LEX LOCI DAMNI INFECTI – APPLICABILITY TO NON-CONTRACTUAL OBLIGATIONS IN CYBERSPACE IN THE JURISPRUDENCE OF FRENCH COURTS

by

LENKA KARBANOVÁ*

Regulation n° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) introduces as a general conflict-of-laws rule the lex loci damni infecti rule. The applicability of this rule to the non-contractual obligations introduces new challenges for non-contractual obligations arising out of internet based relations. Possible problems and solutions may be demonstrated on the decision making practice of the French courts as the French legal system had contained the lex loci damni infecti rule before the introduction of the Rome II Regulation and thus the French judge has been applying this rule to internet non-contractual obligations for longer time and has richer experience in this field.

KEYWORDS

Rome II Regulation, non-contractual obligations, lex loci damni infecti, cyberspace

1. CONFLICT-OF-LAWS RULES IN ROME II

Contrary to contractual obligations, non-contractual obligations were not harmonized until 2007 when upon the proposition of the European Commission from May 2002 resulting from quite long debates and commentary procedure the Regulation (EC) n° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) was adopted. The Regulation came into force on the 11th

* Lenka.Karbanova@email.cz

January 2009 so we could be able after almost two years of its application to evaluate its impact on the B2B non-contractual obligations although the number of decisions based upon this Regulation is still not very high. The regulation of cross-border litigation of non-contractual obligations had fallen within the exclusive authority of the member states which is the reason why we were waiting so long for harmonizing norms. Rome II is supposed to represent a complementary source to Rome I Regulation and Regulation n° 44/2001 (Brussels I which contains the procedural norms).

The Rome II Regulation introduces the principle of its universal scope of application (same as the Rome I does) which means that its conflict rules may also lead to the application of the law of a non-Member-State. As resulting from the European Commission Summary and contributions of the consultation "Rome II"[1] this basic principle provoked both approval and refusal. Mainly the press and the publishing business and business companies in general objected that the universal scope of applicability of Rome II would lead to the introduction of serious problems – they have seen this provision as increasing legal uncertainty and imposing impossible expectations on the online operators that they should be complying simultaneously with differing and conflicting laws. Moreover, they pointed out that necessity to comply with the legal orders of all of the EU members would be against the «country-of-origin principle» defined by the Electronic Commerce Directive and thus doubted the presumed improving of the functioning of the internal market whilst in such an environment it would be more difficult for online operators to comply with all rules. On the contrary, academics and practitioners welcomed this article while pointing out that the coexistence of the two parallel systems (one within the EU and the other for third countries) would lead to a further complication of this already highly complex discipline.

2. GENERAL PRINCIPLES

Although some authors consider as the most common conflict-of-laws rule for non-contractual obligations the *lex loci delicti* rule, the place when the damage occurred was chosen as the common rule for Rome II. This rule is to be applied 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 (art. 4 par. 1). This little apodoses of the first paragraph has been criticized as being confusing whilst

its objective was apparently to prevent the doubts about the law applicable on the situation. Nevertheless, since the 1950's we can observe the inclination from *lex loci delicti* to *lex loci damni* mainly because of the forthcoming globalisation, fluctuation of people, gradual objectification of the subjective responsibility and move from the vindictive to compensatory function of the repression and Rome II goes with the flow in this sense. Use of the unique *lex loci damni* rule shall give priority to the legal certainty and foreseeability of the judicial decisions before the flexibility of courts considering that a judge do not have a choice between *lex loci delicti* and *loci damni infecti* as it is the case of p.e. Brussels I Regulation (art. 5 par. 3) or of the Czech Code on private international law.

The Rome II Regulation introduces the new possibility for the parties to choose independently the law applicable to their relation. This feature has been in general considered very positive mainly because, same as the choice of law in the field of contracts; it is in case of non-contractual obligations in cyberspace more than appropriate. Rome II provides the possibility as to B2B non-contractual obligations of the choice of law *ex ante* and also *ex post.* The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case (art. 14 par. 1). Special conflict-of-laws rules can be find in article 5 and following. We will not go here into a big detail as the special rules could be an object of a separate paper. We will content ourselves with saying that there exist for some specified torts/delicts special rules that should be applied as a *lex specialis* to the general rule, thus with a priority unless there exists a choice of law.

3. PROBLEMS OCCURRING WHEN APPLYING *LEX LOCI DAMNI INFECTI*

The discontent that the article 4 containing general rules does not include the rule for the cases when the damage occurs in more than one state was expressed already in the commentary phase. These voices were not given a hear and thus we do not find in the Regulation Rome II such a provision that should be more than useful for determining the applicable law in cases of non-contractual internet obligations. Surprisingly there was an article placed in the original proposition of the Regulation concerning rules for determining applicable law in the cases when the damage occurred at the place not submitted to sovereignty of any state (planes, boats and similar means of transport) and second paragraph of this proposed article 4 con-

cerned obligations that are not connected with any precise state or with more states at the same time. In this case, the law of the state with the closest connection should have been applied. Unfortunately, this provision had been left out.

As a result, we have to plunge into the practical application of the *lex loci damni* rule to the non-contractual obligations in cyberspace. As usually in the field of private international law, also in this case, the delocalisation phenomenon of the e-obligations implies many problems. If there is a tort or delict resulting from the action that took place on the internet, it can be really difficult to determine where the damage occurred as the website in question can be accessed anywhere in the world and the damage can thus occur at any place of the access. And as the legal orders of the countries all over the world differ, a webpage which might be in complete harmony with the norms of one state can breach the obligations implied by laws of other state. We can mention the opinions of the internet giant Amazon[2] that objected during the public consultations of the proposal that "a company operating legally for example in one EU Member State - in order to avoid future legal claims and unknown liabilities – would also need to comply with the non-contractual rules of every other country where it is operating and thereby where a damage could occur. This clearly introduces additional and extremely demanding layers of legal obligations and operating requirements on a company. Even leaving aside the reality of websites being accessed simultaneously from many different locations, it is impossible for an on-line company to verify even where any one website visitor is based, and therefore which country's non-contractual law should apply under Rome II. The very advantage of website technology is that websites can be accessed by individuals from any location. These same individuals may, for valid data privacy reasons, not wish though to provide details of their geographical jurisdiction. Even where details are provided, websites have no means of determining the accuracy or otherwise of this information in a real-time transactional environment". It is upon the judge to dissipate such fears by adequate interpretation of the Rome II rules when applying them to non-contractual obligations in cyberspace. We will demonstrate possible approaches to the interpretation on the French courts' practice.

4. PRACTICE OF FRENCH COURTS

The French legal system contains the *lex loci damni* rule in its Code of civil procedure, in the part containing private international law rules, more precisely in the article 46. Even if this rule concerns the determining of the possible competence of French courts, we can take advantage of the fact that the French courts had been interpreting *lex loci damni* rule with regard to the internet disputes long before the Rome II Regulation entered into force and take inspiration of their opinions on this problem. We can observe a quick evolution (or maybe a revolution) in the jurisprudence of the French courts during past seven years. The French courts used in the course of a few past years two different theories for determining whether the damage occurred on the French territory or not and thus whether the non-contractual obligation should be or not submitted to the French law. The first approach is characterized by so-called "accessibility criteria" (*critére d'accessibilité*) and thus can be called the theory of accessibility. This theory was progressively substituted by the "orientation theory" based on the "orientation criteria" (*critère d'orientation*).

The theory of accessibility, so typical in the past for the French Courts, uses for determining the alleged affection of the French territory by an illegal act that took place in cyberspace, a pure fact of a possibility of accessibility of the website in France, by a French user which brings very extensive interpretation of the affectation of the territory. This approach was presented for the first time in the *Castellblanch*[3] decision of the French Cassation Court in 2003. In this case the French producer of champagne owning a registered mark *Cristal* in France opposed Spanish company *Castellblanch* that displayed on its internet sites sparkling wine under the *Cristlal* mark registered for this company in Spain. The French company filed a counterfeiting law suit against *Castellblanch* at the French judge according to its place of business stating that the French company suffered prejudice on the French territory resulting from the actions of Spanish producer on the internet. *Castellblanch* objected that its sites were passive, not aimed at French consumers and did not harm the French producers in any way. The Cassation Court nevertheless explained that even the sites were passive the pure fact of their accessibility on the French territory is sufficient to produce alleged prejudice. This approach using *argumentum ad absurdum* would lead to an unlimited application of French law and absolute competence of

French courts while applying the *lex loci damni* rule. Any website on the internet, even without any closer connection to France, could be thus submitted to the competence of French courts. Moreover, this theory would lead to the *forum shopping* according to the most favourite regime for the pleading party.

This theory was abandoned for evident reasons in favour of the "orientation criteria" or "orientation theory" that appeared for the first time in 2005 in the decision *Hugo Boss*[4] of the Cassation Court that was more deeply defined in the decision of the Parisian Appeal Court in 2006 in its decision Normalu[5] and Google v. AXA[6] in 2007. The Parisian appeal court stated in the Normalu decision that the accessibility of the website all over the world lies in the very nature of the Internet and that this criterion alone cannot be determinative, otherwise jurisdiction would be systematically conferred to the French courts. The Court therefore ruled that in every case there is a need of "sufficient, substantial or significant connection between the alleged illegal actions and alleged damage" to pronounce France as *loci damni.* The Court proposed further criteria to determine such a connection – for example the language of the sites, currency used to effect a payment, value added tax range, possibility to have the goods delivered to France etc: In this particular case, the Court was not able to identify such a connection as the websites were designed in English, did not offer any product to French consumers and there was no evidence that the product could have been on sale in France.

This approach was approved for example in the decision *Zidane and others* (2008)[7]. A group of footballers backed by Real Madrid football club filed a law suit against a group of online betting companies that used pictures and information of players and club marks without their permission. Their aim was to stop online betting on these players. The court used the "orientation theory" and took in consideration the fact that none of the pages was edited in French language and there were no bets possible on the French football matches, that the bets made of French territory represented just a marginal part of all bets effected on the sites, that the sites are not by the way of their functioning and content aimed at the French betters and thus did not found a sufficient, essential or significant connection with the French territory.

The orientation theory was approved also in the decision *Republic of Chile/Gazmuri*[8] on 9th September 2009. In this case Chile was prosecuted in

France because of the reproduction of the paintings of the Chilean artist Hernan Gazmuri on the websites of the Santiago de Chile museum without authorisation. The Court stated that even the websites were written in Spanish and edited from Chile, their aim was to provide the international artistic community with the documentation of the museum and they were worldwide open so the French public could be affected by such an illegal act and thus sufficient connection was recognized.

Surprisingly, no longer than three months after this decision, we can observe a new turnaround in the practice of the French courts in one of the most recent eBay decisions. On 2nd December 2009 it was again the Parisian Appeal Court and its decision in the *MACEO* case[9]. In this case Ebay Europe, Ebay France and American society Ebay Inc. appealed against the decision of the first instance court that decided that Ebay committed a counterfeiting delict by reproduction of the publicity of the makes of clothes without the authorization of the company Maceo. The Appeal Court concluded that considering that the website even if it is run from United States is accessible on the French territory and thus the damage that occurred on this territory can be evaluated by a French judge without a necessity to look for the existence of sufficient, essential and significant connection between the alleged acts and French territory; that the selling of the counterfeit products was proved in France; moreover it does not matter that the publicity was written in English (comprehension of a few simple words is more than easy for a visitor of a website) and that the .com extension does not mean any bond to the public of the determined country.

Another interesting point we might observe is a jurisprudence concerning determining of *loci damni infecti* of Chamber of Commerce of the Cassation Court which may be illustrated on the following example: on 9th March 2010, this Chamber issued a decision[10] concerning Swiss company Pneus Online selling tyres online that filed a law suit against German company Delticom that runs the same business using the domain names pneuonline.com, pneusonline.com and pneu-online.com. The demandant company applied to the Commercial Court in Lyon whose territorial competence was contested by the defendant invocating an argument that France is not a country of *damni infecti*. Both commercial court and Cassation Court rejected this argument underlining that "accessibility of the sites for French internet users and the availability of the litigious products in France" are sufficient motives to declare French courts competent in this case. Here we can there-

fore abstract two necessary conditions – a quite vague and already mentioned in the practice of other courts – condition of accessibility that in this case must be accompanied by the availability condition.

The French courts may seem to walk two different ways. These two recent ambivalent approaches are explained by some French authors[11] by distincting between the decision in cases of counterfeiting or forgery (as we mentioned them above) in which the Courts consider as sufficient the fulfilling of the criterion of accessibility. In the cases of unfair competition, they add other criterions such as availability or sufficient connection. The reasoning for such a differentiation is still found as being unclear. One of the possible explanations is in a way that the protection of the rights of intellectual property is specific because these rights are object of the monopole exploitation which justifies their assimilation to the property rights which was expressly declared in 2006 by French Constitutional Council[12]. Thus the harm to property rights can be stated without the obligation to examine the necessary damage that represents the main difference between counterfeiting and unfair competition. Therefore all the supplementary conditions that may be imposed to examine would lead to a significant diminution of the protection of intellectual property rights on the Internet according to the French Constitutional Council.

But if we get back to the cited decision of the Chamber of Commerce of the Cassation Court, we can find these two criterions to determine France as a *loci damni infecti* – accessibility and availability criterion. If we have a closer look at the newly introduced availability criterion, it seems to propose interesting interpretation rules concerning *lex loci damni.* The Court delimitated positively the availability criterion by the packet of indicators that must be identified in every case – in this particular case it was the French language used to edit the sites (but only the fact of the use of certain language cannot constitute the "availability", with exception of less widespread languages such as Czech or Finnish), section of commentaries on satisfaction of the French customers supplied by French users and even if the home page was designed in German, the French clients had a possibility of easy redirection to the sites edited in French – to sum up, the sites were clearly aimed at the French customers and the company focussed on France. The decision proposes also the negative delimitation which helps us to define the cases where the availability criterion is not fulfilled. The defendant objected that the products displayed on the internet were not really

commercialized in France. The Cassation Court rejected such an argument ruling that to establish the availability of the product it does not have to be proved that the products were really sold in France. This approach echoes the art. 2 par. 2 of the Rome II Regulation – the prejudice should be stated even if the products were not sold (have not been sold yet) on the French territory. Article 2 par. 2 of Rome II is in fact drawn up in a same way as the art. 5 par. 3 of the Brussels I. This conceptual identity is strengthened by art. 7 of the Preamble of Rome II- its scope and provisions should be consistent with Brussels I. The notion of damage (*damnum infectum)* has therefore be the same when interpreting and applying these two texts. Effectivity of every rule depends mainly on its simplicity – application of the same criterion (availability of the products) to determine both jurisdiction and applicable law seems to be highly desirable. This interpretation implicitly conducts to the assimilation of the *lex loci damni* rule to the *lex fori* which may be one of the ways how to solve all above mentioned problems related to applying this conflict-of-laws rule to non-contractual obligations in cyberspace.

5. CONCLUSION

We have demonstrated on the practice of the French courts the problems that may occur while applying the *lex loci damni* rule on the B2B non-contractual obligations may be difficult and that we are in desperate need of stable and unification decisions. The applicability of this rule is influenced by the delocalization effect that implies a need to define subsidiary rules used to determine whether the damage occurred in this or that state and the non-contractual obligation should thus be submitted to its legal order. The latest development shows that the accessibility and availability criterions seem to be appropriate whilst they lead us to interpretation that respects also other legal norms such as Brussels I Regulation. Anyway, we have to still wait for clear and integral practice of the Court of European Union and harmonized decision-making of member states courts.

REFERENCES

[1] European Commission. Summary and contributions of the consultation Rome II. Available at: http://ec.europa.eu/justice/news/consulting_public/rome_ii/news_summary_rome2_en.htm

[2] European Commission Public Consultations. Amazon response. Available at:: http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/amazon_com_en.pdf

[3] Cour de Cassation, Civ. 1, 9 December 2003, n° 01-03.225

[4] Cour de Cassation, Cham.Comm., 11 January 2005, n° 02-18.381

[5] Cour d´appel de Paris, 4ème chambre, section A, 26 April 2006, Fernard S., Normalu/Acet

[6] Cour d´appel de Paris, 4ème chambre, section A, 6 June 2007, Google/AXA

[7] Cour d´Appel de Paris, 11ème chambre – section B, 14 February 2008, n° 06/11504

[8] Cour d'Appel de Paris, 1ère chambre, 9 September 2009, n° 08/17985

[9] Cour d'Appel de Paris, 2 December 2009, n° 09/12852

[10] Cour de Cassation, Chambre Commercial, 9 March 2010, n° 08-16.752.

[11] Lardeux, Gwendoline. La compétence internationale des tribunaux français en matière de cyberdélits, Recueil Dalloz, n 19, 13 May 2010, Etudes et commentaires, p. 1183 à 1188

[12] Conseil constitutionnel, 27 July 2006, n° 2006-540 DC