TOWARDS ECONOMIC PERSPECTIVES ON PRIVATE INTERNATIONAL LAW

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Abstrakt v rodném jazyce
Tento příspěvek poukazuje na možné způsoby jak přistupovat k problematice „právo a ekonomie“, ale zdaleka nepředstavuje komplexní přístup k tomuto oboru. Ve své první část uvádí článek příklady, jak lze aplikovat ekonomii v právu, a na to navazuje krátkými historickými poznámkami, z nichž se autor dále dostává k otázce ekonomického přístupu v regulaci přeshraničních smluvních závazků. Ty jsou zpravidla spojeny se snižováním transakčních nákladů nebo je argumentováno zvýšením celkového blahobytu (z pohledu rostoucí míry právní jistoty). Závěrem toho příspěvku je také poukázáno na použití tzv. Coaseho teorému.

Klíčová slova v rodném jazyce
Mezinárodní právo soukromé, právo a ekonomie.

Abstract
This article shows some possible ways how to tackle the problematic of economics in law, but doesn’t present complex approach to economics and law. In its first part some examples of possible application of economics are shown. And in its second part on some historical remarks, the attention is paid to an economic approach to the regulation of cross-border contracts and to reduction of transaction costs contrasting argument of global welfare (growing from legal certainty), also the Coase theorem is mentioned at the very end of this article.

Key words
Private international law, law and economics.

1. INTRODUCTION AND GENERAL THOUGHTS

This article shall be aimed to discuss some aspects of economics perspectives in law. There is no more debate in Europe, whether economic views on law shall be respected or not, and in some respects there is also economic reasoning of issuing or modifying most of legal acts widely recognized.

The purpose of this article is not to justify an economic reasoning or contribution of economic analysis of legal acts, because as I said, I feel that this is already respected in Europe. Anyway in Czech Republic there are not many specialist of economic theory analysing the legal acts and not many lawyers applying economics to their legal praxis or application in decision-making-processes yet.

There is also no attempt to present complex approach, but to show some possible ways how to tackle the problematic of economics in law. The academic debate on this topic is very

broad[1] and there might be also different attitudes from "almost common sense" reasoning through application of economic theory to legal reality and relations between legal reality and economic reality. With respect to that, there are only some remarks towards some examples of possible application of economics in law and some remarks to methodological issues.

2. EXAMPLE OF POSSIBLE APPLICATION OF ECONOMICS

There are certainly thousands of ways how to apply economics or economic perspective/ analysis to law and this contribution makes no attempt to cover them all. But let's focus on some general branches, where the utility of such attitude is most obvious and needed.

The typical topic for law and economics are contracts. Contract Law is often reviewed from economic perspectives, so quite often you may see analysis of incomplete contracts or solving contract formation which means formation of consent of a contract.

Property law and intellectual property from the point of economics is almost self understandable. In this field is also Coase theorem quite often discussed and applied.

In another topic which is quite far, in the criminal law one can see the economic approach in sanctions (the theory of optimal sanctions) or victim precautions. Very important are also empirical studies of the crime rate.

Apart from criminal law, there is another close branch of law which is very often reviewed from economic perspective: tort law. But not only comparing strict liability and negligence is discussed here. For instance product liability is often included to this topic.

One of the broadest discussion made on the field law and economics is related to antitrust law, which is more and more „economics based" in recent years. Since the „more economic approach" was launched, there is debate, whether Competition law or antitrust law is still a law[2]. The other spectrum interested people ask the other way around: The „more" economic approach in European competition law - is it only „more" or also enough? It has been told by some competition specialists[3] that this more economic approach means in practice compromise between economics based approach and legal certainty. From this perspective we may argue, that limitation of economic approach is needed in order to keep certain level of legal certainty. On the other hand we may argue, that there is much more economics that is still relevant for EC competition law than currently respected parts of the economic approach[4].

We shall not forget the private antitrust enforcement either. This policy was presented in European Commision's White Paper on Damages Actions for Breach of Antitrust Rules. And

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[1] Some examples of complex resources: Cooter and Ulen, Law & Economics; Posner, Economic Analysis of Law; The New Palgrave Dictionary of Economics and the Law; Katz, Foundations of the Economic Analysis of Law; Polinsky, An Introduction to Law and Economics

[2] Neruda, R. Je právo hospodářské soutěže právem? Ekonomická východiska a souvislosti soutěžního práva. In Sborník příspěvků z mezinárodní konference studentů doktorského studijního programu "Obchodní právo" MU "Ekonomické aspekty právní úpravy a jejího výkladu". Brno : Masarykova univerzita v Brně, 2006. ISBN 80-210-3952-3, s. 43-52. 2005, Brno.

[3] Prof. Dr Roger Van den Bergh

[4] Dtto.

recently it was also discussed with public via questionnaire procedure. This private enforcement brings decentralised application of EC competition law, where damages play central role. There are plenty of studies, which show and explain implications of such legal instrument. But we cannot expect any big change in preparation process of this regulation or directive[5]. But what we can already see is that many economic expertises only quantify damages.

But regarding economics it's never so easy to tell if enough economics is applied, because we also need to watch what kind of economics we want to apply. There are so many possible economic approaches as schools of economics and anyone could never choose one of them since most of them come from very different basis and are almost not comparable.

But regarding the title of this article, let's give also an example on private international law: We could point out the new-coming Regulation of European Parliament and Council ES no. 864/2007 about law applicable in non-contractual relations[6]. When speaking about torts and liability law it's important to understand that economic analysis is not pointed at the public law targets, but in respect to private liability to damages. There is big potential and also work done in the field of

Apart from legal predictability there is always an argument of reduction of administrative cost[7], which may advocate use of economics in law. It's not easy to unify liability rules, because these are very often a reflection of different values and different historical development as well[8]. On the other hand there is also argument that aim of tort law is prevention of accidents and damages. Faure in his work presents an idea that if fit would be possible to indentify economic reasons to a specific liability regime[9], the comparative lawyer could verify whether differences between the tort rules in various legal systems are in fact merely optical differences[10] or whether these differences are result of different values, as mentioned above.

3. SOME HISTORICAL REMARKS ON THEORY ISSUES

As it has been noted, when applying economics to law, we must be aware, what economics we take. There was certainly development – and in different periods the main-stream theory has been changed. Every historical excursion of formal studies begins with works of Adam Smith's, especialy wwith „The Wealth of Nations[11]", which describes application of

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[5] The legal form hasn't been chosen yet.

[6] Regulation (EC) no. 864/2007 Of the EP and of he Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

[7] Some may argue that use of the term "administrative cost" is not justified here and the term transaction cost shall be used. Transaction cost may be understood as cost of some change. With respect to that administrative cost is used here and it includes conflict-of-law solutions together.

[8] Faure, M.: Economic Analysis of Tort Law and European Civil Code In Towards a European Civil Code, Amsterdam: Kluwer Law International, 2004, ISBN 904112280

[9] For instance: strick liability for hasardous activities and negligance/fault regime for an non-hasadours activities etc.

[10] Optical differencies may be understood as result of different legislative techniques based on dogmatic or doctrinal traditions in legal system.

[11] Smith, Adam (1776) An Enquiry into the Nature and Causes of the Wealth of Nations

economics in law, so called "the law of monopolies" and restraint of trade. From this classical perspective mostly freedom issues were promoted.

Later, neo-classical synthesis and neoclassical economics combined mathematics and Keynesian macroeconomics. A simple neo-classical model sees free markets maximizing social welfare. A part of its theory is called allocative efficiency. Allocative efficiency is also known as Pareto[12] efficiency and it explains in sophisticated way why a situation is finally efficient and utility is perfected, if resources can no longer be reallocated to make anyone better off without making someone else worse off. In such case a society has achieved allocative efficiency[13], but there is probably always chance to make somebody better off with making someone else worse off, but it doesn't work vice versa.

4. FINDING OPTIMUM IN BROADER SENSE

In order to measure anything, there is always need to set up the scale for measures first. If an economist wants to analyse a legal act and prove whether this act is optimal, it must be clear, what criterions he or she would choose.

Let's suppose that the most needed criterion is lowering of restraints occurred in enforcement of customers' rights. As for an example of results of attempts of Commission to facilitate the promotion of product liability presented in form of Directive on product liability we can see that argument of harmonisation necessarily doesn't work always. There are authors among lawyers and economists, who say that this Directive is too unclear in certain points and prove that there are too many references to the domestic law, which makes all this inefficient.

From the point of view of European Commission we may understand also political arguments, even it wasn't spelled out, that if there is an Directive once, it will be able to be changed later easily than made from the beginning again. But also from other perspectives this case could be watched differently. Thus next paragraph shall present other and more sophisticated points of view.

5. COASE THEOREM, IT'S USE IN CROSS-BORDER CONTRACTS AND CONCLUSION

Recently Jürgen Basedow was discussing in his article[14] what is an objective of regulation of cross-border contracts? The traditional lawyer's answers, he says, would be the uniformity of decisions: the contract should produce the same rights and obligations without respect to the State Court or arbitration panel which is called upon to enforce it. Another addend argument brings the point of Commission's view: Rome Convention[15] would raise the degree of legal certainty, strengthen confidence in the stability of legal relations and enhance the protection of vested rights in the area of private law.

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[12] Italian economist Vilfredo Pareto

[13] Holman, R. Ekonomie, Praha: C. H. Beck, 2002.

[14] Basedow, J. Lex mercatoria and the Private International Law of Contracts in Economic Perspective In Uniform Law Review, Roma: Unidroit, 2007, ISSN 1124-3694

[15] Rome Convention on the Law applicable to Contractual Obligations, 19.6.1980, consolidated version in Official Journal EC 1998 C 27/34.

Then Basedow notices that some economic analysis presents very different primary objectives of the regulation of cross-border contracts: I.e. Andrew Guzman‘s comments governmental interests: the objective is the maximization of global welfare. „Traditional (American) choice-of-law concepts such as national interests or comity are relevant only to extend that they affect global welfare. Focusing on the well-being of individuals, of course is equivalent to focusing on the effect actions have individuals. In other words, the only basis of jurisdiction to be considered is „effects“.[16]

Basedow argues with four reasons why an economic approach to the regulation of cross-border contracts has to pursue a less ambitious objective: reduction of transaction costs. (Because a civil court or arbitration tribunal is not in a position to assess the growth or reduction of global welfare in a single case involving just a plaintiff and a defendant.)[17] Basedow agrees that the quest for legal certainty is the legal reflection of what economists have in mind when they identify possessive and transactional security as essential achievements of law.

I would suggest analysing this situation with a helping tool of The Coase theorem and his argumentations about transaction costs. From my perspective there still remains a question: is the unified regulation of cross-border contracts the best solution for transaction cost?)

The Coase theorem describes the efficiency of an economic allocation. It states that if there is no transaction costs, bargaining will lead to an efficient outcome regardless of the initial allocation of property rights. In practice, the question „Is the unified regulation of cross-border contracts a best solution for transaction cost?“ must be answered with respect to the content of the regulation and its administrative difficulties and other transaction costs.

The Coase theorem counts more on the economic motives than on legal motives. We may criticise that transaction costs are almost always too high for efficient bargaining and it’s unrealistic to assume there were no costs in market transactions. But on the other hand, the Coase theorem is kind of theory and must be applied under certain conditions and it’s outcomes must be adjusted to a particular situation.

In my opinion, there is almost always big probability in European legal acts and regulations to find too high transaction costs and it’s analysis from that point would have been difficult to deliver properly in this paper.

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