaching upon the unity of conflict rules in the EC at which the coming Regulation primarily aims.

A different question arises when the EU itself, at a later stage, wants to become a party to conventions in the area of choice of law of non-contractual obligations. In this way, the EU could both achieve more unity in worldwide private international law provisions, and it could influence the content of these and other conventions in the (re-)negotiations. According to general principles, the EU should have the external competence to enter into such agreements once it has exercised its competence internally.

Title IV – Final clauses

Article 25

This Regulation shall enter into force six months after its publication in the Official Journal of the European Communities.	No changes
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This Regulation shall be binding in its entirety and directly applicable in all Member States.	No changes
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