HUK-COBURG II: A Case on Mandatory Overriding Law or Jurisdiction?

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1. Introduction

In Case C-86/23 *E.N.I. and Y.K.I. v HUK-COBURG-Allgemeine Versicherung AG II* (‘*HUK-COBURG II*’), the principal issue that arose was whether a Bulgarian compensation provision may be interpreted as having mandatory effect. In suggesting that it does not, the Court required the facts to have sufficiently close links with the forum. (Hereinafter the ‘sufficient connexion test’) Ostensibly, a freestanding sufficient connexion test could be viewed as a disguised jurisdictional control of the forum rather than part of a mandatory law analysis. In doing so, parallels to *renvoi* and *forum non conveniens* are drawn.

2. Facts

The daughter of the Bulgarian claimants died in a road traffic accident in Germany. The person responsible was insured by the defendant. The claimants commenced a claim in Bulgaria against the defendant for non-material damages suffered for the loss of their daughter. (*HUK-COBURG II* at [16]–[17])

The case was dismissed on appeal. As German law governed the claim under the Rome II Regulation, the claimants ‘had not established that the mental pain and suffering sustained had caused pathological harm’ required under German law. (*HUK-COBURG II* at [20], [24], [51])

Crucially, the Court also said that Bulgarian law, in particular Article 52 Zakon za zadalzheniyata i dogovorite (‘ZZD’), did not apply to the case as a mandatory overriding rule under Article 16 Rome II Regulation. This issue as to whether the ZZD applied as a mandatory overriding rule was appealed to the Varhoven kasatsionen sad (Supreme Court of Cassation), which then referred the question to the ECJ.

3. The CJEU's Reasoning

In essence, the ECJ said that although it is for the member state court to assess whether Article 52 ZZD was a mandatory overriding rule, it strongly suggested that it did not. (*HUK-COBURG II* at [47]-[54]). In the operative part, the Court said that that the Rome II Regulation must be interpreted as meaning that a forum law 'cannot be regarded as an 'overriding mandatory provision', within the meaning of that article, unless, where the legal situation in question has sufficiently close links with the Member State of the forum, the court before which the case has been brought finds, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that national provision was adopted [.]' (Emphasis mine)

4. Issues with Linking Sufficient Connexion and Mandatory Law

When faced with an allegedly mandatory provision, *HUK-COBURG II* requires a three-step analysis: (1) identify whether the law has a mandatory effect, (2) identify whether the facts have a sufficiently close connexion with the forum, and (3) determine whether the facts fall under the statute. One reading of the sufficient connexion test in this context is that it is intrinsic to the concept of mandatory law and is read in by the ECJ into the requirements of Article 16 Rome II Regulation. [1] However, there are two issues with this view.

Firstly, it may be that a sufficient territorial connexion forms part of the reason why a forum statute is a mandatory statute and is relevant to determining whether a mandatory rule applies to the facts.[2] But linking territorial connexion and mandatory effect is problematic as they are analytically distinct. In *Soldiers, Sailors, Airmen and Families Association v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29, Lord Llyod-Jones warned that there is a risk of 'confusion' if both territoriality and mandatory effect are conflated. The former relates to the intrusion into the territorial affairs of another state, while the latter relates to 'whether the public policy of the forum displaces the more modest presumption that statutes only apply if they form part of the applicable law.'[3]

Secondly, one might argue that sufficient territorial connexion is *required* for a forum rule to be deemed a mandatory rule. But the difficulty here is why a territorial connexion with the forum matters at all. The point of mandatory

overriding rules is that such rules are so important to the forum that they justify the departure from the law chosen by default choice of law rules. Viewed this way, it is difficult to see why the facts must be sufficiently connected with the forum for a mandatory law to apply. Forum mandatory overriding rules operate precisely because they are reflections of fundamental values of the forum. Requiring a territorial connexion could dilute this.

This is not to say that the Bulgarian law ought to be viewed as mandatory law. Rather, from an interpretative standpoint, grounding a rejection simply because the Bulgarian law fails to satisfy a sufficient connexion test is at least open to question.

5. A Disguised Jurisdiction Analysis?

From the above discussion, there exist questions regarding the role of a freestanding connexion test with the concept of overriding mandatory law. It is, however, plausible to read the judgment differently, where the sufficient connexion test is a jurisdictional analysis of forum choice disguised as a choice of law analysis.

Firstly, this interpretation is not precluded by the judgment itself. In the operative part, the ECJ stated that the 'legal situation in question has sufficiently close links with the Member State of the forum' before the forum court seised conducts a mandatory law analysis. Further, in the Court's own analysis of what constitutes mandatory law from paragraphs 37 to 54, the Court did not place reliance on the lack of a sufficient territorial connexion. It was a factor in its own right (paragraphs 32 to 36) but does not seem necessary to the mandatory law analysis and the suggestion that Art 52 ZZD does not have a mandatory effect.

Secondly, both the ECJ judgment and the Advocate General's opinion suggest this. The Court observed at paragraph 36 that although the claim was brought by the parents, who are domiciled in Bulgaria, the accident took place in Germany and was insured by a German insurer. The daughter who died and the person who caused the accident were Bulgarians, but are now residents in Germany. To a common lawyer, this discussion bears a striking resemblance to Step 1 of the *forum non conveniens* analysis in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, where the court asks which jurisdiction has the most real and substantial connexion with the dispute (ie. the 'natural forum'). The

jurisdictional impetus is fortified by the Advocate General's opinion, which at paragraph 53 explicitly states that 'the requirement of a close link helps to prevent forum shopping.'

This jurisprudential instinct to discuss the sufficiency of connexion is not unwarranted. Under the Brussels I bis Regulation, jurisdiction is allocated by a series of brightline rules, normally based on the domicile of the defendant (Article 4), and at times the claimant (for instance, under Article 11). Crucially, in Case C-281/02 *Andrew Owusu v N. B. Jackson*, the ECJ erred on the side of certainty in rejecting the doctrine of *forum non conveniens*. But in doing so, it deprived the courts of a flexible tool to control jurisdiction, making an indirect control via choice of law rules understandable.[4]

In fact, controlling jurisdiction via choice of law is not new. Briggs observes in 1998 that the doctrine of *renvoi* has, in part, served such a function in English law historically.[5] In this vein, the doctrine of *forum non conveniens* was part of the 'tailor-made rules against forum shopping which went straight to the heart of the problem, and did not seek to operate by remote control.'[6]

If so, *HUK-COBURG II* is another example of the interrelatedness of the conflict of laws. When jurisdictional rules are understood rigidly, the pressure points move to other areas, including the choice of law.

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[1] Eg. Dominika Moravcová, 'Navigating the nexus: The Doctrinal Significance of close connection in the Enforcement of (not only) overriding mandatory norms' (2025)

[2] Eg. Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971.

[3] *Soldiers, Sailors, Airmen and Families Association v Allgemeines Krankenhaus Viersen GmbH* [2022] UKSC 29 [36].

[4] The irony here is that the ECJ has now *read in* a sufficient connexion test into both Rome I and II Regulations, a move which it declined to do in the Brussels I bis Regulation.

[5] Adrian Briggs, ‘In Praise and Defence of Renvoi’ (1998) 47(4) The International and Comparative Law Quarterly 877.

[6] Adrian Briggs, ‘In Praise and Defence of Renvoi’ (1998) 47(4) The International and Comparative Law Quarterly 877, 879.