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THE PITFALL OF INTERPRETING ROME II REGULATION CONSISTENTLY WITH BRUSSELS I REGULATION[1]

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Annotation. *This article addresses several aspects of interaction between procedural and conflict rule regulation in private international law both of which are subject to unification process under the European Community law. They are interdependent of each other, and use the same or similar terms on many occasions. Problems with interpretation arise in application of these legal regulations. The European Court of Justice addresses them more or less successfully. As demonstrated in this article, the interpretation of procedural rules of regulation may contribute to the clarification of the conflict rules and vice versa. It can be even said that the mutual interaction of conflict rules and procedural rules through interpretation is both unavoidable and desirable.*

Keywords: *Non-contractual obligation, delict, tort, Brussels I Regulation, Rome II Regulation, unification, interaction, interpretation, qualification, unjust enrichment, pre-contractual liability, European Court of Justice, Kalfelis, Mines de potasse d'Alsace.*

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1. General introduction

The topic I would like to deal with in this article falls within the scope of the European area of freedom, security and justice (European judicial area). I do not want to deal either with the history or the development of this phenomenon or with the territorial aspects but would like to concentrate on a specific segment of its substantive content.

The conception of the whole European judicial area is based on the idea that sufficient and required level of economical integration may not be attained without a corresponding level of legal cooperation. This idea is reflected both in the internal deliberations of the EU as it is documented by many Action Plans of the Council and the Commission[2] and by adoption of many legal acts of various character – international treaties in the past and regulations in the present regulating both procedural and conflict rules. Substantive level of law has not been subjected to the more global form of unification though some particular parts have already been unified. For many years there has been no other directly applicable legal regulation of private international law than the Brussels and Rome Conventions[3] despite of works in progress in respect of Brussels II Convention and others. It was because of the lack of competence of the EC institutions in the field of private international law ("PIL") – the EC Treaty[4] did not provide for a possibility to adopt legal regulations in this area. Therefore the only possible legal basis was Article 293 (ex-220) of the EC Treaty which assumed cooperation among the member states by means of international treaties (called by some authors[5] as EC tertiary law or subsidiary treaties) on *inter alia* simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts. The main reason for slow unification of legal rules was the requirement to conclude an international treaty – some states were unwilling to transfer their sovereignty to the EC, and since they were free to decide on whether to become a party to a treaty or not, they were reluctunt both negoting or signing them. Therefore only those two international treaties were adopted. The change was brought by the Amsterdam Treaty which amended the EC Treaty by inserting new Articles 61–69. These Articles, especially 61[6] and 65[7] vested new powers to the Euro-

2 Action Plan of the Council And the Commission on How Best To Implement the Provisions of the Treaty of Amsterdam On an Area of Freedom, Security and Justice (1999/C 19/01), Presidency Conclusion, Vienna European Council 11 and 12 December 1998; Presidency Conclusions, Tampere European Council 15 and 16 October 1999.

3 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 1968 and Rome Convention on the law applicable to contractual obligations of 1980.

4 Treaty Establishing the European Economic Community/Treaty Establishing European Community, 1958.

5 Pauknerová, M. *Evropské mezinárodní právo soukromé*. Praha: C.H.Beck, 2008, p. 44; Pauknerová, M. Evropské mezinárodní právo soukromé a procesní - aktuální otázky. *Evropské právo*, 2003, 8: 1 - 6.

6 In order to establish progressively an area of freedom, security and justice, the Council shall adopt: … c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;

7 Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:
(a) improving and simplifying:
– the system for cross-border service of judicial and extrajudicial documents,

pean institutions which have obtained the authority to adopt legal regulations in the area of PIL. These new powers were widely discussed but their analysis is not the aim of this article therefore I refer to more detailed studies on this issue.[8] Nevertheless many of the commentaries of prominent scholars criticized the new powers of the EC institutions in the field of private international law, as the member states have not themselves taken action on the issue and it resulted in adoption of many new regulations eventually transforming previous international treaties into community regulations.[9] One of these new articles has also brought a certain change into the process of interpretation of the legal acts relating to the European area of freedom, security and justice. It is the Article 68 which changes the provision of the Article 234 in the sense that only those courts against whose decisions there is no judicial remedy under national law may request ECJ for a preliminary ruling.

In this article I would like to discuss only the field of delicts – torts.[10] Procedural issues became regulated much earlier than conflict issues by adoption of the Brussels

– cooperation in the taking of evidence,
– the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

8 I do not want to analyse more deeply the question whether the closer legal integration is or not foreseen by the EC Treaty and therefore is or is not possible, or more precisely whether the EC institutions exceed the power vested in them. In this sense I refer to: Remien, O. Community Law versus Conflict of Laws. *Common Market Law Review*. 2001, 38: 53-86. p. 74.; Basedow, J. The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam. *Common Market Law Review*. 2000, 37 (3): 687-708. p. 697; Hamburg Group For Private International Law. Comments on the European Commission's Regulation on the Law Applicable to Non-Contractual Obligations. *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, 2003, 67, p. 4. de Oliveira, H.U.J. The EU And a Metamorphosis of Private International Law. In *Reform and Development of Private International Law*, Oxford: Oxford University Press, 2002, p. 134.

9 E.g. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I, previous Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis), Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I, previous Rome Convention on the law applicable to contractual obligations).

10 In the history the term "tort"is reserved for common-law system countries while the "delict"is used in continental-law countries. In the EC background it is not possible to accept this longstanding rule any more. Many

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in 1968. Later it was transformed into a Regulation no. 44/2001/EC with the same title abbreviation of Brussels I Regulation. Its Article 5(3) establishes the rules for jurisdiction in case of delict/tort. Conflict of rule regulation followed much later as Regulation no. 864/2007 on the law applicable to the non-contractual obligation (Rome II). The Rome II Regulation was adopted in July 2007, published in the Official Journal of the European Union on 31 July 2007 and entered into force on 11 January 2009. However, the history of Rome II is somewhat longer. The original draft of the Rome Convention (on the law applicable to contractual and non-contractual obligation) from the early 70s included conflict rules for both contractual and non-contractual obligations. Its drafting was initiated before the United Kingdom and Ireland became EC members. After the accession of these two states the preparatory works slowed down because of differences between continental and common law especially in the area of delicts/torts. Finally it was agreed to exclude non-contractual conflict rules from the scope of the regulation restricting the scope of the draft to conflict rules for contractual obligations.[11]

2. Interaction of the Separate Levels of Legal Regulation in Delicts/Torts

The basic purpose of private international procedural law is to determine the jurisdiction of courts of a certain entity (state) in face of other entities (states) and to govern recognition and enforcement of foreign judgments issues. The goal of conflict rules is to determine the law applicable to non-contractual obligations. Even though the two issues are independent of each other, from the factual point of view it is not appropriate to separate them absolutely as it is done in theory. Central-European tradition of conflict rules requires courts to use the conflict rules when solving a dispute with a foreign element as well as to apply the law established by a conflict rule.[12] However, it is obvious that the need to apply foreign law extends the time necessary to decide a case, and last but not least the costs of the proceedings are inflated. It would be much easier, faster and cheaper if the court were allowed to decide according to his *lex fori* – of course also respecting the conflict rules at the same time.

The PIL in the EC has undergone significant changes during the last decade as demonstrated in the field of delicts/torts. It seems to be most suitable in the situation when both procedural and conflict rules are formed by the same author to reach the status when the conflict rules determine such applicable law which is at the same time the law of the court having jurisdiction to decide the case. Of course, an appropriate conflict rule

European authors use tort in their comparative works whether they talk about torts or delicts. In the European comparative context rhe term "tort" gains a more general meaning without unambiguous connection to common-law reality. *See* Van Dam, C. *European Tort Law*. Oxford: Oxford University Press, 2006

11 Valdhans, J. Evropský justiční prostor ve věcech civilních. Část XIII. návrh nařízení o právu rozhodném pro mimosoudní závazky. *Právní fórum*. 2006, 3: 33-39.

12 Kučera, Z. *Mezinárodní právo soukromé*. Brno: Doplněk, 2001.

still needs to be determined. The idea of mutually corresponding solution finds reflection in the Rome II Regulation and the effort to gain the desirable result is evident. Nevertheless certain distinctions can affect the endeavour even when taking into account the main rules concerning delicts/torts and it is the first issue of interpretation that I would like discuss.

Article 5(3) of Brussels I Regulation as an alternative to the general rule in Art. 2 provides for jurisdiction of the courts of the place where the harmful event occurred or may occur. Conception of the place where the harmful event occurred was interpreted widely by the European Court of Justice in Case 21/76 *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA* in the sense that *where the place of the happening of the event which may give rise to liability in tort* (lex loci delicti commissi)*, delict or quasidelict and the place where the harmfulevent results in damage* (lex loci damni infecti) *are not identical, it must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.* The result is that the defendant may be sued, at the option of the plaintiff, either in the courts of the place where the damage occurred or in the courts of the place of the event which gives rise to and is at the origin of that damage. In practice it is highly problematic to localize the place where the damage occurred especially in the case of purely financial losses.[13] In many cases (car accidents) these places would be identical, but on a number of situations, as unfair competition, environmental damage or defamation, they will differ.

However in its general conflict rule[14] Rome II picks out from those two solutions mentioned by the ECJ in the *Bier* case the *lex loci damni infecti* solution[15] only with which the interpretation problems are linked. We can come to the conclusion that the law of the state where the damage occurred will be determined as applicable law but the legal proceedings will take place in the state where the event giving rise to the damage occurred. Nevertheless cases concerning unfair competition[16] or environmental damages[17] where the two places are likely to be different are excluded from the general rule of the Rome II and are governed by their own special regulations which have priority over the general rule. Therefore the difficulties caused by the usage of one rule (*l.l. damni infecti*) only in Rome II contrary to two rules (*l.l. delicti commissi* and *l.l. damni infecti*) in Brussels I are less likely to arise. The link between Brussels I Article 5(3) and Rome II is rather clear. Even though Brussels I is a procedural regulation in certain situations it

13 Hertz, K. *Jurisdiction in Contract and Tort under the Brussels Convention*. Copenhagen: DJØF. Publishing, 1998, p. 237-250.

14 *For more information see* Dickinson, A. *The Rome II Regulation: The Law Applicable to Non-contractual Obligations*. Oxford: Oxfod University Press, 2008, p. 295 – 362; Valdhans, J.; Myšáková, P. Conflict Rules for Delicts and Quasi-Delicts. In *Europeanization of the National law, the Lisbon Treaty and some other Legal Issues*. Brno: Masarykova univerzita, 2008, p. 128-138.

15 Art. 4 (1) Rome II: …Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs.

16 For more information see Hellner, M. Unfair Competition and Acts Restricting Free Competition. *Yearbook of Private International Law.* 2007, 9: 49–69.

17 For more information see Graziano, T. K. The Law Applicable to Cross-border Damage to the Environment. *Yearbook of Private International Law.* 2007, 9: 71 – 86.

uses substantive law criteria (place of performance of the obligation, habitual residence of maintenance creditor, place of harmful event, etc.) for the purposes of jurisdiction. Similarly the Rome II has to use substantive law concepts for its conflict rules or as connecting factors.

Moreover recital 7[18] of the Rome II Regulation requires interpreting Rome II provisions consistently with Brussels I and Rome I Regulations. The question is whether it is even possible to use the results of interpretation of procedural rules for the purposes of interpreting the rules of conflict? As mentioned before, procedural and conflict rules are independent from each other. I do not want to challenge this canon of private international law but it is necessary to realize that both procedural rules and conflict rules use substantive law terms e.g. a place of a harmful event. On that score it is possible to use the results of interpretation of one for the help with interpreting the other.

On the basis of this information it is possible to formulate a hypothesis for this paper. I do not preclude the possibility of using interpretation of Brussels Convention/Regulation for the purposes of interpretation of the Rome II Regulation. The question is whether interpretation of Brussels Convention/Regulation is clear and sufficient to serve for the purposes of interpretation of Rome II Regulation? Consequently could the contribution be seen also in the opposite way in the sense that interpretation of Rome II Regulation could be used for the interpretation of Brussels I Regulation?

3. Interpreting Rome II Consistently With Brussels I – Helpful Position

In this part of the article I would like to discuss the interpretation of Article 5(3) Brussels I by the ECJ which could be really helpful in many situations. There is an important legal provision in Article 4 (1) of Rome II which states that the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur should be used. *Videlicet* the applicable law would be only the law of the country where the direct damage occurred. The preliminary rulings of the ECJ on the Brussels Convention/Regulation are able to answer the question what should be considered as direct damage.

3.1. C-220/88 *Dumez*

In C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others* the question was raised in proceedings to establish quasi-delictual liability brought before the French courts by the French company (Dumez) against German banks. Du-

18 The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

mez sought compensation for damage which it claimed to have suffered owing to the insolvency of their subsidiaries established in Germany, which was brought about by the suspension of a property-development project in Germany for a German prime contractor, allegedly because of the cancellation by the German banks of the loans granted to the prime contractor. French first-instance court upheld the objection of lack of jurisdiction raised by the German banks, on the ground that the initial damage was suffered by the subsidiaries of Dumez in the Federal Republic of Germany and that the French parent company sustained a financial loss thereafter only indirectly. This judgment was confirmed by the court of appeal taking the view that the financial repercussions which Dumez claimed to have experienced at their head offices in France were not of such a kind as to affect the location of the damage suffered initially by the subsidiaries in the Federal Republic of Germany. In support of their appeal in cassation against that judgement, Dumez claimed that the decision of the ECJ in Case 21/76 *G . J . Bier BV v. Mines de potasse d' Alsace SA*, according to which the expression "place where the harmful event occurred" used in Article 5(3) of the Convention covered both the place where the damage occurred and the place of the event giving rise to the damage, with the result that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places, was also applicable to cases of indirect damage. Finally after receiving the case the ECJ stated that the judgment in *Mines de potasse d' Alsace* had related to a situation in which the damage had occurred at some distance from the event giving rise to the damage but by the direct effect of the causal agent, namely the saline waste which had moved physically from one place to another. By contrast, in *Dumez*, the damage allegedly suffered by Dumez through German bank´s cancellation of the loans granted for financing the works originated and produced its direct consequences in the same Member State, namely the one in which the lending banks, the prime contractor and the subsidiaries of Dumez, which were responsible for the building work, were all established. The harm alleged by the parent company, Dumez, is merely an indirect consequence of the financial losses initially suffered by their subsidiaries following cancellation of the loans and the subsequent suspension of the works.

It means that the damage alleged is no more than the indirect consequence of the harm initially suffered by other legal persons who were the direct victims of damage which occurred at a place different from that where the indirect victim subsequently suffered harm.

3.2. C-364/93 *Marinari*

Similar decision was issued in C-364/93 *Antonio Marinari v. Lloyds Bank plc and Zubaidi Trading Company.* In 1987, Mr. Marinari lodged with a Manchester branch of Lloyds Bank a bundle of promissory notes with a face value of US (752) 500 000, issued by the Negros Oriental province of the Republic of the Philippines in favour of Zubaidi Trading Company of Beirut. The bank staff, after opening the envelope, refused to return the promissory notes and advised the police of their existence, stating them to be of dubious origin, which led to Mr. Marinari' s arrest and sequestration of the promissory notes. After his release by English Authorities, Mr. Marinari sued Lloyds Bank

in the Tribunale di Pisa, seeking compensation for the damage caused by the conduct of its staff. The documents forwarded by the national court show that Mr. Marinari was claiming not only payment of the face value of the promissory notes but also compensation for the damage he claims to have suffered as a result of his arrest, breach of several contracts and damage to his reputation. Lloyds Bank objected to the jurisdiction of an Italian court on the ground that the damage constituting the basis of jurisdiction *ratione loci* had occurred in England. Mr. Marinari applied to the Corte Suprema di Cassazione for a prior ruling on the question of jurisdiction. This court decided to keep the proceedings pending and asked the ECJ for a preliminary ruling. The ECJ came to the conclusion that the choice available to the plaintiff by the judgment in *Mines de potasse d'Alsace* could not however be extended beyond the particular circumstances which justify it. Such extension would negate the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction. It would lead, in cases other than those expressly provided for, to recognition of the jurisdiction of the courts of the plaintiff's domicile, a solution which the Convention does not favour. Whilst it has thus been recognized that the term "place where the harmful event occurred" covers both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere. Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State. The final answer offered by the ECJ was that the concept of a place where the harmful event occurred of Article 5(3) did not, on a proper interpretation, cover the place where the victim claimed to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.

3.3. C-168/2002 *Kronhofer*

Finally I would like to mention the case C-168/2002 *Rudolf Kronhofer v. Marianne Maier and Others*. That question was raised in proceedings in which Mr. Kronhofer sought to recover damages for financial loss which he claimed to have suffered as a result of the wrongful conduct of the defendants in the main proceedings as directors or investment consultants of the company *Protectas* with the office registered in Germany. The defendants persuaded Mr. Kronhofer by telephone to enter into a call option contract relating to shares. However, they failed to warn him of the risks involved in the transaction. As a result, Mr. Kronhofer transferred a total amount of USD 82 500 in 1997 to an investment account with *Protectas* in Germany which was then used to subscribe for highly speculative call options on the London Stock Exchange. The transaction in question resulted in the loss of part of the sum transferred and Mr. Kronhofer was repaid only part of the capital invested by him. When that action was dismissed, Mr. Kronhofer appealed to the Oberlandesgericht Innsbruck which declined jurisdiction on the ground that the court of domicile was not 'the place where the harmful event occurred',

as neither the place where the event which resulted in damage occurred nor the place where the resulting damage was sustained was in Austria. An application for review on a point of law was brought before the Oberster Gerichtshof which supplicated to ECJ. According to its opinion in this situation an interpretation held by Mr. Kronfoher allowing Austrian courts to decide the case would mean that the determination of the court having jurisdiction would depend on matters that were uncertain, such as the place where the victim's 'assets are concentrated' and would thus run counter to the strengthening of the legal protection of persons established in the Community which, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued. It would in most cases give jurisdiction to the courts of the place in which the claimant was domiciled. It means that the 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

4. Interpreting Rome II Consistently With Brussels I – a Pointless Position

Regardless of the thoughts already expressed in this contribution I would like to deal with more general issues concerning interpretation of Rome II and Brussels I Article 5(3). The question I am going to consider may sound funny in the light of decades long history of interpreting Brussels Convention and Brussels I Regulation but it appears again in relation to Rome II. The question is: what is the meaning of delict (matter relating to tort, delict or quasidelict) for the purposes of Rome II and Brussels I Article 5(3)? The importance of the answer is so obvious that everybody has to wonder whether it was answered by the European Court of Justice. Of course it was and not once. Was the reply of the ECJ sufficient? Was the interpretation successful? Those are completely different questions with entirely different answers. The preliminary rulings are expected to solve interpretation problems of EC law but very often the ECJ confuses it with the issues of qualification. Nevertheless it is necessary to state that the process of interpretation of the wording of a legal regulation (the direction from the legal regulation towards inexplicit amount of issues of fact) can be understood from the opposite direction as qualification (the relationship between specific factual circumstances with the wording of a legal regulation). If the ECJ engages in interpretation of a legal regulation, it simultaneously decides the the issues of qualification.

4.1. 189/87 *Kalfelis*

Most frequently in literature and also by the ECJ the *Kalfelis*[19] case is mentioned in connection with the term delict. Between March 1980 and July 1981 Mr Kalfelis con-

19 Case 189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others.*

cluded with the bank established in Luxembourg, through the intermediary of the bank established in Frankfurt am Main a number of spot and futures stock-exchange transactions in silver bullion and for that purpose paid DM 344 868.52 to the bank in Luxembourg. The futures transactions resulted in total loss. Mr. Kalfelis claimed DM 463 019.08 together with interest. His claim was based on contractual liability for breach of the obligation to provide information and on tort, since the defendants caused him to suffer loss as a result of their conduct contra *bonos mores*. He also claimed unjust enrichment, on the ground that futures stock-exchange contracts, such as futures transactions in silver bullion, were not binding on the parties by virtue of mandatory provisions of German law and therefore sought to reclaim the sums which he overpaid. Luxembourg bank challenged the jurisdiction of German courts at every stage. The German Bundesgerichtshof referred a preliminary question to the ECJ asking whether *the term 'tort' in Article 5 (3) of the Brussels Convention were to be construed independently of the Convention or whether it was to be construed according to the law applicable in the individual case (lex causae), which was to be determined by the private international law of the court hearing the case*, *and whether Article 5 (3) of the Brussels Convention confered, in respect of an action based on claims in tort and contract and for unjust enrichment, accessory jurisdiction on account of factual connection even in respect of the claims not based on tort*?"

In its answer the ECJ stated that the concept of "matters relating to tort, delict or quasi-delict" served as a criterion for defining the scope of one of the rules concerning the special[20] (it could be called 'alternative' due to the chance to choose between this and general rule) jurisdictions available to the plaintiff must be given an independent meaning - not in accordance with the law of one of the states concerned but, first, with the objectives and the scheme of the legal provision which is interpreted, secondly, with the general principles which stem from the corpus of the national legal systems. According to the ECJ, torts/delicts within the meaning of Article 5 (3) of the Brussels Convention (Regulation) must be regarded as an independent concept encompassing all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5 (1).

The statement that the matter related to tort, delict and quasidelict should be interpreted independently is not surprising at all. Much more interesting is the reversed interpretation of delict as a situation when the responsibility rises from the other reason than contract. The definition offered by the ECJ in *Kalfelis* was really wide and according to this interpretation it covered all situations which were not covered by Brussels I Art. 5(1). This judgment was criticised by many authors. For example Kaye considers this

20 It can be called alternative due to the chance to choose between this and general rule – see Rozehnalová, N.; Týč, V. *Evropský justiční prostor (v civilních otázkách)*. Brno: Masarykova univerzita v Brně, 2003. or Rozehnalová, N.; Valdhans, J. Evropský justiční prostor ve věcech civilních. Část III.: Nařízení č. 44/2001 (ES) o příslušnosti a uznání a vykonatelnosti rozhodnutí ve věcech občanských a obchodních základní pravidlo o pravomoci, speciální pravomoc. *Právní fórum*. 2005, 2: 121-126. *or* Valdhans, J.; Svobodová, K. Judikatura Evropského soudního dvora v oblasti evropského justičního prostoru ve věcech civilních. Část IV. Nařízení Brusel I ve světle judikatury Evropského soudního dvora. *Právní fórum*. 2007, 4: 153-162.

definition is as helpful as defining a Volkswagen as a car which is not a Rolls Royce.[21] Also Stadler gave a slight sigh that ECJ was not able to distinguish between two rules of highest importance in Article 5[22] which compete with each other.[23] In addition, the ECJ in *Kalfelis* said that the jurisdictions enumerated in Articles 5 constituted derogations from the principle that jurisdiction was vested in the courts of the State where the defendant was domiciled and as such should have been interpreted restrictively and departure from the general rule should be admitted only in clearly defined situations. The requirement to interpret the notion restrictively does not really correspond to the wide and uncertain definition.

4.2. C-261/90 *Reichert*

A subsequent decision in Case C-261/90 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG* also did not bring more light on the issue. It only devised to *Kalfelis* stating that the Court had held in the judgment in Case 189/87 *Kalfelis v. Schroeder* that the concept of "matters relating to tort, delict or quasi-delict" served as a criterion for defining the scope of one of the rules concerning the special jurisdictions available to the plaintiff. In view of the objectives and general scheme of the Convention in order to ensure equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned it is important to interpret that concept not as a mere reference to the national law of one or other of the States concerned. Accordingly, the concept of "matters relating to tort, delict or quasi-delict" must be regarded as an independent concept which is to be interpreted, for the application of the Convention, principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect. Once again the ECJ did not present new ideas in the sense of autonomous or in different wording euro-conformal or supranational interpretation. In one of the best known decisions 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* the Court stated it was a duty of both ECJ and all national courts to interpret European legal rules according to the object and scheme of the legal regulation which is interpreted and secondly, to the general principles which stem from the corpus of national legal systems. The ECJ never forgets to remind this form of interpretation.

The Court also held in its judgment in *Kalfelis* that in order to ensure uniformity in all the Member States, it must be recognized that the concept of "matters relating to tort, delict and quasi-delict" covers all actions which seek to establish liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1).

4.3. C-51/97 *Réunion*

In C-51/97 *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* the ECJ was even briefer saying

21 Kaye, P. *Law of the European Judgments Convention*. Chinchester: Barry Rose Law Publishers, 1999, p. 1239.

22 Stadler, A. From the Brussels Convention to Regulation 44/2001: Cornerstone of a European Law of Civil Procedure. *Common Market Law Review.* 2005, 42: 1637-1661.

23 Briggs, A. *Civil Jurisdiction and Judgements*. 4th ed. London: LLP, 2005, p. 182.

that in its judgment in Case 189/87 *Kalfelis v Schröder* the Court defined the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1).

4.4. C-334/00 *Tacconi*

A little bit more precise is the decision of the ECJ in the case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* where the Court stated that the action based on pre-contractual liability fell within the scope of Article 5(3). In 1996 Tacconi brought an action against HWS in the District Court, Perugia for a declaration that a contract between HWS and a leasing company B.N. Commercio e Finanza SpA (BN) for the sale of a moulding plant, in respect of which BN and Tacconi had already, with the agreement of HWS, concluded a leasing contract, had not been concluded because of HWS's unjustified refusal to carry out the sale, and hence its breach of its duty to act honestly and in good faith. HWS thereby infringed the legitimate expectations of Tacconi, which had relied on conclusion of the contract of sale. Tacconi therefore asked the court to order HWS to make good all the damage allegedly caused, which was calculated at ITL 3 000 000 000. The ECJ came to the conclusion that in the view of circumstances of the main proceedings, the obligation to recover the damage allegedly caused by the unjustified break off of negotiations could derive only from the breach of the rules of law, in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract. Therefore it is clear that any liability which may follow from failure to conclude the contract referred to in the main proceedings cannot be contractual and in circumstances characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of the rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

4.5. C-167/00 *Henkel*

In another case C-167/00 *Verein für Konsumenteninformation v. Karl Heinz Henkel* Advocate General Jacobs asked for the positive definition of delict:

"While it may be true, in the words of Advocate General Warner, that 'no one has ever succeeded, even in the context of any national legal system, in formulating an accurate definition of tort that did not beg one or more questions. Like the proverbial elephant, tort is easier to recognise than to define'.

The Court has none the less provided some guidance. In particular it has stressed that the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept which is to be interpreted principally by reference to the scheme

and objectives of the Convention in order to ensure that the latter is given full effect. ECJ seemed not to agree and repeated the *Kalfelis* definition yet again.

5. Which Legal Provision Helps to Interpret the Other One?

When I acquainted myself with the proposal of Rome II Regulation several years ago I thought that according to the character of Rome II and Brussels I and according to the statement in Recital 7 of Rome II the ECJ cases to Brussels Convention and Regulation will be used to help to interpret the Rome II. After the deeper research in this field I found out with a certain degree of surprise that the influence will have more likely the opposite direction.

This idea could be illustrated by an example of unjust enrichment. Usually several types of unjust enrichment are distinguished. For our purposes the best examples are unjust enrichment arising from undue performance (e.g. sending money to a wrong bank account) and unjust enrichment arisen from an expired legal cause (the contract was avoided by one of the parties but the previous payments were not restituted). If we handle these two situations from the view of *Kalfelis* case we should probably judge them differently. The first type could be easily decided on the basis of the Article 5(3) as it is a non-contractual issue. On the other hand, the latter situation is clearly connected with a contract. Rome II also connects this type of unjust enrichment[24] with *lex causae* of an avoided contract.[25] If it is so then jurisdiction should be determined on the basis of Article 5(1) of Brussels I.[26] Is it possible when under Rome II this issue is to be qualified as a quasidelict? Should this internal systematic classification for the purposes of the conflict rule be used also for the procedural level? I believe that it is of primary importance to qualify unjust enrichment as a quasidelict under Rome II. It cannot be overriden by an internal rule of conflict which tries to link a certain factual circumstance with the most appropriate legal system. Therefore Article 5(3) Brussels I should not be used in such a case.

Conclusions

As demonstrated above, the interaction between procedural and conflict rules is not only a current reality - it has an unavoidable and desirable effect. Both levels can profit from the comparison. There are many judgments of the ECJ which shield the uniform interpretation of the procedural legal rules over the EC member states. Some of these judgments are of the quality and meaning that can be used while interpreting the new conflict rule provisions. However, it is possible to claim that the interpretation of the

24 For more information see Pauknerová, M. *Evropské mezinárodní právo soukromé*. Praha: C. H. Beck, 2008, p. 293.

25 Art. 10(1) Rome II Regulation.

26 This article should be used for the matters relating to contract.

older legal provisions is not clear and sufficient in all circumstances and therefore there are still cases when interpretation needs to be improved. On the contrary the text of the new conflict rules itself can help to find the correct interpretation of procedural provisions where the ECJ has not done it so far or its attempts have not materialized.

References

Basedow, J. The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam. *Common Market Law Review*. 2000, 37 (3): 687–708.

Briggs, A. *Civil Jurisdiction and Judgements*. 4th edition. London: LLP, 2005.

d'Oliveira, H. U. J. The EU and a Metamorphosis of Private International Law. In *Reform and Development of Private International Law*. Oxford: Oxford University Press, 2002, p. 111–136.

Dickinson, A. *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford: Oxford University Press, 2008.

Graziano, T. K. The Law Applicable to Cross-border Damage to the Environment. *Yearbook of Private International Law.* 2007, 9: 71–86.

Hamburg Group Forfor Private International Law. Comments on the European Commission's Regulation on the Law Applicable to Non-Contractual Obligations. *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*. 2003, 67.

Hellner, M. Unfair Competition and Acts Restricting Free Competition. *Yearbook of Private International Law.* 2007, 9: 49–69.

Hertz, K. *Jurisdiction in Contract and Tort under the Brussels Convention*. Copenhagen: DJØF. Publishing, 1998.

Kaye, P. *Law of the European Judgments Convention*. Chinchester: Barry Rose Law Publishers, 1999.

Pauknerová, M. Evropské mezinárodní právo soukromé a procesní – aktuální otázky. *Evropské právo*. 2003, 8: 1–6.

Pauknerová, M. *Evropské mezinárodní právo soukromé*. Praha: C. H. Beck, 2008.

Remien, O. Community law versus conflict of laws. *Common Market Law Review*. 2001, 38: 53–86.

Rozehnalová, N.; Týč, V. *Evropský justiční prostor (v civilních otázkách)*. Brno: Masarykova univerzita v Brně, 2003.

Rozehnalová, N.; Valdhans, J. Evropský justiční prostor ve věcech civilních. Část III.: Nařízení č. 44/2001 (ES) o příslušnosti a uznání a vykonatelnosti rozhodnutí ve věcech občanských a obchodních základní pravidlo o pravomoci, speciální pravomoc. *Právní fórum*. 2005, 2: 121–126.

Stadler, A. From the Brussels Convention to Regulation 44/2001: Cornerstone of a European Law of Civil Procedure. *Common Market Law Review.* 2005, 42: 1637–1661.

Stone, P. *EU Private International Law. Harmonization of Laws.* Cheltenham: Edward Elgar, 2006.

Valdhans, J. Evropský justiční prostor ve věcech civilních. Část XIII. návrh nařízení o právu rozhodném pro mimosoudní závazky. *Právní fórum*. 2006, 3: 33-39.

Valdhans, J.; Myšáková, P. Conflict Rules for Delicts and Quasi-Delicts. In *Europeanization of the national law, the Lisbon Treaty and some other legal issues*. Brno: Masarykova univerzita, 2008, p. 128-138.

Valdhans, J.; Svobodová, K. Judikatura Evropského soudního dvora v oblasti evropského justičního prostoru ve věcech civilních. Část IV. Nařízení Brusel I ve světle judikatury Evropského soudního dvora. *Právní fórum*. 2007, 4: 153-162.

Van Dam, C. *European Tort Law*. Oxford: Oxford University Press, 2006.

ROMOS II REGLAMENTO AIŠKINIMO SUDERINAMUMO SU BRIUSELIO I REGLAMENTU PINKLĖS

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Santrauka. *Straipsnyje analizuojami probleminiai Romos II ir Briuselio I reglamentų aiškinimo aspektai. Romos II reglamentas apibrėžia nesutartinėms prievolėms taikytiną teisę, antrasis leidžia nustatyti teismų jurisdikciją civilinėse ir komercinėse bylose. EB teisės aiškinimo vienodumą užtikrina Europos Teisingumo Teismas (ETT) teikdamas prejudicinius sprendimus. Šis straipsnis siekia atsakyti į klausimą, ar galima remtis ETT sprendimais dėl Briuselio Konvencijos ir Briuselio reglamento aiškinant Romos II reglamentą ir jei taip, ar tai būtų naudinga praktikoje. Pagal Romos II reglamento preambulės 7 dalį, reglamentas turi būti aiškinamas atsižvelgiant į Briuselio I reglamentą. Iš pirmo žvilgsnio ši idėja atrodo logiška, nes Briuselio Konvencija ir Briuselio I reglamentas yra kur kas senesni nei Romos II reglamentas. Teismo praktika dėl Briuselio konvencijos ir reglamento 5 straipsnio 3 dalies yra gausi ir, be abejonės, daugeliu atvejų reikšminga. Tačiau yra kai kurių probleminių klausimų, dėl kurių itin svarbu vėl analizuoti delikto sąvoką. Šią Briuselio konvencijos sąvoką ne kartą aiškino ETT, nors jam nepavyko adekvačiai jos apibrėžti. Pirmą kartą apibrėžti šią sąvoką Teismas pamėgino Kalfelis byloje – deliktas apibrėžtas labai neišsamiai ir neigiamai. Sąvokos apibrėžimas nebuvo patobulintas nė viename iš vėlesnių sprendimų (C-261/90 Reichert, C-51/97 Reunioneuropéenne, C-167/00 Henkel) ir pastaruosius du dešimtmečius delikto sąvoka išliko labai neaiški. Šiuo metu tebėra neaišku, kaip reikėtų suprasti delikto sąvoką pagal Briuselio I reglamentą. Nors Romos II reglamentas turi būti aiškinamas atsižvelgiant į Briuselio I reglamentą, neabejotina, kad tai nepadėtų išspręsti jokių praktinių problemų, susijusių su delikto sąvokos aiškinimu.*

Iš tiesų pats Romos II reglamentas gali padėti išaiškinti pagrindines Briuselio I reglamento sąvokas. Be abejonės, kai kurie Romos II reglamente įvardyti institutai turi būti laikomi deliktais (pvz., atsakomybė už gaminiu padarytą žalą, nesąžininga konkurencija, žala aplinkai, šmeižtas, intelektinės nuosavybės teisių pažeidimas) arba kvazideliktais (negotiorum gestio, nepagrįstas praturtėjimas, culpa in contrahendo). Sudėtingesnės problemos kyla dėl niuansinių situacijų, kurios susijusios su sutartimi, tačiau kyla ne iš sutartinių teisinių santykių. Tokių klausimų ETT nebuvo linkęs spręsti remdamasis Briuselio I reglamentu, tačiau, esu tikras, kad ETT negalės laikytis to paties požiūrio ir aiškindamas Romos II reglamentą. Atitinkamai, Romos II reglamento aiškinimas turėtų padėti aiškinti Briuselio I reglamento 5 straipsnio 3 dalis bei 5 straipsnio 1 dalis.

Reikšminiai žodžiai*: nesutartiniai įsipareigojimai, deliktai, Briuselio I reglamentas, Romos II reglamentas, vienodinimas, aiškinimas, kvalifikavimas, nepagrįstas praturtėjimas, ikisutartinė atsakomybė, Europos Teisingumo Teismas, Kalfelis byla, Mines de potasse d'Alsace byla.*

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