The European Law of Torts, Case Study: Regulation no. 864/2007 of the European Union

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Abstract: The purpose of this paper is to provide readers and third persons with general knowledge on the notion of non-contractual liability, in what aspects non-contractual liability it is distinguished from contractual and criminal liability, in what aspects non-contractual liability it is similar compared to contractual liability, which law is applicable to regulate non-contractual obligations, what rules apply to set out the competent court to issue decisions on cases where the subject-matter is non-contractual obligation etc. Special and exclusive focus has been given to clarify the principle of autonomy of the will of the parties and the principle "Lex loci delicti comissi", all based on Regulation no. 864/2007 of the European Union of 11th July 2007, on the law applicable to non-contractual obligations, otherwise known as "EU Rome II".

Keywords: Non-contractual liability; Contractual liability; Lex loci delicti comissi; Non-contractual obligations; the principle of autonomy of the will of parties

1. Introduction

The concept of damages in contemporary legal systems is extensive. The damage is to reduce one's property (ordinary damage) and to prevent its growth (lost profit), as well as to cause the other's physical pain, psychic suffering or fear (moral damage). The damage arises from the contract basis where the contract is not executed entirely or is executed only partially or improperly executed. The damage also derives from non-contractual relations, respectively torts. The damage arising from the non-contractual relationship is distinguished from the damage arising from the contractual relationship. Initially, from the aspect of national law,

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the Republic of Kosovo, in addition to other states with a contemporary legal system, in this regard, through Law no. 04/L-077 on Obligations paid special attention to the damage and compensation of material and non-pecuniary damage, specifying what constitutes damage in the legal aspect, who should compensate it, on what basis, the types of damages etc. Due to the nature of this paper, we will emphasize on the most characteristic issues of non-contractual relations. This will be done in accordance with Regulation no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations otherwise known as EU Rome II. Apart from the aforementioned sources, during the drafting of this scientific paper I also used the Law on the Resolution of the Collision of Laws with the Provisions of Other States in the Certain Relations of 1982 of the Former Yugoslav Socialist Federal Republic.

2. The Notion of Torts

The term “Delict” is derived from the Latin term “delictum”, which means a violation of the law. It is difficult to define legally the notion of torts/delicts. Tort is a wrong act or omission that gives rise to the right to a claim for compensation. Tort represent any inadmissable act by which the damage is caused and which incurs the obligation to reimburse the damage caused. (Milloshevic, 1971, p. 145) The law of tort covers a wide range of situations, including such diverse claims as those of a passenger injured in a road accident, a patient injured by a negligent doctor, a pop star libelled by a newspaper, a citizen wrongfully arrested by the police, and a landowner whose land has been trespassed on. As a result, it is difficult to pin down a definition of a tort; but, in broad terms, a tort occurs where there is breach of a general duty fixed by civil law. (Elliot & Quinn, 2011, p. 2) When a tort is committed, the law allows the victim to claim money, known as damages, to compensate for the commission of the tort. This is paid by the person who committed the tort known as the tortfeasor. (Elliot & Quinn, 2011, p. 2) The delict must be distinguished from a breach of contract and a criminal offense. A contract violation exists in cases where the contract is not executed at all, is executed in part or executed irregularly. For example, in the sales contract, the buyer does not pay at all the purchase price of the item (eg 850 euros for an iPhone 8), pays only 500 Euros, or instead of fulfilling the obligation in money, fulfills it at other ways that are described as improper. A defendant can be liable in both contract and tort. For example, if a householder is injured by building work done on their home, it may be possible to sue in tort for negligence and for breach

of a contractual term to take reasonable care. (Elliot & Quinn, 2011, p. 3) Whereas, the criminal offense is a dangerous social act, which is explicitly regulated by the Penal Code, ie with criminal legal norms. For criminal offenses, the principle "nullum crimen sine lege nulla poena sine lege" applies, which means there is no criminal offense, no penal sanction, without being prescribed by law. The opposite applies for torts. Torts are not foreseen precisely by the law, they are different and it is impossible to regulate all of them explicitly by the law. For criminal offenses, the principle of officiality applies. When a criminal offense is committed, the state interferes while at torts, it is in the will of the party whether it will sue to compensate for the damage caused to him/her by the respective tort e.g by breaking the windows of the house or the car. By contrast, a tort action is between the wrongdoer and the victim, and the aim is to compensate the victim for the harm done. It is therefore incorrect to say that someone has been prosecuted for negligence, or found guilty of libel, as these terms relate to the criminal law. (Elliot & Quinn, 2011, p. 2) For criminal offenses in certain cases the perpetrator may be held responsible even when the criminal offense has been attempted, whereas for the torts this rule does not apply. But it is important to note that by committing the tort, at the same time, the criminal offense can also be caused. For example, destruction or damage to property is a tort, because it is an illegal act prohibited by civil legal norms, because it is forbidden to cause damage to another and when it is caused, it must be compensated. But the destruction or damage to property constitutes a criminal offense under the Penal Code.[1]

3. Similiarities and Differences between Contractual Liability and Non-Contractual Liability

3.1. Similarities between Contractual Liability and Non-Contractual Liability

The first (1) similarity consists in how both the contractor and the tortfeasor are responsible for their actions. This contributes to justice, both in legal and moral sense, because everyone must respond to their actions. (Alishani, 1989, p. 605) Common to these responsibilities is that both of them carry the indemnity task. (Dauti, 2013, p. 155) The second (2) similarity consists in the fact that even from the tort, as an unlawful act, even from the violation of the contract, can result in causing the damage. For e.g, if the cd shop's window is broken, material damage is caused (tort liability), and by not executing or partially executing the sales

[1] See article 333 of Kosovo's Penal Code.

contract e.g when the buyer doesn't pay the sale's price, then material damage is caused (contractual liability). For e.g, we are all under a duty not to trespass on other people's land, whether we like it or not, and breach of that duty is a tort. But if I refuse to dig your garden, I can only be in breach of a legal duty if I had already agreed to do so by means of a contract. (Elliot & Quinn, 2011, p. 2) The third (3) similarity consists of the fact that objective responsibility exists not only when the damage is caused by dangerous objects but also when it is considered normal. Objective responsibility exists in contractual liability when someone guarantees the other that the third party will perform a certain act. (Alishani, 1989, p. 605)

3.2. Differences between Contractual Liability and Non-Contractual Liability

But, the differences between contractual liability and non-contractual liability are obvious and clear. They leave no room for misinterpretations and assumptions. The first (1) difference consists in the fact that, non-contractual liability is created de facto and de jure by causing the tort. When the subjects of law, whether a natural or a legal person, causes a delict, in a way it conflicts directly with the aforementioned basic principle of obligations, which states that it is prohibited in obligations to cause damage to the other party, respectively, the parties must refrain from acts or omissions that may lead to causing damage to the other party. However, contractual liability arises when a contract is not executed at all, or only partially executed, or improperly executed. The second (2) difference consists in that, that in contractual liability, the contractor is liable for the alleged guild, while in the non-contractual liability the damper is guilty of the fault, except in cases where the damage is caused by dangerous objects or dangerous activity. (Dauti, 2013, p. 155) The third (3) difference consists in that, that contractual liability is regulated by dispositive norms, because the contracting parties may exclude, limit or extend these rules, whereas non-contractual liability is regulated by imperative norms. The fourth (4) difference implies that, when the contract is violated, the parties are primarily responsible for compensating the damage, but also their heirs can respond when the contract is not related to the personal qualities of the contracting parties. While in non-contractual liability, it may be responsible for compensating the damage: the one who caused the damage, the assistant, the one who encouraged him/her to cause the damage, the possessor of the dangerous thing, the organizer of dangerous activity etc. The fifth (5) difference consists in that, that in the contractual liability, the debtor must, in the event of a breach of his/her obligation, fulfill the contract and reimburse the damage, while in the non-

contractual liability the principal obligation is the reimbursement of the damage. (Dauti, 2013, p. 156) The sixth (6) difference consists in the fact, that prescription deadlines vary at non-contractual liability and contractual liability. The prescription deadlines vary in between the contracts also. The prescription deadline at the non-contractual liability is three (3) years and starts to run from the moment when the injured party has taken notice of the damage caused by the person, and that period may not exceed five (5) years. (Dauti, 2013, p. 156)

4. EU Rome II Regulation and Its General Specifications

First of all, we must bear in mind that the regulation is part of the EU's second group of legislation. The basic EU treaty imposes these types of legislation on a taxative basis: 1. Regulation; 2. Directive; 3. The decision; 4. Recommendation and 5. Opinion. (Reka & Sela, 2011, p. 212) Certainly, the judicial practice of the European Court of Justice is also an important legal source and, together with the overwhelming resources, is rounded off the EU's secondary legislation. The question arises, what is the regulation and what is its meaning? The regulation is a special legal source in the conglomerate of EU law, which has its specifics and features that make it distinct from other legal sources. Generally speaking, the regulation can be compared to the importance, value and power of law in national legal systems. The regulation is the only source from the category of so-called second EU legislation, which has general application and obliges all member states. (Reka & Sela, 2011, p. 213) In the regulation, it is stated correctly the day of its entry into force. Like the law, the regulation should be published in the EU Official Gazette, which is easily accessible electronically so that it can produce legal consequences. Some authors think that the regulation could easily be called "first legislation", since is the only legal source of the EU, after the basic treaties, that has the highest mandatory legal power. (Reka & Sela, 2011, p. 213-215) Regulations have direct application in the territories of EU member states. When we talk about the EU regulations, it should be said that so far some attempts have been made to codify, ie a summary of all EU regulations, especially those dealing with the protection of the common European market and with the unification of customs regulations. (Reka & Sela, 2011, p. 214) Regulation no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, otherwise referred to as EU Rome II (hereinafter: EU Rome II), constitutes a very important legal act within the broad range of legal acts, approved by the relevant EU competent authorities. This regulation was completed

in Strasbourg, France on 11.07.2007, and has entered into force respectively has begun to be implemented in practice from 11.01.2009, except for article 29, which has begun to be implemented in practice from 11.07.2008 (article 32 of EU Rome II). This Regulation shall apply to events giving rise to damage which occur after its entry into force (article 31 of EU Rome II). This Regulation is binding in its entirety and is directly applicable in the EU Member States, in accordance with the EU Treaties. Pursuant to Article 1, paragraph 4 of the present Regulation, for the purposes of this Regulation, “Member State” shall mean any EU Member State other than Denmark. Which implies that every EU member state should implement EU Rome II, except Denmark, because according to Rome itself, the scope and legal solutions set forth in it do not oblige Denmark. Importantly, EU Rome II provides a choice of law rule for torts/delicts. The general rule, where there has been no express choice of law by the parties, is that the law applicable to non-contractual obligations arising out of a tort/delict shall be the law of the country in which the damage occurs. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority. From the scope of this regulation are excluded: non-contractual obligations arising out of family relationships, non-contractual obligations arising out of exchange bills, checks, non-contractual obligations arising out of nuclear damage, non-contractual obligations arising out of violations of privacy and rights that are related to personality, including defamation, etc.[1] To recap, the Regulations set out the conflict of law rules applicable to non-contractual obligations in civil and commercial matters. This Regulation shall apply also to non-contractual obligations that are likely to arise (article 2 of EU Rome II). Any law specified by this Regulation shall be applied whether or not it is the law of a Member State (article 3 of EU Rome II). 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 (article 24 of EU Rome II). The application of a provision 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 (article 26 of EU Rome II). This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations. However,

[1] See EU Rome II, article 1, paragraph 2.

this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation (article 28, paragraph 1 and 2 of EU Rome II).

5. EU Rome II and the Principle of Autonomy of the Will of the Parties

The parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties (article 14, paragraph 1 of EU Rome II). This does not apply to claims for unfair competition, restriction of competition, or infringement of an intellectual property right. (Stone, 2010, p. 389) The requirement of commercial activity appears to exclude agreements with a consumer or an employee. (Stone, 2010, p. 389) Article 14(2) adds that where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties is not to prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. (Stone, 2010, p. 389). Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement (article 14, paragraph 3 of EU Rome II). The autonomy of the will of the parties is not a supra-national institute, but it's an institute of positive international private law. (Bilalli & Kuçi, 2012, p. 303) Through contractual freedom, the parties decide what they want to achieve, fill the scope of their deal and find a solution if they fail fulfill it (Ikonomi, 2017, p. 43). Allowing the parties to determine this law provides them with an artificial means to avoid state policies that would otherwise regulate their deal. (Ikonomi, 2017, p. 45) It can be expressed explicitly or silently. It is thus not necessary that the parties expressly stipulate the applicable law. (Kuipers, 2012, p. 46) It is expressly expressed when the parties by a specific clause in the contract stipulate that the law of the respective state, e.g of the state of Austria or Germany,

will be applied for the purpose of regulating the concrete contractual relationship. But the autonomy of the will of the parties may also appear silent. If the parties clearly and explicitly do not assign the law, then some indicia (facts or circumstances) contained in the contract may be concluded that the parties have considered a concrete law to be enforced for regulating their contractual relationship. Before the EU Rome II Regulation was adopted, the opinion that there was little need for party autonomy in the field of torts was widespread. Moreover, it was thought that party autonomy would probably not be desirable. (Graziano, 2009, p. 113) But, in this regard, we can say that there are some strong and consistent arguments on why the free autonomy of the parties should be allowed. Initially, it is worth mentioning that the possibility for contracting parties to designate the competent law, in principle, is allowed in all civil-law and civil-economic contracts. However, in this regard, it is worth pointing out that the possibility that the parties with the agreement and the desire to assign competent law are not allowed in the civil-law contracts, which for the object have immovable items (immovable property). This position is also supported by the Law on the Resolution of the Collision of Laws with the Provisions of Other States in the Certain Relations of 1983, of the former Socialist Federal Republic of Yugoslavia, in its Article 21, which expressly states: “For contracts that have the exclusive property of the immovable property is the law of the state in whose territory the immovable property is located”. This attitude is also supported by theorists of the law. (Bilalli & Kuçi, 2012, p. 306) In this aspect, the collusive effect of the will of the parties is also excluded in another case, according to Kosovo's legislation. Law on the Resolution of the Collision of Laws with the Provisions of Other States in the Certain Relations of 1983 of the former Socialist Federal Republic of Yugoslavia, in Article 37 explicitly provides that: “For the contractual relations of spouses ownership, the competent is the law which at the time of the contract is competent for personal and property relations (paragraph 1) and if the law set out in paragraph 1 of this Article provides that spouses may choose the law to be competent for the spouse's property contract, the law which they have chosen” Also, autonomy of will is excluded from contractual relations with foreign elements, which states among themselves regulate with international resources uniquely with legal material norms. (Bilalli & Kuçi, 2012, p. 306) Consequently, in these cases, we have to do when states are involved in bilateral or multilateral relations with other states through international treaties (conventions). For example, the Convention for the International Sale of Goods of 1980.

6. EU Rome II and the Principle of "Lex Loci Delicti Comissi"

Chapter Two (2) of EU Rome II, Articles 4-13, expressly refer to "torts". This chapter is titled "Delicts/Torts". Recital 11 explains that, since the concept of a non-contractual obligation varies from one Member State to another, for the purposes of the Regulation "non-contractual obligation" should be understood as an autonomous concept. (Stone, 2010, p. 370) Recital 11 explains that the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict rules in matters of contractual obligations. Since no requirement of writing or other formality is required for an express choice of law, an oral agreement on the applicable law, concluded in the negotiations leading to the conclusion of a substantive contract in writing, will be effective. (Stone, 2010, p. 299) In non-contractual relations, the legal systems of the states from the 14th century to the middle of the twentieth century apply, in principle (with minor exceptions) the same decisive fact "lex loci delicti comissi" or state of the country when the tort is committed. (Bilalli & Kuçi, 2012, p. 326) The decisive fact of torts during the historical development of international private law, which has been applied unanimously over a long time, both in theory and practice, and in the legislation of the largest number of states has been the rule "lex loci delicti comissi", principle, according to which the law of the state where the tort is committed is applied. (Bilalli & Kuçi, 2012, p. 326 and article 4, paragraph 1 of EU Rome II) However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question (article 4, paragraph 2 and 3 of EU Rome II). As a decisive fact for the judicial competence for delicts and quasi-delicts with a foreign element is applied the principle "forum delicti comissi", respectively the court of the state where the unlawful act is commited. However, the competence of the court's where the delict was commited is not exclusively competent, because for delicts and quasi-delicts with a foreign element, the claim can be filed also at the court of the general forum - the residence of the respondent. (actor sequitur forum rei) - (Bilalli & Kuçi, 2012, p. 332) "Lex loci delicti comissi" constitutes a principle of international private law, according to which for the delict of a foreign element applies the law of the state where the

delict of a foreign element was committed. Our law also holds this position, which is manifested in the Law on the Resolution of the Collision of Laws with the Provisions of Other States in Certain Relations of the former Socialist Federal Republic of Yugoslavia, which entered into force on 01.01.1983 but still is applicable, in the absence of a relevant law of the Republic of Kosovo for private international law. Specifically, the legal solution to the "lex delicti comissi" in the above-mentioned law can be found in Article 28, paragraph 1, which expressly states that: "For non-contractual liability for damage, unless in special cases, competent is the law of the country where the act or the law of the country where the consequences have happened, depending on which of these two laws is more favorable to the injured party".

7. Conclusion

After elaborating and analyzing all that was discussed above and related professional literature related to it, we can conclude that the basic principle of obligations is to refrain from acts or omissions that may cause harm (damage) to the other party. However, this principle is not always respected. Parties often cause different damages to other parties, both material and moral. These damages can be caused to other parties, both from a contractual basis and from a non-contractual basis. There is often no difference between these two types of liabilities, and when spoken about these, some jurists commonly think about the same liability. We conclude that non-contractual liability is created de facto and de iure by causing the tort, whereas contractual liability arises when a contract is not executed at all, or is executed only partially or is improperly executed. Contractual liability is regulated by dispositive norms, whereas non-contractual liability is regulated by imperative norms. In this regard, we also came to the conclusion that whoever causes the other harm, should compensate it, respectively, should return the state of "restitutio in integrum", unless it proves that he/she was not guilty at the time of causing the damage. The damage is to reduce someone's wealth (ordinary damage) and to prevent its growth (lost profit), as well as causing the other to suffer physical pain, psychic suffering or fear (moral damage). Also, we came to the conclusion that EU Rome II entered into force from 11.01.2009, with the exception of Article 29, which has begun to be implemented in practice from 11.07.2008. All member states of the European Union are obliged to apply it, except Denmark, which according to EU Rome II itself is relieved of its obligation to implement it. EU Rome II defines the rules of conflict of law applicable to non-contractual

obligations in civil and commercial matters. It does not apply, in particular, to income, customs or administrative matters or to state responsibility for acts and omissions in the exercise of state authority (acta iure imperii). The principle is that the law applicable to non-contractual obligations arising from a delict will be the law of the country in which damage is caused, respectively, the principle "lex loci delicti comissi". We conclude that "Lex loci delicti comissi" is a principle of international private law, according to which the delict of a foreign element applies to the law of the state where the delict of a foreign element was committed. However, the parties may agree in accordance with the principle of their free autonomy to apply the relevant law of a particular country. This can happen in all civil-law and civil-economic contracts in principle. However, this can not happen, ie it is forbidden to happen in contracts with object of immovable property (real estate), ships and aircraft, in banking affairs, in cases where States with international conventions, whether these are two (2) or multilateral ones, regulate matters of such.

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*** Law no. 04/L-077 on Obligations of the Republic of Kosovo.

*** Law on the Resolution of the Collision of Laws with the Provisions of Other States in Certain Relations of the former Socialist Federal Republic of Yugoslavia.

*** Penal Code no. 04/L-082 of the Republic of Kosovo.

*** Regulation no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (EU Rome II).