ŁUKASZ ŻARNOWIEC
https://doi.org/10.33995/wu2024.1.6
date of receipt:22.02.2024
date of acceptance: 23.04.2024

The Assessment of the nature of national law provisions which set the rules for the compensation for harm caused by the death of the closest person in the light of Art. 16 of the Rome II Regulation – comments in the context of a preliminary question submitted to the Court of Justice of the EU following the decision of the Bulgarian Supreme Court of Cassation of February 7, 2023 (case number C-86/23, HUK-COBURG-Allgemeine Versicherung AG)

Despite the fifteen-year period of validity of the "Rome II" Regulation, its application by the courts of the Member States is still, in some respects, a source of serious controversy. It manifests itself with particular intensity in Art. 16, devoted to overriding mandatory rules. This should be attributed to two factors. The first one is the resignation from including therein a legal definition of this category of norms, in contrast to Art. 9 section 1 of the "Rome I" regulation. The other is the phenomenon of a kind of "inflation" of the concept of overriding mandatory provisions, observed in the PIL. It manifests itself in the attempts to attribute such qualification to binding rules of national law, the nature of which do not indicate

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

a conflict of laws element inherent in them, implying the need to apply them in addition to or instead of the applicable law. The case C-86/23 pending before the CJEU, as a result of a request for a preliminary ruling submitted in the decision of the Bulgarian Supreme Court of Cassation of February 7, 2023, gives an excellent opportunity to bring up once again the issue of the proper way of understanding the concept of overriding mandatory rules in the context of Art. 16 of the Rome II Regulation, using as an example the norms applicable in Bulgarian substantive law, which regulate the principles of granting compensation for harm caused by the death of a close relative. Looking at the matter in question from the perspective of the fifteenth anniversary of the regulation's validity, the author recommends particular caution in applying Art. 16 and, at the same time, makes an attempt to formulate a proposal of an answer to the question referred to in a preliminary ruling.

Keywords: private international law, "Rome II" Regulation, overriding mandatory rules, compensation, non-contractual obligation, applicable law.

1. Introductory remarks

Despite the fifteen-year period of validity[1] of the Regulation (EC) No. 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations – "Rome II"[2] in the EU[3], its application by the courts of the Member States is still, in some respects, a source of serious controversy. The provision in which it manifests itself with particular intensity is Art. 16[4], devoted to overriding mandatory rules. This should be seen as partly related to the way it was drafted and how it is essentially connected to the resignation from including a legal definition of this category of norms in this very norm, exactly as is set out in Art. 9 section 1 of "Rome I". Partly, however, it seems to be related to the phenomenon of a kind of "inflation" of the concept

1. Despite initial doubts arising from the wording of Art. 31 of the Regulation, it was finally decided that, in the light of Art. 32, it has been applied by the courts of the Member States bound by it since January 11, 2009 in relation to events occurring after that date – CJEU judgment of November 17, 2011 in case C-412/10, Homawoo v GMF Assurances or Ł. Żarnowiec, *Czasowe ramy zastosowania rozporządzenia Parlamentu Europejskiego i Rady (WE) nr 864/2007 o prawie właściwym dla zobowiązań pozaumownych (rozporządzenie Rzym II) – uwag i na tle orzeczenia Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-412/10,* Homawoo v GMF Assurances, Rozprawy Ubezpieczeniowe 2012, No. 1, pp. 5–13 along with the literature cited there.
2. OJ L 199, 31.7.2007, p. 40. The term "Regulation" used in this Article refers, without further clarification, to 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".
3. Apart from Denmark, which, in accordance with point 40 of introductory notes and Art. 1 section 4 of the Rome II Regulation is not considered a Member State for its purposes.
4. Attention has been drawn to the risk of the appearance of problems related to its application, especially to the uniform understanding of the concept of overriding mandatory provisions, almost since the very beginning of the regulation application – Ł. Żarnowiec, *Przepisy wymuszające swoje zastosowanie w świetle rozporządzenia Parlamentu Europejskiego i Rady (WE) nr 864/2007 z dnia 11 lipca 2007 r., o prawie właściwym dla zobowiązań pozaumownych – „Rzym II" (Dz.Urz. UE 2007 L 199/40)*, w: *Państwo i Prawo w dobie globalizacji. Księga jubileuszowa*, Rzeszów 2011, p. 340–355.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

of overriding mandatory provisions, which has been observed for some time[5]. The said "inflation" manifests itself in the attempts to attribute such nature to binding rules of national law, the essence and content of which, the values behind which, and the goals pursued through which, in fact, do not indicate a conflict of laws element inherent in them, which would imply the need to apply the aforementioned rules to break the general mechanisms of searching for the applicable law. An example of such an approach seems to be provided in case C-86/23 pending before the CJEU, as a result of a request for a preliminary ruling submitted in the decision of the Bulgarian Supreme Court of Cassation of February 7, 2023. Its subject is the issue of the correct classification of the norms applicable in Bulgarian substantive law which regulate the principles of granting compensation for harm caused by the death of a close relative, in the context of Art. 16 of the Rome II Regulation. However, this question has a broader dimension and becomes paramount also in the context of regulations of other Member States, including Poland. It is an excellent opportunity to bring up once again the issue of the proper way of understanding the concept of overriding mandatory rules against the backdrop of the Rome II Regulation and to do so from the perspective of the fifteenth anniversary of its validity, and, at the same time, to attempt to formulate a proposal of an answer to the question referred to in a preliminary ruling.

2. Presentation of the issue constituting the subject of the request for a preliminary ruling.

The issue of the correct interpretation of Art. 16 of the Rome II Regulation, which is the subject of a motion submitted by the Bulgarian Supreme Court of Cassation to the Court of Justice of the EU for a decision under Art. 267 TFEU, manifested itself in the context of the matter tried by that court as a result of the plaintiffs' complaint, in the case for monetary compensation for the death of a close relative. In this very case a lawsuit was brought against the German insurance company: HUK-COBURG-Allgemeine Versicherung AG by the parents of the deceased.

The road accident that caused the woman's death occurred on July 27, 2014, in Germany. It was the fault of the insured driver of the passenger car in which the deceased was traveling as a passenger. Following the consequences of this event, the plaintiffs, Bulgarian citizens with their habitual residence in Bulgaria, demanded, before the Bulgarian courts, that the defendant pay the compensation in the amount of BGN 250,000 to each of them for non-material damage they suffered because of the death of their daughter.

The Sofia City Court adjudicating the case in the first instance, having previously determined the application of the German tort law as a tort statute, partially allowed the claim, pursuant to § 253 sub. 2 BGB. It concluded that the case had met the stringent conditions arising from the invoked provision of the German law, which allows an indirectly aggrieved party to claim monetary compensation in exceptional circumstances only, namely, if the pain and suffering experienced as a result of the death of a close relative resulted in any damage to their own health.

5. M. Pazdan, M. Jagielska, W. Kurowski, M. Świerczyński, M.A. Zachariasiewicz, M. Zachariasiewicz, Ł. Żarnowiec, W odpowiedzi na ankietę skierowaną do państw członkowskich Unii, dotyczącą stosowania Rozporządzenia nr 864, PPPM 2013, vol. 12, p. 192.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license, and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

Following an appeal filed by the defendant, the Court of Appeal in Sofia reviewed the contested judgment of the court of first instance and dismissed the claim in its entirety. It found that the plaintiffs had not demonstrated emotional pain and suffering causing disruption to their health, which is a prerequisite for the right to compensation for non-pecuniary damage in accordance with the German law applicable in the case. At the same time, the court found that there were no grounds to apply (pursuant to Art. 16 of the Rome II Regulation) Art. 52 of the Bulgarian Act on Obligations and Contracts regulating compensation for non-material damage, instead of the German law generally applicable under Art. 4 section 1 of the Rome II Regulation in this case.

The plaintiffs appealed against this judgment to the Supreme Court of Cassation, which found the complaint admissible, pointing to discrepancies in the jurisprudence of Bulgarian courts regarding the qualification of Art. 52 of the Bulgarian Act on Obligations and Contracts as an overriding mandatory provision within the meaning of Art. 16 of the Rome II Regulation. Meanwhile, according to the said court, in the circumstances of the case under consideration, such a classification of the above-mentioned provision would result in the exclusion of the regulation of the German tort law applicable in the light of the conflict of laws rules. In the face of emerging doubts regarding the interpretation of Art. 16 of the Rome II Regulation in relation to the invoked provision of the Bulgarian law, the Supreme Court of Cassation, as a court whose judgments are not subject to appeal, pursuant to Art. 267 TFEU, posed a question to the CJEU. The court asked whether Article 16 of the Rome II Regulation must be interpreted as meaning that a rule of national law, such as that at issue in the main proceedings, which provides for the application of a fundamental principle of the law of the Member State, such as the principle of fairness, in the determination of compensation for non-material damage in cases where the death of a close person has occurred as a result of a tort or delict, may be regarded as an overriding mandatory provision within the meaning of Article 16.

Invoking the judgment of the CJEU of December 15, 2022, issued in case C-577/21, as a result of a motion referred to by the Sofia City Court in the proceedings for compensation for non-material damage initiated by the children of that same accident victim, in which the Court commented on the interpretation of Art. 3 of Directive 2009/103/EC in the aspect of the provisions of German law, the Supreme Court of Cassation drew attention to the differences in the way liability for non-material damage was regulated in German and Bulgarian national laws. In the legal status applicable to the case under consideration, the former made compensation for harm suffered indirectly by the party injured as a result of a road accident dependent on, among others, the occurrence of bodily harm of the indirectly injured person themselves. The psychological trauma was viewed as damage to health only if it constituted part of a health disorder and went beyond the damage which people usually sustained in the event of death or serious bodily injury that occurred to a close family member. In turn, Art. 52 of the cited Bulgarian Law stipulates that compensation for non-material damage resulting from death is determined by the court in accordance with the principle of equity, while the case law clarifies that the criterion for its award is the existence of a particularly close life bond between the claimant and the victim as well as the demonstration of serious emotional suffering resulting from their death. At the same time, however – unlike in German law – it is not necessary for the indirectly injured party to suffer from a health disorder. The amount of compensation granted under both legal orders would also be different. However, it depends on the circumstances of a specific case, under Bulgarian law compensation awarded for non-material damage resulting from the death of a close family member is statistically higher than under German law. In the circumstances of the case under consideration, the application

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

of Art. 52 of the above-mentioned Bulgarian Act pursuant to Art. 16 of the Rome II Regulation, instead of the German tort law applicable under Art. 4 of this regulation, would result not only in the adoption of more lenient conditions for the compensation for non-material damage caused by the death of a close person and for which damage the sued insurance company is responsible but, by extension, in the possibility of awarding a higher compensation .

Referring to the position expressed in the judgment of the CJEU of January 31, 2019 in the da Silva Martins case (C-149/18), the Supreme Court of Cassation pointed out that in the absence of a definition of overriding mandatory rules in the Rome II Regulation against the background of its Art. 16, by analogy, the definition from Art. 9 section 1 of the Rome I Regulation should be applied. This means that in order to recognize a specific national provision as an overriding mandatory one, it must be concluded, based on a detailed analysis of its wording, general scheme, objectives and the context in which it was adopted, that it is of such immense importance within the national legal order that the withdrawal from the application of the applicable law determined pursuant to Art. 4 of the Regulation is justified. This departure should be interpreted strictly. In this context, the Supreme Court of Cassation pointed out that the principle of equity underlying the above-mentioned Art. 52 of the Bulgarian Law was a fundamental principle of Bulgarian law and part of Bulgarian public policy.

3. The concept of overriding mandatory rules in the light of Art. 16 of the Rome II Regulation.

The request for a preliminary ruling submitted to the CJEU confirms that, when looking for the applicable law in a case involving non-contractual obligations, one should also consider the existence of mandatory provisions. Their importance in this category of cases cannot be compared to the role they play in contractual obligations[6] or inheritance matters[7]. However, we are dealing here with their presence, as indicated by the doctrine[8] and jurisprudence of the courts of EU Member States even before the entry into force of the Rome II Regulation[9]. Therefore, the decision of the EU legislator

---

6. G. Wagner, *Die neue Rom II – Verordnung*, IPRax 2008, z. 1, p. 15; J. Carruthers, *Has the Forum Lost Its Grip?* in: J. Ahern, W. Binchy (ed.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, Leiden, Boston 2009, p. 32.
7. Ł. Żarnowiec, *Wpływ przepisów wymuszających swoje zastosowanie na rozstrzyganie spraw spadkowych pod rządami rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 650/2012*, PPPM 2019, v. 25, p. 43–65.
8. D. Schramm, *Ausländische Eingriffsnormen im Deliktsrecht*, Bern 2005, p. 262. According to the author, norms of this type may justify liability in cases where it does not result from the provisions of the *legis causae*, or vice versa: introduce limitations on liability unknown to the *legem causae*, e.g. related to the personal qualifications of a given entity.
9. BGH, wyrok z 01.12.2005 r., III ZR 191/03, unpublished This judgment adopted the application of § 661a BGB (as an overriding mandatory provision) to assess the obligation of an Austrian entrepreneur from the mail order industry towards the plaintiff residing in Germany. This provision imposes an obligation on the entrepreneur who, through a promise of a prize or comparable information addressed to the consumer, gives the impression that the consumer has won a prize, to provide such performance. As the Court emphasized, the public interest reasons underlying the adoption of § 661a BGB indicate that this provision, being an overriding mandatory one, comes into play regardless of the law applicable in the normal course of affairs. Due to the content of Art. 647^1 §5 of the Polish Civil Code, the judgments of the French Court of Cassation of November 30, 2007, N° 06–14.006,

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

to regulate the legal regime of this category of rules in the aspect of non-contractual obligations should be positively assessed.

The regulation touches upon this issue in the introductory notes. Point 32 emphasizes the extraordinary nature of overcoming the general conflict-of-law model when it comes to determining applicable law. It indicates that considerations of public interest justify granting the courts of Member States the possibility of applying, in extraordinary circumstances, exceptions based on the public policy clause and overriding mandatory provisions. This assumption is implemented in Art. 16. It states that the provisions of the Regulation do not restrict the application of the provisions of the law of the *forum* in a situation where they are mandatory, irrespective of the law otherwise applicable to a non-contractual obligation. The originators of the regulation referred to the traditional definition of overriding mandatory rules, previously adopted in Art. 7 of the Rome Convention[10]. It uses this concept to describe provisions which shall be applied to all factual situations falling within the scope of their hypothesis, regardless of the law applicable to a given case in the light of the authoritative conflict of laws rules of the private international law of the *forum*. Whether we are dealing with such a case should be assessed in accordance with the will of a given legislator (national, community or international one)[11]and interpreted based on their content, function or purposes. Such will to regulate civil law relations in addition to or instead of provisions of the law applicable in the normal course of events distinguishes them from ordinary mandatory provisions. The latter set the limits of autonomy of the will of the parties only within a given national legal order, while overriding mandatory provisions they not only leave no room for it at the conflict of laws level[12], but also make a breach in the general model of searching for the applicable law through conflict of laws rules, utilizing objective connecting factors[13].

It should be remembered, however, that the overriding mandatory provisions do not create a specific, separate, and ordered category of legal rules to which this feature should be automatically

JCP G 2008 II 10000; of January 30, 2008, Bull. Civ. III No. 16; of April 8, 2008, N° 07–10.763, Clunet 2008, 1075, discussed in: F. Niggemann, *Eingriffsnormen auf dem Vormarsch (zu Cass. mixte, 30.11.2007 – 06–14.006),* IPRax 2009, vol. 5, p. 444–451 should be considered particularly interesting from the Polish perspective. These judgements adopted Art. 12 of the French Act on Subcontractors of December 31, 1975, as overriding mandatory provision in relation to all construction investments and thus granting the subcontractor a direct claim for payment of remuneration against the investor in the event of non-performance by the general contractor. See also examples from the jurisprudence of English courts by A. Dickinson *The Rome II Regulation: The law applicable to non-contractual obligations*, Oxford 2008, p. 632.

10. Rome Convention of 1980 on the law applicable to contractual obligations (OJL 266, 9.10.1980, pp. 1 – 19)
11. A. Dickinson, *The Rome II …*, p. 634 – 636.
12. J. Pazdan, *Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych,* PPPM 2009, vol. 4, p. 23.
13. W. Popiołek*, Znaczenie przepisów o „bezpośrednim działaniu" w zakresie eksportu kompletnego obiektu w: M. Pazdan, A Tynel (ed.), Zagadnienia prawne eksportu kompletnych obiektów przemysłowych,* Katowice 1980, p. 127–128*;* the same, *Znaczenie przepisów „prawa publicznego" różnych systemów prawnych dla stosunków umownych handlu zagranicznego,* PPHZ 1988, vol. 12, p. 63*;* W. Wengler*, Internationales Privatrecht,* Berlin, New York 1981, p. 970*;* K. Schurig, *Zwingendes Recht, „Eingrifsnormen" und neues IPR,* RabelsZ 1990, vol. 54, p. 220–221*;* H. E. Hartnell*, Rousing the sleeping dog: the validity exception to the Convention on Contracts for the International Sale of Goods,* Yale Journal of International Law, Winter 1993, p. 58–59*;* M. Mataczyński, *Obce przepisy wymuszające swoje zastosowanie, Rozważania na tle art. 7 ust. 1 Konwencji rzymskiej oraz orzecznictwa sądów niemieckich,* KPP 2001, vol. 2, p. 381*;* B. Fuchs*, Statut kontraktowy a przepisy wymuszające swoje zastosowanie*, Katowice 2003, p. 71*;* J. Kropholler, *Internationales Privatrecht,* Tübingen2004, p. 490.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

attributed [14]. Besides, they are not given such character by the provisions relating to them contained in acts of private international law, such as Art. 16 of the Rome II Regulation. Their function is not so much to identify mandatory provisions in the sense indicated above, but rather to determine their meaning in the traditional model of searching for the applicable law. The decision on whether a specific provision is "overriding mandatory" and is to be applied in addition to or instead of the law applicable in the normal course of affairs should be made by the court in the circumstances of a specific case based on a thorough analysis of its content, values behind it, goals it is to reach, and functions it is intended to perform, as well as the interests protected by it against the backdrop of the interests of the forum.

However, for uniform understanding and correct identification of overriding mandatory provisions as well as the way they are phrased in the rules of private international law relating to them is undoubtedly important. Aware of this were the authors of the Rome I Regulation. Art. 9 section 1 of this very Regulation, unlike Art. 16 of the Rome II Regulation, does not limit itself to pointing out the element of will to be applied regardless of the law applicable in a given case in the normal course of affairs that characterizes the provisions in question. Additionally, it emphasizes the importance of protecting the public interests of the country of origin carried out through them[15]. The legal definition contained therein describes overriding mandatory provisions as *"provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation"*.

Even though both legal acts were created in fact simultaneously, this element was ultimately missing from the hastily drafted Article 16 of the Rome II Regulation, which is rightly considered to be its shortcoming[16]. However, this difference should not be considered too important. Even before the entry into force of the "Rome I" Regulation, the doctrine[17] and case law[18] emphasized the connection between the will to regulate given situations, regardless of the law applicable to them in a normal sequence of events, characteristic of overriding mandatory provisions and the implementation

14. As M.A. Zachariasiewicz aptly emphasizes, this is not about a separate, specific category of "police" norms, but about individual provisions protecting "point – wise" particularly important public interests of the country of origin, which have a mandatory character only potentially. The application or non – application of the said provisions always constitutes an individual decision of the court, based on an analysis of their nature and purpose, the interests protected by them, and is always taken based on the circumstances of a specific case – See M. A. Zachariasiewicz in: W. Popiołek (ed.), *System prawa handlowego*. Vol. 9 – *Międzynarodowe prawo handlowe*, Warszawa 2013, p. 263 and literature cited there.

15. D. Martiny, *Europäisches Internationales Vertragsrecht vor der Reform*, ZEuP 2003, p. 614.

16. M. Pazdan, M. Jagielska, W. Kurowski, M. Świerczyński, M.A. Zachariasiewicz, M. Zachariasiewicz, Ł. Żarnowiec, *W odpowiedzi na ankietę skierowaną do państw członkowskich Unii, dotyczącą stosowania Rozporządzenia nr 864*, PPPM 2013, vol. 12, p. 191.

17. S.D. Schramm, *Ausländische Eingriffsnormen* …, p. 229; A. Fuchs*, Zum Kommissionsvorschlag einer „Rom II" – Verordnung*, „Zeitschrift für Gemeinschaftsprivatrecht" 2003–2004, vol. 2, p. 104; M.A. Zachariasiewicz in: W. Popiołek (ed.), *System* …, p. 262.

18. ECJ, judgment of November 23, 1999, in joint cases C-369/96 and C-376/96 (Arblade), in which such a qualification was adopted in relation to provisions of national law, so important for the protection of the political, social and economic order of the state of origin that it is necessary to apply them to all persons within its territory and to all legal relationships connected with it.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

of the public interests of their country of origin. Article 9(1) 1 of the "Rome I" regulation did not introduce any new quality here, but only included something that had already been noticed before in the framework of positive law and emphasized its importance. This also affects the way in which overriding mandatory provisions are understood in the context of Art. 16 of the Rome II Regulation. Here, too, the mentioned feature (although not stated directly) – as related to the very essence of the concept of overriding mandatory provisions – should be considered an important element of the definition of this category of rules[19]. An additional argument in favor of this course of action is provided by the wording of point 7 of the preamble to the regulation. The requirement contained therein which was to ensure compatibility of its provisions with instruments concerning the law applicable to contractual obligations[20] was perceived by the representatives of the doctrine, from the very beginning, as a sufficient incentive to use the definition formulated in Art. 9 section 1 of the Rome I Regulation also in the application of Art. 16 of the Rome II Regulation[21]. Ultimately, the legitimacy of this approach was confirmed by the CJEU in its judgment of January 31, 2019, issued in the case of Agostinho da Silva Martins v. Dekra Claims Services Portugal S.A. (C-149/18)[22]. Commenting on the interpretation of Art. 16 of the Rome II Regulation in regard to the qualification of the provisions of national law governing the limitation period for claims, in the absence of a definition of overriding mandatory provisions specified in the said article, the Tribunal emphasized the need to use the definition contained in Art. 9 section 1 of the Rome I Regulation. It drew attention to the importance of the requirement of consistency in the application of both regulations and, by extension, harmonizing the interpretations of functionally identical concepts defined in these legal acts to the highest possible extent.

---

19. R. Plender, M. Wilderspin, *The European Private International Law of Obligations,* London 2009,p. 744; T.K. Graziano, *Das auf außervertraglicheSchuldverhältnisseanzuwendendeRechtnachInkrafttreten der Rom II – Verordnung,* Rabels Z 2009, vol. 73, p. 72; Idem: *Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle (règlement Rome II)*, RCDIP2008, vol. 3, p. 507; C. Brière, *Le règlement (CE) n° 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (Rome II)*, "Revue trimestrielle LexisNexis JurisClasseur", Janvier-Février-Mars 2008, p. 66; A. Junker, *Die Rom II – Verordnung: Neues Internationales Deliktsrecht auf europäischer Grundlage*, NJW 2007, vol. 51, p. 3680; D. Jakob, P. Picht in: T. Rauscher (ed.), *Europäisches Zivilprozess – und Kollisionsrecht EuZPR/EuIPR Kommentar*, Műnchen 2011, p. 965 – 966; G. Hohloch w: W. *Erman, Handkommentar zum Bürgerlichen Gesetzbuch*, Köln 2011, p. 6795.
20. A. Junker in: H.J. Sonnenberger (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 10, Internationales Privatrecht, Rom I – Verordnung, Rom II – Verordnung, Einführungsgesetz zum Bürgerlichen Gesetzbuche (art. 1–24),* München 2010, p. 1313; J. von Hein in: G.P. Callies (ed.), *Rome Regulations. Commentary on the European Rules ofthe Conflict of Laws*, Wolters Kluwer 2011, p. 565.
21. J. von Hein, *Europäisches Internationales Deliktsrecht nach der Rom II – Verordnung,* ZEuP 2009, vol. 1, p. 24; R. Plender, M. Wilderspin, *The European Private International Law E,*p. 744; A. Dickinson, *The Rome II …*, p. 633–634; A. Junker in: H.J. Sonnenberger (ed.), *Münchener Kommentar E*, p. 1314; M. Pazdan, M. Jagielska, W. Kurowski, M. Świerczyński, M.A. Zachariasiewicz, M. Zachariasiewicz, Ł. Żarnowiec, *W odpowiedziE*, p. 192; Ł. Żarnowiec in: M. Pazdan (ed.), *System prawa prywatnego. Prawo prywatne międzynarodowe*, vol. 20B, Warszawa 2015, p. 864; M.A. Zachariasiewicz in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018, p. 986. As regards possible differences resulting from the lack in the Rome II Regulation of a rule which – as in the case of the Rome I Regulation – would emphasize the element of public interest pursued by the overriding mandatory provisions, see, however: H. Ofner, *Die Rom II – Verordnung – Neues Internationales Privatrecht für außervertragliche Schuldverhältnisse in der Europäischen Union*, ZfRV 2008, vol. 1, p. 23.
22. ECLI:EU:C:2019:84.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

Therefore, against the background of Art. 16 of the Regulation, again, when identifying specific provisions as overriding mandatory ones, the conflict element inherent in them, expressed in the will to apply them in a given case regardless of the law applicable in the normal course of affairs, should be interpreted based on the objective of protecting the public interests of the country of origin introduced in the rule in question. However, it was rightly emphasized that, despite the arguments in favor of uniform understanding of the concept of overriding mandatory provisions in the context of both legal acts, the difference in the ways Art. 16 of the Rome II Regulation and Art. 9 section 1 of the Rome I Regulation were formulated may, in specific cases, lead to erroneous conclusions and constitute an incentive to apply them too hastily in matters relating to non-contractual obligations, substantive norms outside the *legis causae* which do not actually possess overriding mandatory character[23]. The fact that these fears were not groundless is proven by the above-mentioned judgment of the CJEU in the case of Agostinho da Silva Martins v. Dekra Claims Services Portugal S.A. (C-149/18), as well as the preliminary reference that has inspired this text.

In terms of the correct application of Art. 16 of the regulation, the question of how to understand the purpose of protecting the public interests of the country of origin which distinguishes overriding mandatory provisions from all mandatory rules, also posed in reference to Art. 9 section 1 of the Rome I Regulation[24], is therefore of key importance. After all, each norm originating from a given legislator pursues, to some extent, the public interest of its country of origin. Should we, therefore, take into account exclusively the rules in which this goal comes to the forefront, ignoring the provisions that let it be realized occasionally, with regard to a specific way of regulating the rights or obligations of the parties to a private law relationship[25], or should we rather focus on an individual assessment of the essence and degree of the intensification of the "regulatory" nature of a given provision, without excluding cases in which a particularly important public interest behind the said provision is pursued through appropriate "weighing" of the interests of individuals?[26]

Against the background of Art. 16 of the Rome II Regulation (and similarly under Article 9(1) of the Rome I Regulation), the latter point of view should be adopted. Its wording and function do not authorize limiting the concept of overriding mandatory provisions to the rules based on the public law method of regulation. Therefore, it is not without reason that, both at the level of contractual[27]

23. M. Pazdan, M. Jagielska, W. Kurowski, M. Świerczyński, M.A. Zachariasiewicz, M. Zachariasiewicz, Ł. Żarnowiec, *W odpowiedzi na ankietę* ..., p. 192.

24. M.A. Zachariasiewicz in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe ...,* p. 709.

25. See in relation to consumer contract law – M. Lijowska, *Instrumenty kolizyjnoprawnej ochrony konsumenta a przepisy koniecznego zastosowania*, KPP 2006, vol. 2, p. 452.

26. M.A. Zachariasiewicz in: W. Popiołek (ed.), *System* ..., p. 267.

27. An example of this type of regulation is the provisions specifying the rules for remunerating representatives of some professions – see A. Spickhoff, *Zwingendes Gebührenrecht und Internationales Vertragsrecht*, IPRax 2005, vol. 2, p. 128; A. Staudinger, *Erfolgshonorare und quota litis-Vereinbarungen im Internationalen Privatrecht*, IPRax, 2005, vol. 2, p. 132, 134, D. Martiny, *Neue Impulse im Europäischen Internationalen Vertragsrecht,* ZfRV 2006, p. 87. In case law: BGH, judgment of February 27, 2003, VII ZR 169/02, IPRax 2003, vol. 5, p. 449 with a critical gloss of M. Kilian, C. Müller, *Öffentlich-rechtliches Preisrecht als Eingriffsnorm i. S. des Art. 34 EGBGB*, IPRax 2003, vol. 5, p. 436–440 (in which the court considered the national regulations determining the rates of remuneration of architects and engineers (HOAI) as overriding mandatory provisions and applied them on the basis of Art. 34 EGBGB). Such nature is also attributed to the norms granting the agent the right to an indemnification benefit – see ECJ, judgment of November 9, 2000, Rs. C-381/98, in the case of Ingmar GB Ltd./Eaton Leonard Technologies Inc., RIW 2001, p. 133, which recognized Art. 17 and 18 of Directive

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

and non-contractual obligations[28], this term is also used in relation to provisions based on the private law method of regulation, as long as their content, functions, or objectives indicate that they are an instrument used for the implementation of particularly important interests resulting from public order of the country of origin. This is manifested in the intention inherent in them to apply orders or prohibitions arising from these provisions inherent in them, regardless of the law applicable to a given relationship, in the normal course of events. Against the backdrop of non-contractual obligations, examples of regulations of potentially overriding mandatory nature include the ones relating to the principles such as: utilizing the natural environment at the site of the event, regulating the broadly understood trade in works of art, ensuring protection against discrimination or abuse of position by stronger trade participants, securing the freedom of business activity or fair competition, controlling selected areas of the economy, ensuring safety at work and regulating liability for accidents at work, ensuring special protection of selected categories of injured parties or, conversely, of certain persons who may potentially be liable for damage[29]. However, any calculations may only have an auxiliary value because the decision to apply a given norm in violation of the general jurisdiction of *legis causae* must always be taken by the court with regard to a specific provision and circumstances of a specific case.

While remaining open to the perception of provisions based on the private law method of regulation as overriding mandatory ones in the area of non-contractual obligations, we should nonetheless oppose the tendency, which has been noticed for some time now, to excessively expand the scope of this concept. This tendency is visible in attempts to include in this category also the norms in a case where the interests of the country of origin justify giving them binding character, but, at the same time, do not justify giving them the power to regulate legal relationships, regardless of general mechanisms of searching for the applicable law. Such an approach, resulting from a natural tendency of courts and representatives of the doctrine to expand the scope of application of their own law, in the case of non-contractual obligations may be additionally encouraged by the limited importance of the autonomy of will in comparison with contracts, in conjunction

No. 86/653/EEC of 18 December 1986 as overriding mandatory provisions; approvingly in German literature: E. Jayme, *Zuminternationalen Geltungswillen der europäischen Regeln über den Handelsvertreterausgleich*, IPRax 2001, vol. 3, p. 190–191; in Polish literature M. Sokołowski, *Dochodzenie świadczenia wyrównawczego przez polskiego przedstawiciela handlowego od niemieckiego zleceniodawcy*, PPH 2005, vol. 9, p. 49, critically: W.H. Roth, *Methoden der Rechtsfindung und Rechtsanwendung im Europäischen Kollisionsrecht,* IPRax 2006, vol. 4, p. 346. However, it is assessed differently in French case law: Cour de cassation, judgment of November 28, 2000, RIW 2001, vol. 10, p. 780. The classification of norms intended to protect the weaker party of a given relationship is generally considered controversial. This is evidenced by the difference of opinion regarding consumer protection regulations. According to some, they should be perceived as overriding mandatory rules – see A. Heldrich in: P. Bassenge (ed.), *Palandt Bürgerliches Gesetzbuch*, vol. 7, München 1992, p. 2310; T. Pajor, *O zagadnieniach ochrony konsumenta w prawie prywatnym międzynarodowym* in: L. Ogiegło, W. Popiołek, M. Szpunar (ed.)*, Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, p. 257. In turn, others are inclined to attribute such nature to them only in the case of an express statutory reservation – J. Kropholler, *Internationales …,* p. 494, while others even postulate a clear demarcation between the two mentioned categories: P. Mankowski, *Strukturfragen des Internationalen Verbrauchervertragsrecht*, RIW 1998, vol. 4, p. 287–291; the same in: Ch. von Bar, P. Mankowski, *Internationales Privatrecht. vol. I: Allgemeine Lehren*, München 2013, p. 272–273; M. Lijowska, *Instrumenty kolizyjnoprawnej ochrony konsumenta …*, p. 623.

28. See footnote 9.

29. M. Pazdan, M. Jagielska, W. Kurowski, M. Świerczyński, M.A. Zachariasiewicz, M. Zachariasiewicz, Ł. Żarnowiec, *W odpowiedzi na ankietę …,* p. 192.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license, and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

with a related method of regulating legal relationships utilizing primarily the rules of *iuris cogentis*. Therefore, a special emphasis should be placed on the proper distinction between overriding mandatory provisions and ordinary mandatory rules, the meaning of which, despite their imperative nature, is limited to the application of a given *legis causae*. The need to maintain appropriate proportions between both categories of rules is emphasized by the wording of the regulation itself, which in point 32 in the introductory notes uses the word "exception" twice. Namely, it allows the application of overriding mandatory provisions in non-contractual obligations as an exception to the application of the law designated by the uniform conflict of laws rules of the regulation and, in exceptional circumstances, dictated by considerations of public interest, which is rightly interpreted as a manifestation of a narrow interpretation of this concept[30].

The importance of this way of the perceiving of overriding mandatory provisions is also emphasized in the case law of the CJEU. Even under the Rome Convention, the Court emphasized that a derogation of the applicable law related to the existence of overriding mandatory provisions considered through the prism of the legislation of a given Member State should be interpreted strictly[31]. The validity of this method of proceeding, also regarding non-contractual obligations, was confirmed by the CJEU in the previously mentioned judgment in case C-149/18. It emphasizes that in the event of a possible identification of "overriding mandatory provisions" within the meaning of Art. 16 of the Rome II Regulation, the court must ascertain, based on a detailed analysis of the wording of a given provision, its general scheme, its objectives and the context in which it was adopted, that the provision in question is of such importance within the national legal order that it is justifiable to depart from the application of the law designated by Article 4[32].In order to indicate the appropriate perspective for such an assessment, the CJEU referred to the scope of application of the *legis causae* determined by the conflict-of-law rules of the Regulation. It emphasizes that, despite the variety of provisions regulating the issue of limitation of claims (covered by the preliminary reference in those proceedings), Art. 15 l. h expressly subjects them to the general conflict-of-law rule for determining the applicable law and that no other act of EU law sets out specific requirements as to the limitation period for claims such as those raised in the main proceedings[33]. Therefore, the application of a limitation period other than that provided for by the law deemed applicable would require the identification of particularly compelling reasons, such as a manifest breach of the right to an effective remedy and judicial protection resulting from the application of the law designated as applicable under the Regulation[34]. In conclusion, answering the question, the CJEU stated that Art. 16 of the Rome II Regulation must be interpreted as meaning that a provision of national law, such as that relied on in the main proceedings, which provides that the limitation period for a claim for compensation for damage suffered as a result of an accident is three years, cannot be regarded as an overriding mandatory provision within the meaning of the invoked rule of the regulation, unless – based on a detailed analysis of the wording of this provision, its general scheme, its objectives, and the context in which it was adopted – the adjudicating court finds that this provision is of such immense importance within the national legal

30. M.A. Zachariasiewicz in: M. Pazdan (ed.), *Prawo prywatne …*, p. 987.
31. CJEU, judgment of 17/10/2013, in case Unamar, C-184/12, EU:C:2013:663, point 49.
32. pts. 31.
33. pts. 33.
34. pts. 34.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

order that it is justified to depart from the application of the governing law determined pursuant to Art. 4 of the said regulation.

4. Criteria for assessing the nature of Art. 52 of the Bulgarian Act on Obligations and Contracts.

The indicated perspective remains valid also in the context of the issue which constitutes the subject of the preliminary ruling analyzed in this article. It comes down to the admissibility of the qualification as overriding mandatory provisions within the meaning of Art. 16 of the Regulation and, consequently, its application regardless of the law designated pursuant to Art. 4, specifically – the provisions regarding fair compensation for non-material damage in the event of death of close relatives caused by a tort which constitute part of the *legis fori* (Bulgarian law), based on the principle of fairness, perceived as a fundamental principle of the law of the Member State of their origin.

Therefore, the assessment of whether such a qualification would be justified in the light of Art. 16 of the regulation should be based on a detailed analysis of the wording of a provision such as Article 52 of the Bulgarian Law analyzed in the main proceedings, its taxonomy, objectives and the context in which it was adopted when taking into account the manner of its interpretation developed in the case law, in particular, in the interpretative resolutions of the Bulgarian Supreme Court of Cassation cited in the justification of the reference for a preliminary ruling. However, when assessing whether, in the light of the above resolutions, this provision is really so important in terms of public interest of the country of its origin that in order to achieve the values and goals which the said provision represents, it is not sufficient to apply it where the applicable law is Bulgarian law, but it is necessary to ensure its effectiveness in all matters relating to the country of origin, irrespective of the law otherwise applicable to the case, it must also be taken into account, how the issue of compensation for non-material damage is perceived within and outside the Regulation itself, in European Union law.

Following the guidelines resulting from the judgment of the CJEU in the da Silva Martins case, it should be noted that despite different ways of the understanding of the damage and liability for the compensation of the said damage in individual Member States, the existence, nature, and assessment of the damage or the remedy demanded (which should also apply to monetary compensation for the harm suffered) are expressly conveyed in the scope of the application of the *legis causae* (Article 15(c))[35] and thus subject to general conflict-of-law rules for determining the applicable law.

Moreover, the creation of a system of uniform conflict-of-law rules, based on clear, most appropriate connecting factors in a given situation, indicating the same national law, regardless of the Member States courts before which the case is pending, along with the adoption of the *loci damni* criterion as the basic element to be taken into account for non-contractual obligations, is seen as a means of increasing certainty as to the applicable law and, therefore, predictability of the outcomes of disputes, as well as appropriately balancing the interests of the person claimed to be liable and the injured party[36]. However, this objective cannot be reconciled with courts being allowed to utilize too freely, based on Art. 16, the provisions from outside the law applicable

35. M. Świerczyński in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018, p. 983.
36. Recitals 6, 14 and 16 of the preambles to the Regulation.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

to a given case under the authoritative conflict-of-law rules of the Regulation, to assess liability for damages and indicate persons entitled to them, as well as the amount of the compensation due. This would entail the risk of *forum* shopping and pose a threat to the predictability of the outcome of the dispute. It would also expose the parties, and in particular the one held liable, to the need to consider the assessment of the consequences of events involving them on the basis of the regulations whose application they could not predict, which significantly complicates the calculation of the possible risks involved.

Considering the essence of the provision examined in the main proceedings, it is also worth referring to the judgment issued by the CJEU on December 15, 2022, in the case v. HUK-COBURG-Allgemeine Versicherung AG (C-577/21), as a result of a request for a preliminary ruling submitted by Sofia City Court (incidentally, in the context of the circumstances of that same accident). In this judgment, the Court emphasizes, in the context of German law, that the fourth paragraph of Article 3 of Directive 2009/103/EC of the European Parliament and of the Council of 16/09/2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to get insured against such liability must be interpreted as not precluding national legislation, which makes compensation by an insurer against civil liability related to the use of motor vehicles, for non-material damage suffered by close family members of victims of road traffic accidents subject to the condition that harm sustained serious damage to the health of such close family members. Thus, it maintains its previous position that, currently, European Union law does not harmonize the civil liability systems of the Member States and, consequently, these countries retain the freedom to determine civil liability in respect of the use of motor vehicles. Such determination comprises: the extent of damages being subject to compensation, the scope of the right to compensation, persons entitled to receive it, or binding criteria for compensation for non-material damage[37].

For the above-mentioned reasons, the departure from the application of the law applicable on the basis of the authoritative conflict-of-law rules of the Regulation when it comes to the assessment of the conditions for acquiring the right to compensation for non-material damage caused by the death of a close person, as well as the amount of such compensation in favor of the provisions of the law of the *forum*, which regulates this liability differently, should be made as an absolute exception, after prior determination that their particular importance within the national legal order requires such a departure. This should be based on a thorough analysis of the wording, general scheme and the objectives of such provisions, the values protected by them, and the context in which they were adopted. Whether such a situation actually exists in the case of the provision analyzed in the main proceedings may, however, be doubted, taking into account, for example, the general nature of the principle of fairness invoked in its context and the contradiction in the case-law of the Bulgarian courts as to the overriding mandatory nature of the provision in question, raised by the referring court.

37. CJEU judgment of 23/01/2014, case Petillo, C-371/12, EU:C:2014:26 and judgment of 10/06/2021, case Van Amey de Espana, C-923/19, EU:C :2021:475.

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

5. Final conclusions.

The analysis carried out in this text allows us to formulate a proposal for the content of the answer to the question submitted by the referring court for a preliminary ruling. Considering that in the light of Art. 267 TFEU, it is not for the CJEU to assess whether the provisions of the national law analyzed in the main proceedings have the nature of the overriding mandatory provisions, but only to interpret a specific provision of EU law, this proposal – it seems – should read as follows:

Article 16 of the Rome II Regulation must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, which provides for the application of the principle of fairness in the determination of compensation for non-material damage in cases where the death of a close person has occurred as a result of a tort or delict, cannot be considered to be an overriding mandatory provision, within the meaning of that article, unless the court hearing the case finds – on the basis of a detailed analysis of the wording of the provision in question, general scheme of it, values implemented in it, objectives pursued through it, and the context in which it was adopted – that this provision is of such importance that taking into account the public interest of the country of its origin, justifies a departure from the application of the law designated pursuant to Art. 4 of that regulation.

References

von Bar Ch., P. Mankowski, *Internationales Privatrecht. vol. I: Allgemeine Lehren*, München 2013

Brière C., *Le règlement (CE) n° 864/2007 du 11 juillet 2007 sur la loi applicable aux obligations non contractuelles (Rome II)*, "Revue trimestrielle LexisNexis JurisClasseur", Janvier-Février-Mars 2008

Carruthers J., *Has the Forum Lost Its Grip?* in: J. Ahern, W. Binchy (ed.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations*, Leiden, Boston2009

Dickinson A., *The Rome II Regulation: The law applicable to non-contractual obligations*, Oxford 2008;

Fuchs A., *Zum Kommissionsvorschlag einer „Rom II" – Verordnung*, „Zeitschrift für Gemeinschaftsprivatrecht" 2003–2004, vol. 2

Fuchs B., *Statut kontraktowy a przepisy wymuszające swoje zastosowanie*, Katowice 2003;

Graziano T. K., *Das auf außervertragliche Schuldverhältnisse anzuwendende Recht nach Inkrafttreten der Rom II – Verordnung,* RabelsZ 2009, vol. 73

Graziano T. K., *Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle (règlement Rome II)*, RCDIP2008, vol. 3

Hartnell H. E., *Rousing the sleeping dog: the validity exception to the Convention on Contracts for the International Sale of Goods,* Yale Journal of International Law, Winter 1993

Hein J. von in: G. P. Callies (ed.), *Rome Regulations. Commentary on the European Rules of the Conflict of Laws*, Wolters Kluwer 2011

Hein J. von, *Europäisches Internationales Deliktsrecht nach der Rom II – Verordnung,* ZEuP 2009, vol. 1

Heldrich A.in: P. Bassenge (ed.), *Palandt Bürgerliches Gesetzbuch*, vol. 7, München 1992

Hohloch G. in: W. *Erman, Handkommentar zum Bürgerlichen Gesetzbuch*, Köln 2011

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

Jakob D., P. Picht in: T. Rauscher (ed.), *Europäisches Zivilprozess – und Kollisionsrecht EuZPR/EuIPR Kommentar*, Műnchen 2011

Jayme E., *Zuminternationalen Geltungswillen der europäischen Regeln über den Handelsvertreterausgleich*, IPRax 2001, vol. 3

Junker A. in: H.J. Sonnenberger (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 10, Internationales Privatrecht, Rom I-Verordnung, Rom II – Verordnung, Einführungsgesetz zum Bürgerlichen Gesetzbuche (art. 1–24),* München 2010

Junker A., *Die Rom II–Verordnung: Neues Internationales Deliktsrecht auf europäischer Grundlage*, NJW 2007, vol. 51

Kilian M., C. Müller, *Öffentlich-rechtliches Preisrecht als Eingriffsnorm i. S. des Art. 34 EGBGB*, IPRax 2003, vol. 5

Kropholler J., *Internationales Privatrecht,* Tübingen 2004

Lijowska M., *Instrumenty kolizyjnoprawnej ochrony konsumenta a przepisy koniecznego zastosowania*, KPP 2006, vol. 2

Mankowski P., *Strukturfragen des Internationalen Verbrauchervertragsrecht*, RIW 1998, vol. 4

Martiny D., *Europäisches Internationales Vertragsrecht vor der Reform*, ZEuP 2003

Martiny D., *Neue Impulse im Europäischen Internationalen Vertragsrecht,* ZfRV 2006

Mataczyński M., *Obce przepisy wymuszające swoje zastosowanie. Rozważania na tle art. 7 ust. 1 Konwencji rzymskiej oraz orzecznictwa sądów niemieckich,* KPP 2001, vol. 2

Niggemann F., *Eingriffsnormen auf dem Vormarsch (zu Cass. mixte, 30.11.2007 – 06–14.006),* IPRax 2009, vol. 5

Ofner H., *Die Rom II – Verordnung – Neues Internationales Privatrecht für außervertragliche Schuldverhältnisse in der Europäischen Union*, ZfRV 2008, vol. 1

Pajor T., *O zagadnieniach ochrony konsumenta w prawie prywatnym międzynarodowym* in: L. Ogiegło, W. Popiołek, M. Szpunar (ed.)*, Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana,* Kraków 2005

Pazdan J., *Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych,* PPPM 2009, vol. 4

Pazdan M., M. Jagielska, W. Kurowski, M. Świerczyński, M.A. Zachariasiewicz, M. Zachariasiewicz, Ł. Żarnowiec, W odpowiedzi na ankietę skierowaną do państw członkowskich Unii, dotyczącą stosowania Rozporządzenia nr 864, PPPM 2013, vol. 12

Plender R., M. Wilderspin, *The European Private International Law of Obligations,* London 2009

Popiołek W., *Znaczenie przepisów „prawa publicznego" różnych systemów prawnych dla stosunków umownych handlu zagranicznego,* PPHZ 1988, vol. 12

Popiołek W.*, Znaczenie przepisów o „bezpośrednim działaniu" w zakresie eksportu kompletnego obiektu w: M. Pazdan, A. Tynel (ed.), Zagadnienia prawne eksportu kompletnych obiektów przemysłowych,* Katowice 1980

Roth W.H., *Methoden der Rechtsfindung und Rechtsanwendung im Europäischen Kollisionsrecht,* IPRax 2006, vol. 4

Schramm D., *Ausländische Eingriffsnormen im Deliktsrecht*, Bern 2005

Schurig K., *Zwingendes Recht, „Eingrifsnormen" und neues IPR,* RabelsZ 1990, vol. 54

Sokołowski M., *Dochodzenie świadczenia wyrównawczego przez polskiego przedstawiciela handlowego od niemieckiego zleceniodawcy*, PPH 2005, vol. 9

Spickhoff A., *Zwingendes Gebührenrecht und Internationales Vertragsrecht*, IPRax 2005, vol. 2

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

Staudinger A., *Erfolgshonorare und quota litis-Vereinbarungen im Internationalen Privatrecht*, IPRax, 2005, vol. 2

Świerczyński M. in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018

Wagner G., *Die neue Rom II – Verordnung*, IPRax 2008, vol. 1

Wengler W*., Internationales Privatrecht,* Berlin, New York 1981

Zachariasiewicz M. A. in: W. Popiołek (ed.), *System prawa handlowego*. Vol. 9 *Międzynarodowe prawo handlowe*, Warszawa 2013

Zachariasiewicz M.A. in: M. Pazdan (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warszawa 2018

Żarnowiec Ł., *Czasowe ramy zastosowania rozporządzenia Parlamentu Europejskiego i Rady (WE) nr 864/2007 o prawie właściwym dla zobowiązań pozaumownych (rozporządzenie Rzym II) – uwag i na tle orzeczenia Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-412/10, Homawoo v GMF Assurances, Rozprawy Ubezpieczeniowe 2012, no 1*

Żarnowiec Ł., *Przepisy wymuszające swoje zastosowanie w świetle rozporządzenia Parlamentu Europejskiego i Rady (WE) nr 864/2007 z dnia 11 lipca 2007 r., o prawie właściwym dla zobowiązań pozaumownych – „Rzym II" (Dz.Urz. UE 2007 L 199/40)*, w: *Państwo i Prawo w dobie globalizacji. Księga jubileuszowa*, Rzeszów 2011, p. 340–355

Żarnowiec Ł., *Wpływ przepisów wymuszających swoje zastosowanie na rozstrzyganie spraw spadkowych pod rządami rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 650/2012*, PPPM 2019, v. 25

Żarnowiec Ł.in: M. Pazdan (ed.), *System prawa prywatnego. Prawo prywatne międzynarodowe*, vol. 20B, Warszawa 2015

Ocena charakteru przepisów prawa krajowego wyznaczających reguły zadośćuczynienia za krzywdę spowodowaną śmiercią osoby najbliższej w świetle art. 16 rozporządzenia Rzym II – uwagi na tle pytania prejudycjalnego przedstawionego Trybunałowi Sprawiedliwości UE postanowieniem Bułgarskiego Najwyższego Sądu Kasacyjnego z 07.02.2023 r. (sprawa C-86/23, HUK-COBURG-Allgemeine Versicherung AG)

Pomimo piętnastoletniego okresu obowiązywania rozporządzenia „Rzym II", jego stosowanie przez sądy państw członkowskich jest nadal pod pewnymi względami źródłem poważnych kontrowersji. Ze szczególną intensywnością objawia się to na tle art. 16, poświęconego przepisom wymuszającym swoje zastosowanie. Należy to przypisać dwóm czynnikom. Pierwszym z nich jest rezygnacja z umieszczania w treści art. 16 rozporządzenia „Rzym II" definicji legalnej tej kategorii norm, w przeciwieństwie do art. 9 ust. 1 rozporządzenia „Rzym I". Drugi stanowi natomiast obserwowane w prawie prywatnym międzynarodowym zjawisko swego rodzaju „inflacji" koncepcji przepisów wymuszających swoje zastosowanie. Przejawia się ono w próbach przypisywania takiej kwalifikacji bezwzględnie wiążącym normom prawa krajowego, których charakter nie wskazuje na tkwiący w nich pierwiastek kolizyjny, implikujący konieczność ich stosowania obok lub zamiast prawa w normalnym toku rzeczy właściwego. Sprawa C-86/23 tocząca się przed TSUE, w następstwie pytania prejudycjalnego zawartego

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license, and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)

w postanowieniu Bułgarskiego Najwyższego Sądu Kasacyjnego z dnia 7 lutego 2023 r., daje doskonałą okazję do ponownego podjęcia kwestii prawidłowego rozumienia pojęcia przepisów wymuszających swoje zastosowanie w kontekście art. 16 rozporządzenia Rzym II, na przykładzie norm obowiązujących w bułgarskim prawie materialnym, które regulują zasady zadośćuczynienia za krzywdę wyrządzoną śmiercią bliskiej osoby. Patrząc na omawianą kwestię z perspektywy piętnastej rocznicy obowiązywania rozporządzenia, autor zaleca szczególną ostrożność w stosowaniu art. 16, a jednocześnie podejmuje próbę sformułowania propozycji odpowiedzi na zadane pytanie prejudycjalne.

Słowa kluczowe: prawo prywatne międzynarodowe, rozporządzenie „Rzym II", przepisy wymuszające swoje zastosowanie, zadośćuczynienie, zobowiązanie pozaumowne, prawo właściwe.

DR HAB. ŁUKASZ ŻARNOWIEC, PROF. UKSW – Department of Civil Law and Private International Law, Institute of Legal Sciences, Faculty of Law and Administration, Cardinal Stefan Wyszyński University (UKSW) in Warsaw
e-mail: l.zarnowiec@uksw.edu.pl
ORCID to 0000-0001-7873-677X

All texts published in the journal are made available free of charge under the Creative Commons (CC BY-ND 3.0) license,
and Authors publishing in the journal – retaining all copyrights – accept the terms of the Creative Commons (CC BY-ND 3.0)