

Austrian Article on Rome II

A critical article on the Rome II Regulation has been written by *Helmut Koziol* and *Thomas Thiede* (both Vienna) and is published in the latest issue of the *Zeitschrift für vergleichende Rechtswissenschaft* (ZVglRWiss 106 (2007), 235 et seq.):

“Kritische Bemerkungen zum derzeitigen Stand des Entwurfs einer Rom II-Verordnung”

Koziol and *Thiede* criticise the general rule provided in Art.5 of the Proposal (COM(2006) 83 final (now Art.4 of the Regulation)) for focusing solely on the interests of the injured party by designating the law of the country in which the damage arises or is likely to arise and not taking into account the interests of the liable party sufficiently.

The authors argue that this rule neglected the basic principles of liability law, the main purpose of which is the compensation of the damage suffered by the injured party. Since - according to the rule of *casum sentit dominus* - everybody has to bear the risk within one's own sphere, a special justification was necessary to transfer liability to others. This was only the case if the other party is “closer” to the damage. Thus, not only the interests of the injured party, but also the interests of the liable party should be taken into account and should be balanced. Further, special rules derogating from the general rules in a large number of cases, as provided in Art.5 (2) and (3) of the Proposal (now Art.4 (2) and (3) of the Regulation), are not regarded as desirable since those might result in the consequence that either the general rule was applied in cases not included in the special rules without good reason or that the special rules were applied analogously which might lead to the result that the general rule is not applied anymore.

Therefore, the authors conclude that a general rule which designates in principle the law of the country in which the event giving rise to the damage occurred - except cases where the occurrence of the damage could have been foreseen by the liable party - would have been preferable. As an alternative, which is more similar to the existing rule, the authors suggest a rule which designates the law of the country where the damage occurs, providing for an exception for cases where the damaging effects were not foreseeable for the tortfeasor.