SPEECH GIVEN BY A.PIRE, COUNCIL OF BUREAUX SECRETARY GENERAL AT THE CONFERENCE BRINGING TOGETHER COMPENSATION BODIES AND GUARANTEE FUNDS WHICH WAS HELD IN ROME ON 6TH NOVEMBER 2008 AT THE INVITATION OF CONSAP

The future of the handling of cross-border claims in Europe (EEA)

Preamble

The aim of this speech is firstly to describe the current situation following on from adopting the European Regulation known as "Rome II". We will then go on to discuss the directions that the European regulation may take in the future within the framework of the reimbursement of cross-border victims of accidents which occur within the European Union and to offer some personal thoughts on this topic.

The current situation

"Rome II" and its consequences.

Regulation No. 864/2007 of the European Parliament and Council on the law applicable to non-contractual obligations (Rome II) was adopted on the 11th July 2007. Its Article 32 provides for *"This Regulation shall apply from 11 January 2009"*.

Furthermore, Article 28.1 states that: "*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"*. This provision mainly applies to the Hague Convention of the 4th of May 1971 on the law applicable to road traffic accidents of which certain Member States of the European Union are signatories.

This means that as from the 11th of January 2009, the European Union States will be divided into two groups. There will be the Hague Convention Group (12 Member States: Austria, Belgium, Czech Republic, France, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Slovakia, Slovenia and Spain) and a "Rome II" Regulation Group. This situation which, at first glance, may seem quite unsatisfactory, nevertheless shows progress in relation to the current situation where all Member States, with the exception of the signatories to the Hague Convention, apply their own International Private Law.

Main rules applicable to road traffic accidents

1) The Hague Convention

"The applicable law is the internal law of the State where the accident occurred." (Art 3)

« ..., the following exceptions are made to the provision of Article 3:

a) *Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability*
- *towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,*
- *towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,*
- *towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.*

Where there are two or more victims the applicable law is determined separately for each of them;

b) where two or more vehicles are involved in the accident, the provisions of a) are applicable only if all the vehicles are registered in the same State;

c) where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of a) and b) are applicable only if all these persons have their habitual residence in the State of registration.

2) "Rome II"

"Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur." (Art. 4.1)

"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." (Art. 4.2)

"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 pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question." (Art. 4.3)

The application of the provisions of Article 4 of "Rome II" leads to the rules of the country where the accident occurred being applied to the majority of road traffic accidents, as it is regarding the country where the direct damages were caused. We can therefore note a similarity of the basic solution between "Rome II" and the Hague Convention.

On the other hand, when an exception is made to the basic criteria, we see a significant difference: we note the concept of "country of registration of vehicle" in the Hague Convention, and the notion of "normal country of residence" for "Rome II".

We also note:

i. the existence of a derogatory clause in "Rome II" which allows for moving away from the rules of the Regulation if it results from a

series of circumstances in which the tort/delict shows significantly close links with another country. This kind of clause does not exist in the Hague Convention;

ii. the possibility for the parties to choose the law applicable to non-contractual obligations by a subsequent agreement to the occurrence of the causal factor of the damages provided for in Article 14 of "Rome II".

The fact that these differences and their varying consequences exist has not escaped the European legislator. Indeed, Article 30 specifies that:

a. *Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:*

(i)…

(ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

The future of European Regulations

Declaration of the Commission on the re-examination clause (Article 30)

During preparatory work on the « Rome II » Regulation, the European Parliament hoped that a specific provision would be adopted with a view to defining the law applicable to damage repairs caused as a result of road traffic accidents (assessment of the quantum of the damages on the basis of the law of the normal country of residence of the victim). This proposal was not kept but the European Commission felt obliged, further to the Regulation, to provide the following statement:

"The Commission, being aware of the different practices followed in the Member States as regards the level of compensation awarded to victims of road traffic accidents, is prepared to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence. To that end the Commission will make available to the European Parliament and to the Council, before the end of 2008, a study on all options, including insurance aspects, for improving the position of cross-border victims, which would pave the way for a Green Paper.

It is important to mention in this context a study carried out in 2007, at the request of the European Parliament, by CEPS (Centre for European Policy Studies) called *"Full compensation of victims of cross-border road traffic accidents in the EU: the economic impact of selected options"*.

The CEPS study is interesting as it considers different options which could be an alternative to the current solution in application when reimbursing the consequences of cross-border road traffic accidents (applying the *lex loci delicti commissi*) and, at the same time, aiming to provide the victim with compensation equivalent to the *restitutio in integrum* principle.

The authors of the study state that the current solution is liable to create situations in which the victim or their relatives are not completely reimbursed for the damages suffered when an accident occurs abroad.

These cases of "insufficient compensation" are, according to the study, mainly due to the following factors:

- the standard of life of the country where the accident occurred
- the system of responsibility of this country
- the calculation criteria for compensation
- the rate of vehicles which have valid insurance

Moreover, the authors of the study remind us that the principle of *"restitutio in integrum"* is mentioned by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 as being the criteria to be adopted when assessing the compensation for personal injury. As for the European Union Charter of Fundamental Rights signed in Nice in 2000, it requires us to carry out the standardised protection of civil rights of all European citizens.

The following options were examined:

- *Option 1: the judges apply the law of habitual residence of the victim in order to assess the quantum of the damages;*
- *Option 2: the judges apply the "principle of ubiquity" (the law applicable is that which is most advantageous to the victim between the law of place of the tort/delict and that of the place where the damage was caused);*
- *Option 3: the judges rely on common principles for the assessment of damages*
- *Option 4: the damage is covered by the victims' third party liability insurance;*
- *Option 5: to create a European compensation fund for victims of cross-border accidents.*

Each of these options is analysed according to its impact on:
- the victims;
- the insurance undertakings and their insureds
- legal proceedings
- Administration costs for citizens, insurance undertakings and national and European administrative bodies.

The option is then assessed according to its ability to carry out the *restitutio in integrum* of victims of cross-border accidents (Costs/Benefits).

<u>Assessment of the economic impact of the options kept by the CEPS</u>

1 Application of the « lex damni » when assessing the quantum

This proposal can be interpreted in one of two ways:

Option 1a: the judges apply the criteria and the headings of damage used by the courts of the country of the victim. In this case, it is only the procedure followed by the judge when assessing the damages which changes.

Option 1b: the judges take the amount of compensation that the victim would have received into account if the accident took place in their country of residence: under this option, the judges should not only calculate the compensation of the victim on the basis of the definition

of the damages in the normal country of residence of the victim, but also take into account the amounts normally agreed on in that country for the type of damages incurred.

Evaluation of option 1a:

The judges must know the details of the legal system applicable in the country of residence of the victim without taking into account the amounts attributed in that country. Medical experts must also learn to assess the damages which may not necessarily be reimbursed in the country where the accident took place (eg: loss of amenity).

Result: this solution would cause an increase in legal and medical expertise costs.

Danger: this solution leaves some room for the possibility of "insufficient compensation" of victims if the concepts are not applied correctly or if the standard of living in the victim's country has not really been appropriately considered.

Other costs generated by this option: increase in compensation and insurance premiums.

This impact will be felt more in countries where the standard of living is lower, where the insurance cover is low and where there is a ceiling on compensations provided.

This option should not guarantee the *restitutio in integrum* when the country where the accident took place has a standard of living which is relatively low and where the compensation is lower than in the victim's country. We can also fear an increase in the length of legal proceedings given the complexity of the evaluations required of the parties involved.

Evaluation of option 1b

This option is more suitable for ensuring full compensation for the victim. Nevertheless, it brings about other concerns.

The judges should not only have to know the legislation and the jurisprudence of the victim's country with a view to correctly applying the method of compensating damages, but they should also take into account the standard of living of the victim in their country of residence with a view to appropriately determining the compensation amount.

If the insured sums do not cover the damages, then additional damages will need to be paid by the person responsible for the accident. If, on the contrary, the insurance covers all damages, the insurance undertakings will have to take into account the highest compensation to be paid out by increasing their insurance premiums.

Nevertheless, this option would need to be able to carry out *restitutio in integrum* of the victim.

2. The principle of ubiquity

The law applicable is that which is the most favourable to the victim according to this principle.

Disadvantages of this solution:

- The possibility of insufficient compensation of victims in countries which authorise lower compensation would remain substantially unchanged in relation to the preceding option.
- The victims of accidents which occur in a country where the standard of living is higher and the compensation is higher than their country of origin, will be overcompensated in comparison with what they would have received in their normal country of residence.
- The insurance undertakings of the countries where the compensation is lower would be obliged to increase their premiums.
- The victims should show which law is more advantageous, which is liable to cause wider legal uncertainty.
- Once defined, the possible uncertainties in the application of concepts of the foreign law highlighted here above, will remain.

3. Reference to common principles as regards the assessment of damages.

Another option would consist of establishing a series of common principles for calculating quantum, accepted at the European level. This option would always be based on the application of *lex loci* for the assessment of the quantification of damages, but would have to reduce the differences in compensation within the Member States.

Three sub-options can be considered:

Option 3a: A European rating scale of disabilities (eg; that which was presented at the EP by the CEREDOC [European Confederation of those Specialised in the Assessment and Compensation of Physical Injury]).
Option 3b: A European list of compensation attributed to certain specific types of injuries which could possibly be coupled with corrective factors reflecting the standard of living, taxation and social security of each Member State.
Option 3c: Standardisation of the level of compensation between Member States for each type of damages.

As regards the European rating scale of disabilities, the putting in place of such an option would take a certain amount of time since the assessment of injuries is carried out in a variety of different ways within the Member States. This rating scale is also the subject of criticism, notably of the fact that it would not allow the taking into account of specificities and the individual characteristics of the victim (more specifically as regards non-financial damages).

However, these criticisms do not lead to complete rejection of the idea of a unique rating scale. They look to show that the exclusive use of such a rating scale would not allow for ensuring the *restitutio in integrum* of the victim and therefore would have to be completed with the use of additional criteria.

None of the three sub-options can ensure the carrying out of decisive steps towards the complete compensation of victims of road traffic accidents, specifically if such common principles are obligatory. On the contrary, the adoption of a non-obligatory rating scale could be a useful reference for jurists and judges who wish to grant an evaluation for certain types of personal injury. However, such an evaluation would remain coupled with the existing legal rules allowing for the consideration of the particularities of each case. Moreover, the adoption of common principles does not automatically guarantee that these are always interpreted and applied in a uniform way in all Member States: from which, a risk of inequitable compensation is inherent to this solution.

Establishing common principles of assessment for damages would certainly give rise to costs for the judicial system and for medical experts in the short term. In the long term, these costs would probably have to be stabilised and significantly reduced from the moment that the judges and medical experts automatically refer to the rating scale when assessing damages.

Conversely, the adoption of a scale would have a positive impact on insurers and insureds, as the application of criteria which is relatively uniform and foreseeable for the assessment of damages would help with the ex-ante assessment of the costs for all cross-border accidents. This solution can also standardise the compensation of non-financial damages and ensure equal treatment for EU victims.

To base oneself on common principles for the assessment of damages may possibly bring about a reduction in transaction costs as all parties involved would use the same approach to assess damages. Even when the amount suggested is not accepted by the victim and the case consequently goes to the courts, the use of common principles contributes to speeding up the solving of the case. However, serious and complex cases would probably be penalised by the adoption of common principles and a judicial solution should remain the best means of ensuring appropriate compensation to the victim.

4. Compensation by the intermediary of the victims' MTPL insurer.

According to this option, the victims MTPL insurer (or their "First party" insurer) would, in the first instance, pay the damages caused following on from the accident and would be able to request subrogation from the insurer of the person responsible for the accident. This approach would not change the existing *lex loci* application system within the framework of the assessment of damages. However, the victim would nevertheless be compensated as if the accident had occurred in the territory of their country of residence.

On the basis of these considerations, we can assume that the costs to be paid by the MTPL insurers, which are obliged to provide insurance cover for damages to victims of cross-border accidents, should not be substantial and could be compensated for with a slight increase in the level of premiums.

The transaction costs should also be comparatively low and certainly lower than the current context as the majority of causes should be managed by the insurers. Furthermore, the compensation should be able to be paid more quickly than at present as the victims would be directly compensated by their own insurer in their country of residence.

This option would have the following effects:

a) Approximate fulfilment of the *restitutio in integrum* of the victims of cross-border accidents with the exception of pedestrians and cyclists who would not be covered by this option;
b) The reduction of the courts administrative costs;
c) The judges and medical experts should not be obliged to use the criteria of other jurisdictions.

5. Creation of a European compensation fund for the compensation of victims of cross-border accidents.

The final option suggested by the CEPS study would consist of creating a European fund aimed at making up the compensation of the "insufficiently compensated" victims of cross-border accidents. It's financing would be carried out via the means of contributions chargeable to the insurance premiums.

The European fund would only serve to pay the non-compensated damages, eg: when the assessment of damage in the victim's country of residence is much higher than in the country where the accident occurred.

In this way, the European fund would ensure the *restitutio in integrum* of victims of cross-border accidents as these victims would receive the same amount of compensation as if the accident had occurred in their country of residence.

The advantages of such a fund should nevertheless be compared to the administrative costs of the creation and the management of such a system. We can fear that the administrative costs in particular will be quite high.

This option could be combined with one or other of the suggested solutions. For example, the European fund could be linked with solution 4 (compensation by the insurer of the victim for civil liability). This insurer would find themselves in a better position than the victim when asking to participate in the fund, as well as for managing the compensation requests addressed to this fund.

Given the fact that the link between the European fund and option 4 would not eliminate the discrepancies relating to headings of compensation and to their evaluation in each Member State, we could consider the introduction of a list of common principles, as in option 3, and the tools of correction based on the average compensation amounts in the Member States involved.

Effects of this proposal:

- Approximate fulfilment of the *restitutio in integrum* of the victims of cross-border accidents;
- A reduction in the courts administrative costs;
- Judges and medical experts are not obliged to apply the compensation criteria of other jurisdictions;
- Gradual development of a list of common compensation principles in the 27 Member States;
- A contribution from all insurance undertakings with a view to resolving the problem with the compensation of victims of cross-border accidents;
- The need to create a European fund of which the management could be costly. In this regard, combining with option 4 could reduce costs.

The CEPS in its conclusions writes that "options 4 and 5 provide solutions based on insurance policies, which may be worth discussing as a means to achieve *restitutio in integrum* for victims of cross-border road traffic accidents without imposing significant and burdensome adaptations in the way such claims are dealt with by national judges and medical experts."

In accordance with what the Commission undertook on adopting the "Rome II" regulation, it is preparing to present a study on "all possibilities, notably in the field of insurance, to improve the situation of cross-border victims" to the European Parliament and Council in order to pave the way for a Green Paper. To this effect, the Commission asked a lawyer's

office to provide them with a report on the issue. This report would, to some extent, be influenced by the conclusion of the CEPS study. It could possibly contain other proposals which are not currently known.

Personal remarks

I would like to conclude this speech by expressing two personal remarks which only involve me and which aim to contribute to general thoughts on the cross-border accidents issue. The first thought is regarding one of the options ruled out by the CEPS, the second, the standardised application of the *restitutio in integrum* principle.

The CEPS study stems from the idea according to which and in accordance with the European Convention for the protection of human rights and fundamental freedoms, the victims should be compensated on the basis of the *restitutio in integrum* principle.

This principle seems to have been accepted and applied by all Member States (or nearly all). Nevertheless, we note that in certain cases where the victim does not live in the State where the accident occurred, there is a risk of insufficient compensation. According to the study, this would be due to differences in the standard of living as well as differences in how the damages are assessed. We could therefore think that if the victim is compensated according to the criteria of their country of residence then the *restitutio in integrum* would be carried out. This was the proposal that was presented to the European Parliament during discussion which preceded the adoption of the "Rome II" Regulation.

The CEPS study considers that this solution would involve significant costs as regards legal administration and medical assessment. It is true that if the compensation is provided in the Member State where the accident occurred, the judges responsible for assessing the compensation would have to apply the rules of another Member State. The same goes for the medical experts and insurers in charge of putting together a compensation offer.

However, these comments do not take into account the development of European legislation in the field of motor insurance. The 4th Directive provides for the victim to have the ability to revert to the representative of the insurer of the vehicle involved in the accident who is in charge of the settling of the claim, in the victims' country of residence. We can therefore confirm that the assessment of the damage, according to the rules of the victims' Member State of residence, is no longer a problem from the moment when it makes use of the insurer's representatives' services who, this goes without saying, is aware of the compensation criteria of the State in which they are established.

If negotiations between the victim and the representative do not reach a compromise, then a recent modification to the 4th Directive, which was recently confirmed by a case law of the Court of Justice, allows the victim to take action against the insurer before the courts of their country of residence. There would also not be any difficulty for the courts here to apply the national criteria when they proceed to assessing the victims' compensation.

The CEPS study mentions that compensation on the basis of the criteria of the Member State of residence of the victim should cause an increase in insurance premiums in the Member States where the standard of living is relatively lower than those States where the visitors come from. This statement is correct, in principal, but must be qualified to the extent where the experience of the last 10 or so years has shown that the standard of living in the new Member States quickly catches up to the average European standard. It therefore concerns a temporary phenomenon.

It is worth mentioning the fact that, pursuant to the 5th Motor Insurance Directive, all insurance policies will, in the near future, cover amounts which are sufficient to compensate the large majority of bodily injuries.

In this respect, we must be aware that if the increase in guarantee amounts foreseen by the 5th Directive constitutes a significant improvement in the subject, it does not however allow for the compensation of the most serious individual cases which in some Member States, the most serious cases far exceed a million euros. Furthermore, the increase in guarantee amounts do not allow for payment of multiple claims when the guarantee is limited to five million euros per accident.

To conclude this first remark, we can therefore ask ourselves if, among the 5 solutions put forward by the CEPS, the application of the rules of the country of residence of the injured party is not the most realistic and best performing solution.

Indeed, the CEPS, in its conclusions, recommends either the creation of a European fund or compensation from the MTPL insurer of the victim's vehicle. However, the first solution seems to be unrealistic as both the putting in place of a fund looks difficult and costly and the second solution, which shows some advantages, does not provide for pedestrians, cyclist and local vehicle passengers which, today, make up the majority of visitors.

A second remark concerns the application of the *restitutio in integrum* principle. As all Member States claim to apply this principle, would standardisation of the compensation of personal injury be a possibility within the European Union? This would undoubtedly be desirable for a number of reasons and more specifically, from the point of view of insurance undertakings because it would offer a broader predictability of the costs incurred by cross-border accidents. Can it nevertheless be done?

We would need to recall what the compensation of a victim suffering from substantial personal injury comprises of in order to answer this question.

In brief, the victim and/or other eligible applicants are reimbursed for three important items:

- medical and hospitalisation expenses or more precisely, the percentage of costs which are not covered by social security;
- current and future economic loss which will have deductions taken off by social security;
- non-economic loss (inability to engage in leisure activities, disfiguration damage, etc)

As regards non-economic damages:

When we examine the forms of compensation to victims in the different Member States, we note a broad difference when it concerns the compensation of non-economic loss. For what reason does such a situation allow for compensation in one Member State and the lack of compensation in another Member State? It is a case of a choice of society. It would be unrealistic to consider standardisation under these conditions given the principle of subsidiarity.

Better still, we could carry out the standardisation of headings of damage taken into consideration within the framework of non-economic loss. It is not about a comfortably off undertaking as, within certain Member States, ideas are not always definitively fixed. It is

sufficient, in order to be aware, to take note of the summary report presented in Trier in June 2000 by Professor Francesco Busnelli entitled: "The rationalisation of the medico-legal assessment of non-economic loss". The proposals contained in this report have, until now, gone unheeded. We therefore have to resign ourselves to the fact that there will be a significant gap between Member States in the years to come.

As regards the medical and hospitalisation costs:

It is without a doubt the field in which a certain amount of standardisation already exists insofar as in all Member States, the medical and hospitalisation costs are, according to varying methods either reimbursed to the victim (for the part which they have paid themselves) or to the Social Security body which paid in advance.

As regards reimbursement to the Social Security body, it is worth reminding ourselves of Article 93 of the European Regulation 1408/71. This regulation demands that Member States recognise the right of the victim to subrogation against a third party of the social security body which carried out the payments in accordance with the legislation of a Member State for damages resulting from events which took place in the territory of another Member State.

As from the moment when the principle of reimbursement of medical costs and hospitalisation is accepted in all States of the European Union the costs must be fully reimbursed, with little importance being placed on the amount of these costs and on the fact that they vary considerably from one State to the other.

As regards financial damages:

From the point of view of the victim, this is certainly the most important aspect of compensation. It makes sense that the subsequent professional loss of salary due to a road traffic accident is compensated according to individual methods of proof in each Member State and throughout the European Union.

A certain kind of standardisation therefore exists. Conversely, compensation of financial damages in the future displays a broad diversity of compensation methods. For example, in some States compensation is only paid out when there is concrete proof of a loss of or reduction in professional salary directly related to the accident. In other States, the reduced ability to work is the subject of compensation even if the victim has in fact not had any deductions taken off of their professional salary. If we would like to have some kind of standardisation in this matter then it would be essential to come to an agreement on a common method of assessing the financial reduction suffered by the victim. Unfortunately, recent efforts in this matter have been unsuccessful.

We arrive thus to the conclusion that standardisation within the European Union is possible. However, it would require a number of years to be carried out. We therefore have to admit that the *restitutio in integrum* is a principle which varies in content depending on the regulations of each Member State. Given that these differing regulations seem to give the residents of the individual Member States satisfaction, the only way to apply this principle to victims of cross-border accidents is to compensate them according to the rules of their Member State of residence.

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